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Civil Rights Law

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CASENOTES

CIVIL RIGHTS LAW—Blockbusting Provision of the Fair Housing Act of 1968 Is Constitutional—Standing of the Attorney General Clarified. United States v. Bob Lawrence Realty, Inc., 474 F.2d 115 (5th Cir. 1973).

Blockbusting has been recognized as a fundamental element in the perpetuation of segregated neighborhoods.[1] The practice is exploited by unscrupulous realtors who stimulate and prey upon racial bigotry and fear by initiating and encouraging rumors that blacks are about to move into a given area, that all whites will leave, that the market value of properties will descend drastically, and that residence in the area will become unsafe for non-blacks.[2] In *United States v. Bob Lawrence Realty, Inc.*,[3] the Court of Appeals for the Fifth Circuit was presented with the first challenge to the constitutionality of section 3604(e), the anti-blockbusting provision of the Fair Housing Act of 1968.[4] The action was brought by the Department of Justice pursuant to section 3613,[5] and the complaint alleged that appellant

1. Brown v. State Realty Co., 304 F. Supp. 1236, 1240 (N.D. Ga. 1969).

2. Contract Buyers League v. F & F Investment, 300 F. Supp. 210, 214 (N.D. Ill. 1969). For a description of particular tactics *see* United States v. Mintzes, 304 F. Supp. 1305, 1310-11 (D. Md. 1969). *See generally* Note, *Blockbusting*, 59 GEO. L.J. 170 (1970); *Blockbusting: A Novel Statutory Approach to an Increasingly Serious Problem*, 7 COLUM. J. LAW & SOC. PROBS. 538 (1971).

3. 474 F.2d 115 (5th Cir. 1973).

4. 42 U.S.C. §§ 3601 et seq. (1970). The relevant subsection provides:

> *§ 3604. Discrimination in the sale or rental of housing.*
>
> As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—
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> (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin.

5. 42 U.S.C. § 3613 (1970) provides:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter

and four other Atlanta, Georgia, real estate brokers had engaged in blockbusting activities in a racially transitional area of southeast Atlanta. The government alleged specifically that the defendants participated, individually and collectively, in a pattern or practice of resistance to the enjoyment of rights granted by the Act, and that a group of persons had been denied rights secured by the Act, raising an issue of general public importance.[6]

On appeal, appellant Bob Lawrence Realty argued principally that section 3604(e) was unconstitutional on the grounds that Congress lacked the authority to pass it, that it violated the first amendment guarantee of freedom of speech, and that the U.S. Attorney General did not have standing to bring the action.[7] Rejecting appellant's arguments *in toto*, the court affirmed the injunction entered by the district court.

Constitutionality of Section 3604(e)

In addressing the question of constitutionality, the court, Judge Goldberg writing, was guided by several earlier cases. The first of these was *Jones v. Alfred H. Mayer Co.*,[8] where the U.S. Supreme Court affirmed the constitutionality of section 1982,[9] construing that statute to prohibit all racial discrimination, both public and private, in the sale and rental of property. Section 1982 is, according to the Court, a "valid exercise of the power of Congress to enforce the Thirteenth Amendment."[10]

The *Jones* decision opened a new chapter in the history of the thirteenth amendment,[11] which many civil rights authorities had considered to be of

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and such denial raises an issue of general public importance, he may bring a civil action . . . requesting such preventive relief . . . as he deems necessary.

. . .

6. 474 F.2d at 117.

7. After the original complaint was filed, the district court denied several motions filed by the defendants. United States v. Bob Lawrence Realty, Inc., 313 F. Supp. 870 (N.D. Ga. 1970). Following this, appellant and two other defendants filed separate motions for summary judgment, which were denied. The Court did find that the government's evidence was insufficient to make out an *individual* pattern or practice of violations by appellant. United States v. Bob Lawrence Realty, Inc., 327 F. Supp. 487 (N.D. Ga. 1971). At trial the district court enjoined appellant and one remaining defendant from further violations of section 3604(e). United States v. Mitchell, 335 F. Supp. 1004 (N.D. Ga. 1971). Only Bob Lawrence Realty appealed.

8. 392 U.S. 409 (1968).

9. 42 U.S.C. § 1982 (1970).

10. 392 U.S. at 413.

11. U.S. CONST. amend. XIII provides:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Congress shall have power to enforce this article by appropriate legislation.

little use since the early part of the twentieth century.[12] The decision affirmed the power of Congress under the enabling clause of the amendment to "determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."[13] The *Jones* Court drew its authority, and a proliferation of key phrases ("badges of slavery" or "relics of slavery," protection of "freedom" and "fundamental rights"), from the *Civil Rights Cases*,[14] decided just after the amendment was ratified. At that time, Mr. Justice Bradley reasoned that "legislation may be necessary and proper to meet all the various cases and circumstances to be affected by [the thirteenth amendment], and to prescribe proper modes of redress for its violation in letter or spirit."[15] However, the opinion construed the "badges and incidents of slavery" quite narrowly, and held the amendment not to be applicable to mere social rights. Curiously, Justice Bradley had earlier provided a much broader interpretation of the amendment, in dictum, while sitting on circuit in *United States v. Cruikshank*.[16] Congress, he said, had the power to eliminate "badges of servitude" and give "full effect to this bestowment of liberty on these millions of people."[17]

The expansive tendencies explicit in *Cruikshank* and implicit in the *Civil Rights Cases* were abruptly halted in *Hodges v. United States*,[18] which held specifically that Congress could not legislate under the thirteenth amendment to protect private employment contracts. The definition of slavery and its incidents remained severely limited, and the power of Congress under the amendment was strictly construed until *Jones*; since *Jones*, however, the early history of the thirteenth amendment has lost almost all significance.[19]

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12. *See generally* Note, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294 (1969).

13. 392 U.S. at 440.

14. 109 U.S. 3 (1883).

15. *Id.*, at 20.

16. 25 F. Cas. 707 (No. 14,897) (C.C. La. 1874), *aff'd*, 92 U.S. 542 (1875). *But see* Plessy v. Ferguson, 163 U.S. 537 (1896), which narrowed the Civil Rights Cases holding. In United States v. Morris, 125 F. 322 (E.D. Ark. 1903), which involved a conspiracy to prevent blacks from leasing and cultivating land, the federal court chose to ignore *Plessy*, and followed the expansive interpretation of *Cruikshank*, providing what is perhaps the closest precedent for *Jones*.

17. 25 F. Cas. at 711.

18. 203 U.S. 1 (1906).

19. For an excellent analysis of the "old" thirteenth amendment, see tenBroek, *Thirteenth Amendment to the Constitution of the United States, Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171 (1951). Professor tenBroek writes that the proponents of the amendment envisioned broad changes depending upon an analysis which not only abolished slavery, but guaranteed the provision of life, liberty and property, all protected by the government—a federalism revolution according to Lockean principles.

Following *Jones* by little more than a year, *Brown v. State Realty Co.*[20] was the first constitutional test of section 3604(e) on the federal district court level. Plaintiffs as private citizens brought an action for injunctive relief and damages against defendants who had allegedly violated section 3604(e) while soliciting real estate listings in plaintiffs' neighborhood.[21] In countering defendants' constitutional attack on section 3604(e), the court rejected use of the commerce clause as the basis of congressional authority for the statute citing *Heart of Atlanta Motel Inc. v. United States*[22] and *Katzenbach v. McClung,*[23] and noting: "There is no evidence that the activities proscribed herein are in interstate commerce . . . . Thus, any claim of jurisdiction on such grounds must fail."[24] The court also rejected section 5 (the enabling clause) of the fourteenth amendment as the basis for federal jurisdiction, citing as authority *United States v. Guest,*[25] for absence of the requisite state action. However, the district court did find justification for section 3604(e) in the thirteenth amendment, as construed in *Jones*, offering that the Supreme Court opinion "seems to constitute a pre-approval of the Fair Housing Title . . . of which the 'blockbusting' provision is a part."[26] There remained for the court to consider whether the provision was itself a rational means of effectuating the stated policy of the Act, the burden being upon defendants to show otherwise.[27] Since no such showing was made, the court denied a motion to dis-

20. 304 F. Supp. 1236 (N.D. Ga. 1969).

21. As provided in 42 U.S.C. § 3612 (1970), private citizens may bring civil suits to enforce the rights granted by sections 3603, 3604, 3605 and 3606 without regard to the amount in controversy. Paragraph (c) of the section allows relief to be granted for actual damages and not more than $1000 punitive damages plus court costs and attorney's fees as appropriate, in addition to providing for injunctions and restraining orders.

22. 379 U.S. 241 (1964). Owner of a motel which solicited and received patronage from interstate travelers brought suit to enjoin the Attorney General from enforcing the public accommodations section of the Civil Rights Act of 1964 against him. The Court stated that the test of the exercise of power under the commerce clause is simply whether the activity sought to be regulated is commerce which concerns more than one state and has a real and substantial relation to the national interest.

23. 379 U.S. 294 (1964). The Court included within the power of Congress to regulate under the commerce clause those intrastate activities which so affect interstate commerce as to make congressional regulation of them appropriate.

24. 304 F. Supp. at 1239.

25. 383 U.S. 745 (1966). Plaintiffs in *Brown* contended that section 5 of the fourteenth amendment was no longer limited to classic state action in the historical sense of the amendment, but that the provision gives Congress unlimited authority to enact legislation restricting individuals from activity which might affect a state's ability to perform fourteenth amendment obligations. This was the thrust of Justice Brennan's dissent in *Guest,* 383 U.S. at 774-86. The majority held otherwise, requiring classic state action.

26. 304 F. Supp. at 1240.

27. *Id.,* citing Katzenbach v. McClung, 379 U.S. 294 (1964) (power under commerce clause); Katzenbach v. Morgan, 384 U.S. 641 (1966) (power under the four-

miss and entered an injunction against further violations of section 3604(e).

The same approach was adopted without hesitation in *United States v. Mintzes*,[28] which was the first case brought by the U.S. Attorney General under section 3613 to enforce the provisions of section 3604(e). The federal district court in Maryland agreed with *Brown* that the constitutionality of section 3604(e) could not be justified by either the commerce clause or the fourteenth amendment, and rested its argument squarely on *Jones*, while eschewing any detailed thirteenth amendment analysis. Citing *Brown*, the court also concluded that section 3604(e) is a ". . . rational and not unreasonable means of effectuating the stated policy of the legislation 'to provide, within constitutional limitations for fair housing throughout the United States.' "[29]

The significance of *Brown* and *Mintzes* is that while each decision was based upon the authority of the *Jones* holding, neither opinion sought to bring the fact situations peculiar to blockbusting cases precisely within the field of the analysis which supports *Jones*. Rather, each sought to justify its decision with the broad federal policy articulated by Mr. Justice Stewart in *Jones*. Justice Stewart was careful, however, to distinguish between section 1982 and Title VIII of the Civil Rights Act of 1968,[30] leaving no doubt that the discrimination prohibited by the 1866 Act was specifically racial. Blockbusting, on the other hand, normally involves white realtors exploiting the fear and ignorance of white homeowners—the link here with slavery, and thus with the thirteenth amendment, is much more tenuous. Yet, when blockbusting is successful, and the fleeing whites do sell at "panic" prices, it does not necessarily mean that the blacks who are then induced to buy the properties will do so at bargain prices, or even fair prices.[31] The policy of *Jones*, that the thirteenth amendment guarantees that a dollar in the hand of a black will buy as much as a dollar in the hand of a white, does seem to leave lower courts the option to apply that policy and its constitutional underpinning to blockbusting cases, the caveat of Justice Stewart notwithstanding.

Having taken this option, *Lawrence Realty* did not significantly improve upon the thirteenth amendment arguments of either *Brown* or *Mintzes*.

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teenth amendment); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (power under the fifteenth amendment).

28. 304 F. Supp. 1305 (D. Md. 1969).

29. *Id.*, at 1313.

30. 392 U.S. at 413-15.

31. *See* Note, *Discriminatory Housing Markets, Racial Unconscionability, and Section 1988: The Contract Buyers League Case*, 80 YALE L.J. 516 (1971).

Judge Goldberg did not consider either the commerce clause or the fourteenth amendment, but found the mandate of *Jones* clear and compelling, and denied that appellant could have made an effective argument against the rationality of the statute. However, the court was also called upon in *Lawrence Realty* to consider appellant's contention that section 3604(e) was an unconstitutional prior restraint on the right of free speech.

In neither of the previous section 3604(e) cases was there a direct first amendment attack on the statute. Judge Thomsen, who wrote the opinion in *Mintzes*, did consider the problem briefly in dictum.[32] He argued that Congress added the phrase "for profit" specifically to avoid charges that the statute restrained protected speech, the implication being that statements made within a commercial context do not enjoy the same protection as other forms of speech. In another opinion, *United States v. Hunter*,[33] the court held that section 3604(c)[34] does not violate the First Amendment:

> It is now well settled that, while 'freedom of communicating information and disseminating opinion' enjoys the fullest protection of the First Amendment, 'the Constitution imposes no such restraint on government as respects purely commercial advertising.' *Valentine v. Chrestensen*, 316 U.S. 52, 54 . . . (1942).[35]

Earlier authorities for the general proposition that the first amendment does not protect at least some commercial statements are *Lorain Journal Co. v. United States*[36] and *Associated Press v. United States*.[37] In *Lorain Journal*, the Supreme Court upheld an injunction which prevented the publisher from accepting or rejecting commercial advertisements of others in violation of the antitrust laws. In *Associated Press*, the Court sustained an injunction against the company's exclusive news arrangement with a Canadian company, also in violation of the Sherman Act.

In all three cases, *Hunter, Lorain Journal* and *Associated Press*, the argument can conceivably be made that what was enjoined was not so much speech as it was commercial *activity*. That was precisely the major argument ad-

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32. 304 F. Supp. at 1311-12.

33. 459 F.2d 205 (4th Cir. 1972), *cert. denied*, 409 U.S. 934 (1972). This case was relied upon heavily by the court in *Lawrence Realty*.

34. 42 U.S.C. § 3604 (1970). The section reads in relevant part:

> As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—
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> (c) to make, print, or publish, or cause to be made, printed, or published, any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination.

35. 459 F.2d at 211.

36. 342 U.S. 143 (1951).

37. 326 U.S. 1 (1945).

vanced by the district court in *Lawrence Realty*.[38] Furthermore, Judge Goldberg said, "Section 3604(e) regulates commercial activity, not speech,"[39] and described the representations of Bob Lawrence Realty as just such activity. Even granted that such activity has some informational value, he argued, such value to the prospective seller (or, for that matter, to the realtor) is greatly outweighed by the express congressional interest contained in section 3604(e) in preventing blockbusting.[40]

The district court had stated more bluntly that "[t]he statute is one regulating conduct, and . . . any inhibiting effect it may have upon speech is justified by the Government's interest in protecting its citizens . . . ."[41] Again, as in the thirteenth amendment arguments, the court in *Lawrence Realty* did not seek to break new legal ground in its first amendment argument, but rather sought to justify section 3604(e) by demonstrating more traditional bases for the statute.

Standing of the Attorney General

According to section 3613, the Attorney General has standing to sue whenever there is an "individual" or a "group" pattern or practice which resists the enjoyment of rights granted by the Fair Housing Act, or whenever a group of persons has been denied such rights and such denial raises an issue of general public importance.[42] To date, the phrase "pattern or practice" seems to have raised the most problems for the courts.

The Court of Appeals for the Fifth Circuit first considered the phrase in *United States v. Mayton*,[43] a voter registration case which involved alleged violations of the Civil Rights Act of 1960.[44] The court in declaring that ". . . the words pattern or practice were not intended to be words of art,"[45] took its cue from former Deputy Attorney General Walsh who said before the House Judiciary Committee: "Pattern or practice have their generic meanings. In other words, the court finds that the discrimination was not an isolated or accidental or peculiar event . . . ."[46] This guideline was followed by the *Mintzes* Court, which determined that three violations of section 3604(e) were sufficient to establish a pattern or practice.

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38. 313 F. Supp. at 872.
39. 474 F.2d at 121.
40. On the point of overriding governmental interest, *see* United States v. O'Brien, 391 U.S. 367, 376-77 (1968), where Chief Justice Warren determined that O'Brien's act of burning his Selective Service registration card was not a form of normally protected speech, but was essentially an unprotected act whose ancillary speech aspects were less compelling than the government's interest.
41. 313 F. Supp. at 872.
42. *See* note 5 *supra*.
43. 335 F.2d 153 (5th Cir. 1964).
44. Specifically, violations of 42 U.S.C. § 1971(e) (1970).
45. 335 F.2d at 158.
46. *Hearings on H.R. 10327 Before the House Comm. on the Judiciary*, 86th Cong., 2d Sess. ser. 15, at 13 (1960).

A similar approach was taken by the court in *United States v. West Peachtree Tenth Corporation*,[47] where the court reasoned that, with regard to the phrase "pattern or practice," "[n]o mathematical formula is workable, nor was any intended."[48]

The federal district court in *Lawrence Realty* found that appellant had not engaged in an individual pattern or practice, but that the evidence clearly established a group pattern of violations of which appellant had been a part. On appeal, Bob Lawrence argued that the Attorney General must prove that appellant had participated in an individual pattern or practice in order to have standing to obtain relief for a group pattern or practice, and that the Attorney General must allege and prove conspiracy or concerted activity in order to have standing to obtain injunctive relief against a group pattern or practice of violations.

Following the "clear meaning" of section 3613 and the standard of usage established in the earlier cases, Judge Goldberg found appellant's contentions erroneous. He argued that deference to the desire of Congress to prevent blockbusting required a simple definition of when the Attorney General would have standing to bring a suit under section 3613. It followed that the Attorney General's determination (supported by the findings of the district court) that he had reasonable cause to believe that violations were taking place established his standing.[49] The court went so far as to indicate that it is the Attorney General's prerogative alone to decide when an issue of general public importance, as defined by the Act, has been raised.[50] This reasoning may perhaps establish a standard for future cases brought to enforce section 3604(e), thus obviating the necessity for the Attorney General to present evidence in pretrial hearings just to establish that an issue of general public importance exists.

Conclusion

One danger created by *Brown* and *Mintzes*, and preserved by *Lawrence Realty* is that of placing all one's eggs in one thirteenth amendment basket. While the mandate of *Jones* may be clear, the guidelines offered may not always be appropriate in blockbusting cases. *Jones* dealt with a purely racial problem, while a good percentage of cases brought to enforce section 3604(e) will most likely be initiated by white homeowners. Grounding the congressional authority of the statute in the thirteenth amendment alone,

47. 437 F.2d 221 (5th Cir. 1971).
48. *Id.*, at 227.
49. *See* United States v. Iron Workers Local No. 1, 438 F.2d 679 (7th Cir. 1971).
50. 474 F.2d at 125.

at least as it was construed by *Jones*, may well lead some courts to demand that plaintiffs prove definitie racial discrimination.

Indeed, *Jones* warned that not all unfair housing problems might be solved with the thirteenth amendment, and hinted that the commerce clause or the fourteenth amendment might be appropriate in some cases.[51] Both of these alternatives were rejected in *Brown* and *Mintzes* and were not even considered in *Lawrence Realty*. Seeking to bottom its decision on the "new" thirteenth amendment, the court in *Lawrence Realty* appears to have overlooked a fundamental difference between the facts it reviewed and those presented in *Jones*. Plaintiff in *Jones* relied upon section 1982, an early statute which is in no way a comprehensive open housing law, and which would be useless against blockbusting, especially in the incipient stages which involve whites only. Furthermore, Joseph Lee Jones was a black man, and the opportunity to inject new life into the thirteenth amendment by way of section 1982 was quickly seized by the Supreme Court. In contrast, the 1968 Fair Housing Act is a comprehensive open housing statute, and the blockbusting provision was designed to halt the practice even in its incipient stages. There was no compelling need in *Lawrence Realty* to justify section 3604(e) only with the thirteenth amendment. The opportunity existed to bring into play a complete arsenal of federal authority, and the court ignored it.

To use the fourteenth amendment in a case similar to *Lawrence Realty* would require avoiding the state action requirement, which, in light of *United States v. Guest*, does not seem possible at present. The commerce clause is a much more hopeful alternative. *Katzenbach v. McClung* demonstrated that actual interstate commerce need not be demonstrated in order to justify congressional regulation.[52] Surely a case can be made that the results of blockbusting, e.g., the perpetuation of segregated neighborhoods, rapidly changing neighborhoods, or the movement of people across state borders, do have some measurable effect upon interstate commerce.

Nor did *Lawrence Realty* completely answer the first amendment attack on section 3604(e). It has not been fully established that speech entirely within a commercial context is less deserving of protection than other forms of discourse. The cases draw support for the contention that commercial statements are subject to *Jamison v. Texas* limitations.[53] That decision has

51. 392 U.S. at 417. Justice Stewart described the Fair Housing Act of 1968 as, "a detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority."

52. *See* note 23 *supra*. *See generally*, Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942).

53. 318 U.S. 413, 417 (1943). The Court said: "The states can prohibit the use

come under recent attack in *Ginzburg v. United States*,[54] an obscenity case in which the Supreme Court said that "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment."[55] The contention, admittedly advanced in *Lawrence Realty*, that section 3604(e) violations are activities rather than pure speech seems to be the most logical way out of this quandary. Finally, it must be said that while the blockbusting provision appears to have withstood its first appellate challenge, the *Lawrence Realty* opinion merely finessed the subtle problems presented. A firm resolution must await some future case.

Richard D. Vergas

CONSTITUTIONAL LAW—Membership Preferences in a Recreational Facility Where There Is a Transfer of These Rights as an Incident to a Real Property Transaction Are Covered Under 42 U.S.C. § 1982—A Club Is Not Characterized as Private, When It Is Open to Every White Person within a Geographic Area, Race Being the Sole Criterion for Membership—Tillman v. Wheaton-Haven Recreation Association, Inc., 410 U.S. 431 (1973).

The Civil Rights Act of 1866,[1] now codified as 42 U.S.C. §§ 1981, 1982, lay dormant for nearly one hundred years before coming to the attention of civil rights advocates as a means of redressing private acts of discrimination. In an innovative reading of section 1982 the Supreme Court construed the section's provisions to ban private discrimination in housing.[2] The resurrection of this previously dormant section protecting an individual's right to buy and sell property without regard to his race was seen as a broad ju-

of the streets for the distribution of purely commercial leaflets, even though such leaflets may have 'a civic appeal, or a moral platitude' appended." Jamison in turn relied upon Valentine v. Chrestensen, 316 U.S. 52 (1942), where the Court was "clear that the Constitution imposes no . . . restraint on government as respects purely commercial advertising." 316 U.S. at 54.

54. 383 U.S. 463 (1966).

55. *Id.* at 474.

1. 42 U.S.C. §§ 1981, 1982 (1970), *formerly* § 1 of the Civil Rights Act of 1866.

2. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

dicial innovation but has consequently created problems in the application of the section's provisions. Dispute over the scope and coverage of section 1982[3] has been intensified in light of Title II of the 1964 Civil Rights Act[4] in which federal protection was given to certain rights also within the ambit of Section 1982. Although the boundaries of the 1866 Act remain unclear, the Court by its unanimous decision in *Tillman v. Wheaton-Haven Recreation Association, Inc.*[5] affirmed the use of section 1982 as an effective weapon for fighting the inequities of private racial discrimination.

Wheaton-Haven Recreation Association, a non-profit corporation, was organized for the purpose of operating a swimming pool for its members and their guests. Under Wheaton-Haven's by-laws, persons residing within a three-quarter mile radius of the pool received special membership preferences.[6] Persons living outside this area could only constitute thirty per-cent of the association's total membership. Dr. and Mrs. Harry Press, black homeowners living within the three-quarter mile radius, attempted to obtain an application for membership, but their request was refused, on the basis of their race. The Presses and three other plaintiffs[7] brought suit in a federal district court, seeking declaratory and injunctive relief as well as monetary damages. They contended that membership in Weaton-Haven constituted a type of personal property or a form of leasehold interest in real property,[8] the ownership of which could not be denied them on racial

3. 42 U.S.C. § 1982 (1970).

4. Civil Rights Act of 1964, § 201 *et seq.*, 42 U.S.C. §§ 2000a to 200a-6 (1970).

5. 410 U.S. 431 (1973).

6. Residents living within the prescribed geographic area, needed no endorsement for membership from a current member; residents received priority if the membership was full over all persons except those who had first options; and a resident member who was a homeowner and who sold his home and resigned his membership conferred on his purchasers a first option to acquire membership, subject to the approval of the board of directors. 410 U.S. at 433.

7. Mr. and Mrs. Murray Tillman, the white plaintiffs, were the members of Wheaton-Haven who invited a black guest, Mrs. Grace Rosner, to the pool. She was admitted on her first visit but subsequently was denied admission pursuant to a new rule limiting guests to relatives of members. Mrs. Rosner was the fifth plaintiff. Tillman v. Wheaton-Haven Recreation Ass'n, 451 F.2d 1211, 1213 (4th Cir. 1971).

8. Plaintiffs further argued "admission to membership is said to be a contract between the association and the member," 451 F.2d at 1213-14, and that a denial of this contract right would violate section one of the Civil Rights Act of 1866, codified as 42 U.S.C. § 1981 which reads in relevant part:

> All persons within the jurisdiction of the United States shall have the same right in every state and Territority to make and enforce contracts . . . as is enjoyed by white citizens.

Several cases have held that 42 U.S.C. § 1981 involving the protection of contract rights reaches private acts of discrimination. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 n.78 (1968); *accord,* Young v. International Tel. & Tel. Co., 438 F.2d 757 (3d Cir. 1971). *But see* Cook v. Advertiser Co., 323 F. Supp. 1212 (N.D. Ala. 1971). The fourth circuit in *Tillman,* however, did not consider this argument, con-

grounds by virtue of section 1982 of the Civil Rights Act of 1866.[9] In addition, plaintiff's claimed that Wheaton-Haven qualified as an entertainment establishment within the scope of the Civil Rights Act of 1964 and therefore, the association's discriminatory membership policies did not fall within the private exemption provisions of the 1964 Act.[10] The district court granted summary judgment for the defendants and the plaintiffs appealed.

The Court of Appeals for the Fourth Circuit affirmed this decision,[11] one judge dissenting, and held that Wheaton-Haven was exempt from the provisions of the Civil Rights Act of 1964 because it was a private club. It further found that actions brought under the 1866 Act were subject by implication to the private club exemption contained in the 1964 Act.[12] On certiorari the United States Supreme Court held that Wheaton-Haven's racially discriminatory membership policy violated 42 U.S.C. § 1982, and that Wheaton-Haven was not a private club within the meaning of the 1964 Civil Rights Act, since there was "no plan or purpose of exclusiveness . . . other than race."[13]

The Supreme Court rejected the repeal by implication theory utilized by the Court of Appeals.[14] Rather, in reaching its decision the Court focused on the issue of whether membership in a community recreation facility, incident to the ownership or rental of real property, constituted protected section 1982 property, the use of which could not be restricted solely on the basis of race. This article will concern itself with the nature of section 1982 property in relation to the private club exemption contained in the Civil Rights Act of 1964.

Legislative History

Originally enacted as section one of the Civil Rights Act of 1866,[15] to

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cluding that sections 1981 and 1982 were not available to the plaintiffs. 451 F.2d at 1216 n.11.

9. Civil Rights Act of 1866, ch. 114 § 16, *as amended* 42 U.S.C. § 1982 (1970) provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

10. 42 U.S.C. § 2000a(e) (1970), discussed in part II of this article.

11. 451 F.2d at 1211.

12. *Id.* at 1214.

13. 410 U.S. at 438.

14. As a consequence of this finding, the Court remanded the case to the district court "so that plaintiff's claims could be evaluated "free of the misconception that Wheaton-Haven is exempt from sections 1981, 1982, and 2000a." *Id.* at 439.

15. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27. This Act was passed over

implement the newly ratified thirteenth amendment, the ambiguous language of section 1982, coupled with its unclear legislative history[16] greatly hindered its effectiveness as a civil rights statute. As a result, early Supreme Court cases narrowly interpreted the thirteenth amendment and restricted the amendment's use to situations involving state action. Thus the power of Congress to prohibit private acts of discrimination under section 1982 was limited.[17] Moreover, legal precedent[18] intimated that the fourteenth amendment with its requirement of state action provided at least in part the constitutional authority upon which section 1982 was based.

Not until[19] the decision in *Jones v. Alfred H. Mayer Co.*,[20] did the Supreme Court answer the question of whether the 1866 Act was intended to reach private as well as public acts of discrimination. Mr. Justice Stewart, writing for the majority in *Jones*, analyzed the 1866 Act in light of "its plain and unambiguous language" and its legislative history, and found that Congress had the power under section two of the thirteenth amendment to prohibit those private acts of racial discrimination that it considered to be "badges and incidents of slavery." Specifically, the Court found that denying non-whites the right to purchase, lease, sell or own property constituted such a badge or incident.[21]

As interpreted in *Jones*, a company's refusal to sell a home to an individ-

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the veto of President Andrew Johnson. Fearing that the Act was unconstitutional under the thirteenth amendment, Congress re-enacted the 1866 Act in § 18 of the 1870 Enforcement Act, which was based on the fourteenth amendment. Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140 (codified at 42 U.S.C. § 1982).

16. *See* Casper, *Jones v. Mayer: Clio Bemused and Confused Muse*, 1968 SUP. CT. REV. 89 (1968).

17. In Hodges v. United States, 203 U.S. 1 (1906), the Court declared that the thirteenth amendment did not protect individual rights which were not connected with slavery. The Supreme Court in Jones v. Mayer, overruled *Hodges*. 392 U.S. at 441-43 n.78. *See* Civil Rights Cases, 109 U.S. 3, 24-25 (1883), where the Court stated that "it would be running the slavery argument into the ground to make it apply to every act of discrimination . . . ."

18. Hurd v. Hodge, 334 U.S. 24 (1948) where the Court interpreted the 1866 Act to be incorporated into the fourteenth amendment thus necessitating the requisite finding of state action; *accord*, Corrigan v. Buckley, 271 U.S. 323, 330-31 (1926); *see also*, Buchanan v. Warley, 245 U.S. 60 (1917); Virginia v. Rives, 100 U.S. 313 (1879).

19. The only application of section 1982 prior to *Jones* was in Hurd v. Hodge, *supra* note 18 where the Court upheld a racially restrictive covenant but stated that section 1982 prohibited its enforcement in federal courts. This was the closest case on the facts to Jones, however, it did not present a private discrimination question.

20. This case has been the subject of extensive scholarly examination. *See, e.g.*, Henkin, *The Supreme Court 1967 Term, Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 82 (1968); Kinoy, *The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on Jones v. Alfred H. Mayer Co.*, 22 RUTGERS L. REV. 537 (1968); Note, *Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws*, 69 COLUM. 1019 (1969).

21. 392 U.S. at 440-41.

ual because of his race violated a property right that Congress had expressly covered under section 1982. Property rights protected by section 1982 were lated expanded in *Sullivan v. Little Hunting Park Inc.*[22] to include membership in a recreational facility where such membership was incidental to the acquisition of a leasehold. The *Sullivan* Court followed its previous decision in *Jones* and found that section 1982 was valid thirteeenth amendment legislation and, in addition, extended *Jones* by awarding damages for the violation of the Civil Rights Act of 1866. Moreover, the *Sullivan* decision added to the list of badges and incidents of slavery the fundamental right to lease property and decided that interference with such a right by a third party provided a private right of action under section 1982.[23]

Considered together, *Jones* and *Sullivan* established a "common law of forbidden racial discriminations"[24] under section 1982 even though the precise boundaries of the section remained unclear. The Court's failure to establish the parameters of the 1866 Act was subsequently reflected in the fourth circuit's approach in *Tillman.*

I. Defining a Property Interest Incident to a Real Estate Transaction: Fourth Circuit Approach

The fourth circuit took great pains to distinguish the factual situation presented in *Tillman* from that in the *Sullivan* case, despite apparent similarity. In *Sullivan,* plaintiff owned two membership shares[25] in Little Hunting Park, one of which he assigned to T.E. Freeman as a concomitant part of a lease agreement between Freeman and the plaintiff. After the Board of Directors refused to approve plaintiff's assignment because Freeman was black, suit was initiated to secure injunctive relief and damages under section 1982.[26] The Court found that the board's refusal to approve the membership assignment was a violation of Freeman's right to lease a right which included the assignment of membership rights in facilities incidental to the rental of real property.[27]

In *Tillman,* plaintiffs claimed a parallel connection between a real es-

22. 396 U.S. 229 (1969).
23. *Id.* at 237.
24. 396 U.S. at 247 (Harlan, J., dissenting).
25. In Wheaton-Haven, each family could have only one membership share since membership was by family units. Thus membership was not transferable unless the first option provision was considered a transfer of membership rights incident to a sale of property.
26. 396 U.S. at 234, 235.
27. *Id.* at 236-37. This interpretation was reenforced by the fact that Freedman paid part of his rent for the privilege of using the club facilities,

tate transaction and club membership. Although membership could not be assigned or leased as in *Sullivan*,[28] under the Wheaton-Haven by-laws once a member sold his residence and resigned his membership, his purchaser was entitled to a first option to become a member. Plaintiffs argued that the first option allowed by the Wheaton-Haven association achieved the same result as the outright transfer of membership permitted by Little Hunting Park Recreation Association.[29]

In reaching its conclusion that section 1982 was unavailable to plaintiffs as support for a cause of action, the fourth circuit emphasized certain factors: first, membership in Wheaton-Haven was not for sale or lease to the public and that unlike the membership involved in *Sullivan*, membership in Wheaton-Haven was not incident to the purchase of a home from a member;[30] and second, purchase of a home within the geographically delimited area did not impliedly carry with it the right to membership in the association[31] but gave the new owner only a first option to be considered for membership before other persons, if a waiting list existed. Since the club membership had never been full,[32] the court reasoned that the first option was not the equivalent of a transfer of membership because all prospective members, with or without an option, could have an application for membership considered immediately.[33]

As discussed in Judge Butzner's dissent in *Tillman*,[34] the majority failed to consider the economic importance of the first option if membership rolls became full in the future. In such a case, a white owner would be able to sell his home at a higher price than a black resident because the former could convey an option for membership in Wheaton-Haven. Furthermore, membership priorities aimed at persons residing within the three-quarter mile radius of the pool, coupled with the pool's restrictive membership policy, would discourage blacks from buying into that community and would

28. *See* note 25 *supra*.
29. 451 F.2d at 1217.
30. *Id.* The previous owner of the home, which the black plaintiffs in Tillman purchased, had not been a member of Wheaton-Haven. Therefore, Dr. Press sought an application for membership without the benefit of a first option.
31. The fourth circuit found that the radius requirement in Wheaton-Haven was merely an area preference and concluded that there was no connection between membership and ownership of land as was the case in *Sullivan*. 451 F.2d at 1219.
32. The fourth circuit relied on defendant's assertion at oral argument that membership in Wheaton-Haven, limited to 325 families, had been held at 260 families for several years. 451 F.2d at 1213 n.1. This assertion was later corrected to reflect a full membership list in 1968. The court of appeals was not influenced by this factor and denied a *rehearing en banc* over two dissents. *Id.* at 1225 (Winter, Craven, JJ., dissenting).
33. 451 F.2d at 1217.
34. *Id.* at 1222 (Butzner, J., dissenting).

diminish the value of their purchase in contradiction to the dictates of section 1982.[35]

Thus, the Supreme Court was confronted with the problem of reconciling the fourth circuit's approach to section 1982 in *Tillman* with its own earlier interpretation in *Jones* and *Sullivan*. Significantly, resolution of this issue depended on whether the Court conceived *Tillman* to be factually distinguishable from *Sullivan*. Recognizing the similarities in the nature of the property right manifested in the two cases, the Court found that the fourth circuit had erred in failing to follow the holding in *Sullivan*.[36] The Court reasoned that section 1982 of the Civil Rights Act of 1866 guaranteed all citizens "the same right . . . as is enjoyed by white citizens . . . to . . . purchase, lease, sell, hold and convey real and personal property."[37] Implicit in this guarantee is the right to the same use and enjoyment of property as a white citizen would receive. Specifically, this includes access to recreational facilities available to all residents in a particular community as an incident of their ownershhip or rental of real property. Furthermore, the Court rejected the notion that the first option was not to be considered an incident to any sale of property by virtue of the membership rolls having never been full.[38] In light of the membership priority given to persons buying homes from Wheaton-Haven members, and the priority given generally to persons residing within a three-quarter mile radius of the pool, the Court concluded that Wheaton-Haven's discriminatory practices abridged and diluted the black plaintiff's right to these membership benefits.[39]

II. The Effect of the Private Club Exemption on the Civil Rights Act of 1866: Repeal by Implication

Although minor factual differences distinguished *Tillman* from *Sullivan*, the fourth circuit and the Supreme Court reached opposite conclusions as to the availability of section 1982 as a basis for relief. The divergence of the different approaches taken by the courts can be seen in the opinion of Judge Haynsworth, writing for the majority, who found that the private club exemption embodied in the Civil Rights Act of 1964[40] operated to limit any

35. The Court stated in Jones v. Mayer, that the thirteenth amendment "would be left with "a mere paper guarantee" if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man." 392 U.S. at 443.

36. 410 U.S. at 435-36.

37. 42 U.S.C. § 1982 (1970).

38. 410 U.S. at 437.

39. *Id.*

40. 42 U.S.C. § 2000a(e) (1970) states: "The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public . . ."

inconsistent provisions of the Civil Rights Act of 1866. While admitting that repeal by implication[41] was not favored, Judge Haynsworth reasoned that since the 1964 Act expressly protected conduct made unlawful by the earlier statute,[42] and since the 1964 Act was the most recent expression of congressional intent in this area, the 1964 Act should be controlling.

After deciding that the subject matter coverage of the 1866 Act was by necessity restricted by the private club exemption of the 1964 Act, Judge Haynsworth then considered whether Wheaton-Haven qualified as a private club.[43] The Court in *Sullivan* faced an analogous situation in which the coverage of the 1866 Act and the 1964 Act seemed to converge.[44] The Court did not focus on whether the private club exemption operated to make the 1866 Act inapplicable but, rather, determined that the club in *Sullivan* was not private and then considered whether membership in the club constituted section 1982 property.[45] Ignoring this compelling precedent, Judge Haynsworth sought to distinguish between the organizational structure in Wheaton-Haven from that found in Little Hunting Park to reach his conclusion that Wheaton-Haven qualified as a bona fide private club. What constitutes a private club has never been defined with specificity. Particularly, determining whether a club is private, hinges on its membership and admission policies. In assessing Wheaton-Haven's claim for private club consideration, Judge Haynsworth found that Wheaton-Haven met the traditional test of privacy.[46] The most important factor[47] influencing this conclusion was

41. 451 F.2d at 1214 n.5. In dealing with this question, the courts have consistently declined to interpret subsequent civil rights legislation as impairing the remedies provided under the Civil Rights Act of 1866. *See, e.g.*, Jones v. Mayer, 392 U.S. at 413-17 (Fair Housing Title of Civil Rights Act of 1968 does not impair the sanction of section 1982); *accord*, Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972); Young v. International Tel. & Tel. Co., 438 F.2d 757 (3rd Cir. 1971) (Title VII of the 1964 Civil Rights Act does not impose jurisdictional barriers to suits under the 1866 Act (1); Sanders v. Dobbs Houses Inc., 431 F.2d 1097 (5th Cir. 1970) (specific remedies of Title VII of the 1964 Civil Rights Act do not preempt general remedial language of section 1981 of the 1866 Act).

42. Judge Haynsworth based this conclusion on his interpretation of the legislative history surrounding the enactment of the 1964 Act. 451 F.2d at 1214 n.5.

43. The 1964 Civil Rights Act contains no standards for determining whether a club is private. Consequently, courts have developed qualifications on a case by case basis. U.S. v. Jordan, 302 F. Supp. 370 (E.D. La. 1969). One indistinguishable factor is that an organization must have some definite qualifications for selecting members. *See* Sullivan v. Little Hunting Park, 396 U.S. 229 (1969); Wright v. The Cork Club, 315 F. Supp. 1143, 1151-53 (S.D. Tex. 1970). Another factor considered is advertising, since a club could hardly be deemed private if it utilized advertising to attract members. Nesmith v. Young Men's Christian Ass'n., 397 F.2d 96 (4th Cir. 1968).

44. In both cases, the Court was considering membership benefits in a club obtained as an incident of a sale of real property.

45. 396 U.S. at 236-37.

46. In determining whether a club is private, the courts examine an association's membership policies. Offering to serve all the white persons in a geographic area is

Judge Haynsworth's finding that the association had established criteria other than race for the selection of members.[48]

Wheaton-Haven's claim for private club status appears suspect in view of the fact that the only real membership standard expressed in the association's by-laws is that the applicant must reside within a stated geographic area. Every individual owning or leasing a home within the prescribed area is eligible to become a member without meeting any other standards.[49] Membership which was based essentially on the geography of residence and which was readily transferable by an area homeowner through use of a first option at the time of a home sale is the very antithesis of a private club. Moreover, the use of the first option underscores the lack of exclusivity in Wheaton-Haven since the sole criterion for determining membership in those circumstances turned on the purchaser's identity.

Under *Sullivan*, the test for determining what characterizes a club as private is whether there is a "plan or purpose of exclusiveness" with respect to membership.[50] Utilizing this test, the Court concluded that the structure and practices of Wheaton-Haven were indistinguishable from those of Little Hunting Park, since membership in both organizations "[was] open to every white person within the geographic area, there being no selective element other than race."[51] Finding that Wheaton-Haven was not a private club, the Court stated that it was unnecessary "to consider the issue of any implied limitation on the sweep of section 1982 when its application to a truly private club, within the meaning of § 2000a(e) is under consideration."[52] By abdicating its responsibility to resolve the apparent conflict between the Civil Rights Act of 1964 and the Civil Rights Act of 1866, it is clear that confusion between the scope and coverage of the two statutes

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said to be inconsistent with the nature of a private club. Genuine selectivity on some reasonable basis is important. *See, e.g.*, Nesmith v. Y.M.C.A., 397 F.2d 96 (4th Cir. 1968); Sullivan v. Little Hunting Park Inc., 396 U.S. 236 (1969); Daniel v. Paul, 395 U.S. 298 (1969) (recreational facility issuing season memberships to white adults living in the community). *See also*, Kyles v. Paul, 263 F. Supp. 412 (E.D. Ark. 1967) (where only selective element is race, the club will not be deemed private). *Accord*, U.S. v. Jack Sabins Private Club, 265 F. Supp. 90 (E.D. La. 1967).

47. *See* note 48 *infra.*

48. Even though the fourth circuit was unable to find "easily ascertainable standards for membership other than . . . an interest in swimming", it found that there were other selective criteria than race alone. 451 F.2d at 1221. Bolstering this conclusion was the fact that one white applicant had been rejected. It should be noted, however, that in Sullivan, one applicant for membership had also been rejected. Brief for Petitioners at 22, Tillman v. Wheaton Haven Recreation Ass'n, 410 U.S. 431 (1973).

49. 451 F.2d at 1223 (Butzner, J. dissenting).

50. 396 U.S. at 236.

51. 410 U.S. at 438.

52. *Id.* at 438-39.

will become more frequent in cases where membership in an association satisfying the 1964 Act's definition of a private club is connected to a property right seemingly protected under section 1982 of the 1866 Act.

III. Conclusion

The decision in *Tillman v. Wheaton Haven Recreation Ass'n* expresses the Court's continued determination to interpret section 1982 of the 1866 Civil Rights Act broadly. This decision was readily foreseeable in light of the mandate of *Jones v. Alfred H. Mayer Co.* to read the provisions of the 1866 Act in a broad and sweeping manner[53] and in view of the fact that this case was factually indistinguishable from *Sullivan v. Little Hunting Park.* Indeed, affirmance of the fourth circuit's decision by the Supreme Court would have limited the scope of section 1982 to transfers of present valuable rights incident to real property transactions in contradiction to the implications of the Court's previous holdings in *Jones* and *Sullivan.*

Nonetheless, there remains the question whether the 1866 Act is inconsistent with the provisions of the 1964 Civil Rights Act. Significantly, the majority in *Sullivan* and *Jones* had specifically rejected the assertion that by enacting comprehensive civil rights legislation Congress impliedly repealed the Civil Rights Act of 1866.[54] Moreover, the 1964 Act contains a saving clause which provides that nothing in title II shall prevent any plaintiff from enforcing rights based on laws "not inconsistent" with that statute.[55] Basic differences between the scope and coverage of the two acts illustrates that the 1964 Act was not intended to replace the 1866 Act in its entirety.[56] The Court in *Tillman,* however, failed to set down any guidelines for determining which statute shall prevail in situations where membership in a club is arguably incident to a sale of property. Therefore the issue left for future determination by the Court is which statute will take precedence in those factual situations where both Acts appear to apply.

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53. 392 U.S. at 437.

54. 396 U.S. at 237-38.

55. 42 U.S.C. § 2000a-6(b) (1970). Since title II contains no provisions repealing or reversing the terms of any earlier legislation, it is unlikely that Congress intended the 1964 statute to affect the validity or application of any existing remedy.

56. Title II of the 1964 Civil Rights Act is a narrowly drawn statute designed to assure equal access in all places of public accommodation, while the 1866 Act was broadly designed to prohibit racially discriminatory restriction in the sales of property and contracts. For further analysis as to the differences between title II and the Civil Rights Act of 1866 *see,* 69 COLUM. L. REV. *supra* note 20, at 1027-54.

CRIMINAL LAW—Search and Seizure—Mere Presence in an Airport Is a Factor in Justifying a Frisk—Skyjacking Danger Justifies Extension of Scope of Frisk Beyond "Pat Down"—United States v. Moreno, 475 F.2d 44 (5th Cir. 1973)

The danger of aircraft hijacking now justifies declaring an airport a critical zone in which special fourth amendment considerations apply, according to the Fifth Circuit Court of Appeals in *United States v. Moreno*.[1] The court of appeals eased restrictions on both the initiation and the scope of warrantless airport security searches,[2] and upheld a search of a man who was present in the airport but had not attempted to board an aircraft,[3] nor conformed to the behavioral profile,[4] nor even activated a metal-detecting magnetometer.[5]

Defendant Moreno's unusual behavior attracted the attention of Deputy U.S. Marshal Granados when Moreno first deplaned at San Antonio and then again when Moreno returned to the airport a few hours later. On further observation, Granados noticed that Moreno had a bulge in his coat

1. 475 F.2d 44 (5th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3196 (U.S. Oct. 9, 1973).

2. The fourth amendment to the United States Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Supreme Court has ruled that a search may be permissible even without a warrant if it is reasonable. Elkins v. U.S., 364 U.S. 206 (1960). The reasonableness of warrantless airport security searches has been considered in a number of cases summarized *infra* notes 19 and 22. For a general discussion of the boundaries of the reasonableness standard since the landmark case of Terry v. Ohio, 392 U.S. 1 (1968), *see* Note, 39 TENN. L. REV. 354 (1972).

3. Defendant Moreno was actually in a restroom when stopped for questioning.

4. The Federal Aviation Administration (F.A.A.) behavioral profile is a series of criteria developed by a study of the characteristics of known hijackers. These criteria have typically been applied by airlines personnel to prospective passengers to determine which such passengers should receive further attention. Usually about 99.5% of passengers would be cleared by the profile. Dailey, *Development of a Behavioral Profile for Air Pirates*, — VILL. L. REV. — (1973) (not yet published) [hereinafter referred to as Dailey]. The profile itself is secret, but in U.S. v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971) the court decided it did not discriminate by religion, origin, politics, or race. The profile was part of an F.A.A. screening system which became compulsory in February, 1972. Dailey at —. For detailed discussions of the profile *see* U.S. v. Lopez, *supra*; Note, *Airport Security Searches and the Fourth Amendment*, 71 COLUM. L. REV. 1039 (1971) [hereinafter cited as *Airport Security Searches*]; and McGinley and Downs, *Airport Searches and Seizures—A Reasonable Approach*, 41 FORDHAM L. REV. 293 (1972) [hereinafter cited as McGinley and Downs].

5. The magnetometer detects objects of ferrous metal which may be weapons. *See* n.4 *supra*.

pocket. In the ensuing encounter, Granados conducted a pat-down search of Moreno which disclosed no weapon; nevertheless Moreno was ordered to take off his coat. The coat was then searched, and the bulge was discovered to be three packages of heroin.

Basing its decision on *Terry v. Ohio*,[6] the court of appeals decided that a warrantless search under *Terry* may be justified not solely by danger to the officer himself but also by danger to others[7]—to wit, persons soon to be airborne. The court described an airport security search as an exceptional and exigent situation under the fourth amendment and decided that Granados' search met the standard of reasonableness. A search such as that conducted by Granados, though greater in scope than the pat-down authorized by *Terry*, was valid since there was "a proper basis for an air piracy investigation. . . ."[8]

Mass searches without probable cause, of both passengers and carry-on luggage, are now routine throughout the country.[9] Though Moreno was not himself involved in a mass search, the court of appeals nevertheless relied in part on the rationale behind such mass searches to uphold the discretionary search. Therefore, the constitutional basis of these searches deserves analysis.

Terry v. Ohio and Airport Security Searches

A warrantless airport security search does not fit comfortably into the protective frisk for weapons authorized by the Supreme Court in *Terry*. There, the Supreme Court emphasized that to justify an intrusion such as a frisk "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[10] In *Sibron v. New York*,[11] decided with *Terry*, the Supreme Court stated explicitly that the police officer "must be able to point to particular facts from which he reasonably inferred that the individual was

6. 392 U.S. 1 (1968). The suspects in Terry appeared to be planning an armed robbery. To protect himself, the officer conducted a pat-down search of their outer clothing, looking for weapons. The Supreme Court upheld this warrantless search though there was no probable cause for arrest.

7. 475 F.2d at 47, 51.

8. *Id.* at 51.

9. Effective January 5, 1973, the Federal Aviation Regulations (14 C.F.R. Part 107) were amended to require electronic searches of all passengers and inspection searches of all carry-on items. S. REP. No. 93-13, 93d Cong., 1st Sess. 11-13 (1973). For a thoughtful analysis of the impact of airport security searches on the fourth amendment, *see* Gora, *The Fourth Amendment at the Airport: Arriving, Departed, or Cancelled?*, — VILL. L. REV. — (1973). [Gora is affiliated with the American Civil Liberties Union.]

10. 392 U.S. at 21.

11. 392 U.S. 40 (1968).

armed and dangerous."[12]

This reasoning is clearly no support for any system of universal searches, such as that instituted by the Federal Aviation Administration in January, 1973.[13] Similarly, the previous system of selective searches, instituted in February, 1972,[14] could not satisfy this requirement of individualized particular facts. That system, which resulted in a relatively small number of searches, was based upon the FAA behavioral profile.

Unfortunately, of the persons searched as a result of being selected by the profile, only 6 percent did in fact have weapons.[15] An inference which is wrong 94 percent of the time hardly deserves the adjective "reasonable." The same is true of activation of the magnetometer, since about half of the people who walk through the magnetometer activate it,[16] and about 70 percent of carry-on baggage will activate it.[17]

Despite this inability of either the behavioral profile or the magnetometer to provide any basis whatsoever for a reasonable inference that a given individual is armed, courts are naturally reluctant to allow potential hijackers free access to aircraft. Thus, several federal and state courts have in effect allowed security officers to point to the suspect's mere attempt to board an aircraft as one of the "specific and articulable facts" required by Terry[18] as a basis for the inference that the suspect is armed. Even though attempting to board an aircraft is not itself a suspect act, these courts have held that when combined with activation of the metal detector or combined with matching the behavioral profile it can cause sufficient suspicion to justify a *Terry* frisk.[19]

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12. *Id.* at 64.

13. *See* note 9 *supra.*

14. This system required comparing each passenger to the behavioral profile. Those who matched the profile were then searched by magnetometer. *Hearing on the Anti-Hijacking Act of 1971 Before the Subcomm. on Aviation of the Senate Committee on Commerce*, 92d Cong., 2d Sess., ser. 92-97, at 102, 115 (1972). For further discussion of the implications of the 1972 system *see Airport Security Searches* 1052-58; McGinley & Downs 302-06.

15. U.S. v. Lopez, 328 F. Supp. 1077, 1084, 1097 (E.D.N.Y. 1971). At the time Lopez was decided, the profile was part of an anti-hijacking system which resulted in searches of only on the order of 0.1% of the number of passengers. *Id.* at 1097.

16. *Id.* at 1086.

17. *Hearings on Anti-Hijacking Act of 1973, Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess., ser. 93-94, pt. 1, at 238 (1973).

18. 392 U.S. at 21.

19. Cases in which the searches were upheld include U.S. v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971) (search upheld in principle but overturned due to airline tampering with criteria of profile); U.S. v. Lindsey, 451 F.2d 701 (3d Cir. 1971) (search based neither on magnetometer nor on profile); U.S. v. Epperson, 454 F.2d 769 (4th Cir. 1972) (magnetometer alone held sufficient basis for a Terry frisk); U.S. v. Bell, 464 F.2d 667 (2d Cir. 1972) (search based on profile and magnetometer); U.S. v.

These courts implicitly abandoned the *Terry-Sibron* requirement of specificity in the information used to justify a search. However, they did preserve the safeguard of requiring that the information come from a neutral and unbiased source such as the magnetometer or behavioral profile.

Beyond Judicial Permissiveness

The *Moreno* toleration of warrantless airport searches was approached most closely in *United States v. Lindsey*,[20] wherein the defendant, looking very nervous, rushed into the boarding area four minutes before departure with two large bulges visible in his pocket. He used four different names with the ticket agent and the U.S. Marshal. When he moved to board the plane, the Marshal conducted a pat down search which the Third Circuit Court of Appeals subsequently upheld. The *Lindsey* Court declared, "In the context of a possible airplane hijacking . . . the level of suspicion required for

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Slocum, 464 F.2d 1180 (3d Cir. 1972) (both frisk and search of carry-on luggage); People v. Botos, 104 Cal. Rptr. 193 (Ct. App. 1972) (luggage search based on consent); People v. Strulle, 104 Cal. Rptr. 639 (Ct. App. 1972) (luggage search based on consent); U.S. v. Mitchell, 352 F. Supp. 38 (E.D.N.Y. 1972) (allowed a luggage search to continue after discovery of metal which could have activated magnetometer); People v. Lopez, 13 Cr. L. 2112 (N.Y. Sup. Ct., N.Y. Cty. 1973) (allowed a search based on less probable cause than for traditional stop-and-frisk); U.S. v. Wilkerson, 13 Cr. L. 2254 (8th Cir. 1973) (upheld luggage search by airlines company); People v. Kluga, 13 Cr. L. 2316 (Cal. Ct. App. 2d Dist. 1973) (upheld pat down search based on magnetometer); U.S. v. Rivera, 13 Cr. L. 2234 (E.D.N.Y. 1973) (pat down upheld though no warning of option of forgoing the flight); U.S. v. Skipwith, 13 Cr. L. 2307 (5th Cir. 1973) (upheld a boarding-gate search based only on "mere suspicion") and U.S. v. Legato, 480 F.2d 408 (5th Cir. 1973) (search based on an anonymous tip).

SUMMARY OF CASES WITH VALID SEARCHES

Case	Met the Profile	Metal Detected	Irregular Identification	Consent to Search	Had A Visible Bulge	Unusual Conduct
U.S. v. Lopez	Yes	Yes	Yes	——	——	——
Lindsey	——	——	Yes	——	Yes	Yes
Epperson	——	Yes	——	——	——	——
Bell	Yes	Yes	Yes	Yes	——	——
Slocum	Yes	Yes	Yes	——	——	——
Botos	Yes	——	Yes	Yes	——	——
Strulle	——	Yes	——	Yes	——	——
Mitchell	Yes	Yes	Yes	Yes	——	——
People v. Lopez	Yes	Yes	——	Yes	——	——
Wilkerson	(fruit of a mass luggage search)					
Kluga	——	Yes	——	——	——	——
Rivera	Yes	Yes	——	——	——	——
Skipwith	Yes	——	Yes	——	——	——
Legato	(anonymous tip)		——	Yes	——	——

As this table indicates, courts have found a variety of bases for airport security searches.

20. 451 F.2d 701 (3d Cir. 1971). In Lindsey there was no mention of a magnetometer, which may not have been in operation at that airport at that time (March 20, 1970).

a *Terry* investigative stop and protective search should be lowered." However, the *Lindsey* panel identified the limited time available to the Marshal (four minutes) and the context of an actual airline boarding as important elements in the circumstances which justified even the limited pat down search conducted.

Moreno thus represents a relaxation of the reasonableness requirement well beyond available precedent. In *Moreno* Marshal Granados faced no time pressure. He was not confronting a suspect at the point of boarding an aircraft. The search he conducted went beyond a carefully limited pat down search for weapons. Furthermore, regardless of the statistical merits of the behavioral profile and the magnetometer, at least it may be said that they provide neutral and objective information.[21] Marshal Granados used neither the profile nor a magnetometer; he searched Moreno because of subjective observations of a person who was merely within the confines of the airport.

In several cases[22] airport security searches have been overturned, despite the fact that in each of them the search took place only after the suspect had attempted to enter the boarding area. Recently the Second Circuit Court of Appeals excluded evidence found in a search based solely on the fact that the suspect matched the profile. A profile standing alone, it was held, does not establish reasonable suspicion. Three district courts have excluded evidence found in luggage searches: where the luggage had been previously checked, where the owner of the luggage was given no opportunity to decline the search on condition that he not board the plane, and where the scope of the search included the contents of a small envelope with a one-quarter inch bulge at one end. The Supreme Court of New York excluded the fruits of a search based solely on a bulging pocket.

21. For the F.A.A. behavioral profile's neutrality and objectivity we must rely on the *in camera* investigation by the Court in U.S. v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971). That the Lopez Court was sensitive to this issue is shown by its reversal of the conviction simply because the airline had unilaterally altered the profile.

22. Cases in which searches were not upheld include People v. Erdman, 329 N.Y.S.2d 654 (Sup. Ct. 1972) (bulge in pocket); U.S. v. Allen, 349 F. Supp. 749 (N.D. Cal. 1972) (luggage search); U.S. v. Meulener, 351 F. Supp. 1284 (C.D. Cal. 1972) (no option to decline search); U.S. v. Kroll, 351 F. Supp. 148 (W.D. Mo. 1972); (search valid at outset but too extensive in scope); and U.S. v. Ruiz-Estrella, 481 F.2d 723 (2d Cir. 1973) (suspect merely matched the profile).

SUMMARY OF CASES WITH INVALID SEARCHES

Case	Met the Profile	Metal Detected	Irregular Identification	Consent to Search	Had A Visible Bulge	Unusual Conduct
Erdman	No	No	——	——	Yes	No
Allen	Yes	Yes	Yes	No	——	——
Meulener	Yes	Yes	——	——	——	——
Kroll	——	Yes	——	——	——	Yes
Ruiz-Estrella	Yes	No	Yes	No	——	No

Articulable Facts: Specific or Merely General?

An attempt to board an aircraft occurs in the case of all passengers, whether hijacker or not. It is not a specific fact particularly relevant to any one passenger. It does not distinguish one person from the next; rather it is a fact equally true for all. As to supporting an inference that a suspect was armed, the common denominator of the pre-*Moreno* cases upholding searches is that the suspect's attempt to board an aircraft was treated as if it were a specific, particular fact applicable to the suspect and not to his neighbor. Such a general fact is not the "unusual conduct" contemplated by the Supreme Court in *Terry v. Ohio*,[23] and it is not acceptable.[24]

In *Moreno*, of course, the general fact of attempting to board an aircraft has been supplanted by an even more general fact: presence in an airport.

Moreno has thus eliminated both safeguards against arbitrary and biased decisions to search: the requirement that the information justifying the search be specific and the requirement that the information be neutral and objective.

Conclusion: An Ominous Precedent

Moreno has significantly broadened a previously limited exception to the warrant requirement of the fourth amendment and greatly expanded the permissible scope of warrantless searches beyond the previously permissible carefully limited search of a suspect's outer clothing for weapons.

The designation of an airport as a "critical zone" was justified, in the eyes of the Fifth Circuit Court of Appeals, by the "overwhelming public interest" involved.[25] The danger of this judicial toleration of warrantless searches was well described by Judge Mansfield, concurring in *United States v. Bell*:

> If the danger to the public posed by the current wave of hijacking were held to constitute adequate ground for such a broad expansion of police power, the sharp increase in the rate of serious crime in our major cities could equally be used to justify similar searches of persons or houses in high crime areas based solely upon the 'trained intuition' of the police. With the door thus opened, a serious abuse of individual rights would almost inevitably follow.[26]

The permissible scope of a *Moreno* search apparently now extends to items

23. 392 U.S. at 30.

24. "This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." 392 U.S. at 21, n.18.

25. 475 F.2d at 45, 51.

26. 464 F.2d 667, 675-76 (2d Cir. 1972) (concurring opinion).

as unweaponlike in size and appearance as a "detonator planted in a fountain pen."[27] This raises difficult questions. For example, how can such an extensive search be distinguished, in practice, from a search for contraband? How far may an officer go in his search, when he claims he is looking for an object too small to cause a visible bulge in the suspect's clothing? If the only limit to the scope of each search is to be the theoretical ingenuity of hijackers, will airport security officers be entitled to conduct forced searches of body cavities?

Aircraft hijacking poses a serious risk to passenger safety. However, another danger from airport security searches is the serious risk to passenger freedom. We must not close our eyes to either danger.

Joseph R. Whaley

COMMERCIAL PAPER—Uniform Commercial Code 3-419(3) Does Not Protect Collecting Bank Which Takes Check With Forged Endorsement From Conversion Liability—Cooper v. Union Bank, 9 Cal. 3d 123, 507 P.2d 609, 107 Cal. Rptr. 1 (1973).

Efforts of the Uniform Commercial Code (U.C.C.) draftsmen to protect a collecting bank or depositary bank[1] from liability by means of section 3-419(3) for unknowingly taking a check with a forged endorsement suffered another blow[2] in the case of *Cooper v. Union Bank.*[3] Following pre-code law[4] rather than the purpose of section 3-419(3), the California Supreme Court played upon the use of the word "proceeds" to substantiate

27. 475 F.2d at 49.

1. UNIFORM COMMERCIAL CODE, § 4-105(a): " 'Depository bank' means the first bank to which an item is transferred for collection even though it is also the payor bank;" (d): " 'Collecting bank' means any bank handling the item for collection except the payor bank."

2. *See* discussion in J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE, 502-05, § 15-4 (1972).

3. 9 Cal. 3d, 123, 507 P.2d 609, 107 Cal. Rptr. 1 (1973).

4. *See* cases cited in Annot., 100 ALR2d 670 (1965) involving the "right of check owner to recover against one cashing it on forged or unauthorized indorsement and procuring payment by drawee," and cases cited in 9 Cal. 3d 129 at n.6, 507 P.2d at 614 n.6, 107 Cal. Rptr. at 6 n.6.

its determination that the collecting banks still retained the proceeds of the instruments and were thus liable to the true owners. Section 3-419(3) reads as follows:

> Subject to the provisions of this Act concerning restrictive indorsements a representative, including a depositary or collecting bank, who has in good faith and in accordance with the reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who was not the true owner is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands.[5]

From December 1965 to February 1967, an attorney's secretary had forged her employer's endorsement on 29 checks. Some checks she cashed at defendant Union Bank (Union) while the remainder were cashed or deposited to her personal account at Crocker Citizens National Bank (Crocker); both banks collected on these checks from the defendant payor banks.[6] Prior to discovery of the forgeries, the secretary withdrew the entire amount of the checks.

The attorney and co-members of a joint business venture, as payees, sued the collecting and payor banks for conversion. The court of appeals,[7] affirming the trial court's findings,[8] held that since the collecting banks as well as the payor banks had observed reasonable commercial standards, under section 3-419(3) they were not liable. It further affirmed the trial court's ruling that under section 3-406[9] the collecting and payor banks were protected from liability as to those checks taken after April 1, 1966, because of plaintiffs' negligence in not discovering the secretary's forgeries by that date.[10]

While the key issue in the lower courts had been whether defendant banks observed reasonable commercial standards,[11] the California Supreme Court, in holding that the collecting banks' retention of the proceeds deprived them of protection under section 3-419(3), did not find it necessary to scrutinize

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5. U.C.C., § 1-201(35): " 'Representative' includes an agent . . . ."

6. U.C.C., § 4-105(b): " 'Payor bank' means a bank by which an item is payable as drawn or accepted."

7. 103 Cal. Rptr. 610 (Ct. App. 1972).

8. Super. Ct., Los Angeles County, No. 916,635 (1971).

9. "Any person who by his negligence substantially contributes . . . to the making of an unauthorized signature is precluded from asserting the . . . lack of authority against a holder in due course or against a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business." CALIF. COMM. CODE, § 3406.

10. However, the collecting banks and payor banks were not holders in due course (*see* definition in U.C.C., § 3-302) because the forged endorsements prevented them from being holders within the meaning of U.C.C., § 1-201(20).

11. 103 Cal. Rptr. at 614.

the banks' conduct. The court explained that the collecting banks, as either purchasers of the cashed checks or as agents of the depositor for collection on the instruments, retained the proceeds of these checks. The true owners, by bringing this action against the collecting banks, had ratified their collection of the proceeds from the payor banks.

Referring to the law of constructive trusts, the court concluded that when a collecting bank receives final settlement for an item forwarded for collection, it becomes a debtor for the amount of that item. The money received is mingled with the bank's other funds and, unless the bank's funds are diminished below the amount of the instrument, the bank is considered to retain the proceeds ". . . regardless of whether those instruments were cashed or accepted for deposit."[12]

Buttressing its conclusion that defendant collecting banks retained the proceeds, the court noted that the section 3-419(3) draftsmen would have been more explicit had they intended to protect collecting banks in view of the fact that pre-code law was nearly unanimous in holding a collecting bank liable to the true owner for taking a check with a forged endorsement. The court pointed out that a different interpretation of section 3-419(3) would only result in circuity since the collecting bank would ultimately be liable to the payor bank under its warranty of good title.[13]

Further changing the lower courts' application of the U.C.C. statutes, the court stated that although Union was liable for the seven checks cashed prior to April 1, 1966,[14] under section 3-404[15] plaintiffs' negligence precluded them from recovering from the collecting banks for the checks taken after that date even though their conduct may have been below reasonable commercial standards.

While the *Cooper* opinion dealt with several important issues, each deserving of lengthy analysis, its primary importance is its undermining, through a contrived application of banking and constructive trusts theories, of the section 3-419(3) draftsmen's intent to protect a collecting bank from conversion liability for payment on a forged endorsement. Significant also is the court's use of section 3-404 to exonerate the collecting banks because of plaintiffs' negligence without requiring the collecting banks to prove their observance of reasonable commercial standards. Although *Cooper*

12. 9 Cal. 3d at 131, 507 P.2d at 615-16, 107 Cal. Rptr. at 7-8.

13. CALIF. COMM. CODE, § 4207(1): "Each customer or collecting bank who obtains payment or acceptance of an item and each prior customer and collecting bank warrants to the payor bank or other payor who in good faith pays or accepts the item that (a) he has a good title to the item or is authorized to obtain payment or acceptance on behalf of one who has a good title . . . ." 9 Cal. 3d at 133, 507 P.2d at 617, 107 Cal. Rptr. at 9.

14. All the checks taken by Union were cashed.

15. CALIF. COMM. CODE, § 3404(1): "Any unauthorized signature is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it . . . ."

presented a number of important issues, the scope of this article will be limited to an analysis of the court's shaping of the key issue in terms of the meaning of "proceeds" and its employment of that issue to determine, or rather evade, the section 3-419(3) draftsmen's intent.

Ervin's Continuation of Pre-Code Law

The *Cooper* court was not the first to evade the section 3-419(3) draftsmen's intent. In *Ervin v. Dauphin Deposit Trust Co.*,[16] the only other case decided under the U.C.C. substantially similar in facts and issues to *Cooper*, the Pennsylvania court held that there was no express provision of the U.C.C. concerning the collecting bank's liability for a check taken with a forged endorsement, so therefore pre-code law must be followed.

The collecting bank's liability to the payee for cashing a check with a forged endorsement was well established under pre-code law and the Uniform Negotiable Instruments Law.[17] The ratification theory mentioned in *Cooper* was frequently used,[18] while other cases said the payee was entitled to recover in conversion.[19] According to the *Ervin* court, section 3-419(3) ". . . speaks of something other than the negotiating or the honoring of a check when it refers to the representative having 'dealt with an instrument or its proceeds on behalf of one who was not the true owner.' "[20] While the *Ervin* court held that prior law applied regardless of whether the check was cashed or accepted for deposit,[21] it implied that there was no doubt as to the defendant's possessing the proceeds since the checks, all having been cashed, were purchased with the bank's own money and the proceeds then collected from the drawee banks.[22]

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16. Ervin v. Dauphin Deposit Trust Co., 84 Dauph. 280, 38 Pa. D. & C.2d 473 (1965), 3 U.C.C. Rep. 311 (1965).

17. *See* cases cited in F. BEUTEL, BEUTEL'S BRANNAN NEGOTIABLE INSTRUMENTS LAW, § 23 (7th ed. 1971) and note 4 *supra*.

18. Independent Oil Men's Assn. v. Fort Dearborn Nat. Bank, 311 Ill. 278, 142 N.E. 458 (1924); Portland Cement Co. v. United States Nat. Bank of Denver, 61 Colo. 334, 157 P. 202 (1916).

19. *See* cases cited in Annot., *supra* note 4, at 677.

20. 3 U.C.C. Rep. at 318. Bailey explains that what the court suggested was ". . . [I]f the bank had dealt with an unauthorized agent of the payee who cashed the check after getting the payee's genuine indorsement, the bank would not be liable." H. BAILEY, THE LAW OF BANK CHECKS, § 15.14, 496, 500 n.223 (4th ed. 1969).

21. 3 U.C.C. Rep. at 315.

22. "Even though this subsection [§ 3-419(3)] should be held to apply here it can give defendant no solace, for as we view it, defendant still has the proceeds of all of the checks in its hands. When it purchased or cashed the forged checks drawn on other banks it did so with its own money and then, in putting them through for collection it obtained from the drawee banks money which belongs to the plaintiff." 3 U.C.C. Rep. at 319.

Retention of Proceeds

While the *Cooper* court used the law of constructive trusts as a basis for deciding that a collecting bank, which takes a check with a forged endorsement, retains the proceeds after payment to the forger, *Ervin* commentators[23] opined that an important factor in determining whether the bank retains the proceeds is whether the bank cashes the check or takes it for deposit. The commentators theorized that when a bank cashes a check, it retains the proceeds since it is not the "representative" referred to in 3-419(3) having purchased the check with its own money and then collected the proceeds;[24] but when it takes a check for deposit, it parts with the proceeds since it is a representative for collection. The *Cooper* court summarily rejected this theory in a footnote.[25] Making no distinction between the checks cashed and those taken for deposit by the collecting banks, the court viewed the collecting banks as retaining the proceeds in both situations.[26]

The court could have used U.C.C., sections 4-201(1) and 4-208(2) to determine whether the collecting banks had the proceeds. Section 4-201(1)[27] could be viewed as assuring the bank's agency status regardless of whether the check is cashed or taken for deposit, although a reading of that subsection does not reveal with certainty that a collecting bank which cashes a check is an agent.[28]

Following pre-code law,[29] section 4-208(2) using the "first-in, first-out rule," provides that ". . . credits given are first withdrawn." ". . . [T]he

23. ADVANCED ALI-ABA COURSE OF STUDY IN BANKING AND SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE 54-57, 1968 (dialogue between Prof. E. Allan Farnsworth and Fairfax Leary, Jr.); BAILEY, *supra* note 20, at 499-500; E. Allan Farnsworth, Fairfax Leary, Jr., *UCC Brief No. 10: Forgery and Alteration of Checks*, 14 PRACT. LAWYER, 77, 79-80 (1968).

24. ADVANCED ALI-ABA COURSE OF STUDY, *supra* note 23, at 56-57; BAILEY, *supra* note 20, at 499-500; and PRACT. LAWYER, *supra* note 23, at 79-80.

25. "Commentators have suggested that the Ervin case may stand for the rule that the collecting bank parts with the proceeds if it accepts an instrument for deposit in an account and later pays out the money in the account but does not part with the proceeds if it cashes the instrument. . . . There appears to be no practical rationale for this arbitrary solution, and the Ervin decision clearly appears to negate it. . . ." 9 Cal. 3d at 131-32 n.12, 507 P.2d at 616 n.12, 107 Cal. Rptr. at 8 n.12.

26. 9 Cal. 3d at 130, 507 P.2d at 614, 107 Cal. Rptr. at 6. As it turned out, the only liability found was that of Union for the checks it had cashed over the counter prior to April 1, 1966, so that the collecting banks were not responsible for any checks which had been taken for deposit.

27. U.C.C., § 4-201(1): ". . . [P]rior to the time that a settlement given by a collecting bank for an item is or becomes final . . . the bank is an agent . . . of the owner of the item and any settlement given for the item is provisional. This provision applies . . . even though credit given for the item is subject to immediate withdrawal . . . ."

28. ADVANCED ALI-ABA COURSES OF STUDY, *supra* note 23, at 57; BAILEY, *supra* note 20, at 499.

29. *See* cases cited in Annot. 59 A.L.R.2d 1173, 1190, (1958). Crediting proceeds of negotiable paper to depositor's account as constituting bank a holder in due course.

first amounts withdrawn from the account are to be applied against the oldest deposits, and as soon as the proceeds of the instrument have been withdrawn under such computation, the bank has given consideration for the instrument. . . ."[30] Although section 4-208(2) would not have changed the outcome in *Cooper*,[31] it nevertheless could have been used by the court in its efforts to ascertain when a collecting bank may be considered to retain the proceeds. The section 4-208(2) approach would comply with the solution suggested by Fairfax Leary, Jr. that "[a] balance sheet approach seems preferable. Namely, are the bank's assets still inflated as a result of the transaction and the cancelling of liability to its customer? If so, that should be the extent of its liability."[32]

Evasion of the Draftsmen's Intention

Whatever the U.C.C. draftsmen had in mind when creating section 3-419(3), they did not intend, as the *Cooper* court erroneously concluded, to follow pre-code law.[33] At least 11 states, including California, mention in their respective comments to section 3-419(3) that it is intended to protect a collecting bank.[34] Furthermore, settling a pre-code controversy,[35] the

30. *Id.* at 1176.

31. As mentioned previously, the only liability found was that of Union before April 1, 1966, up to which date it had cashed checks, but had taken none for deposit.

32. PRACT. LAWYER, *supra* note 23, at 80.

33. CLARKE, BAILEY AND YOUNG, BANK DEPOSITS AND COLLECTIONS, 167 (3rd ed. 1963); White and Summers, *supra* note 2, at 502; Bailey, *supra* note 20, at 499; State of New York Law Revision Commission Legislative Document No. 65(D), Article 3-Commercial Paper, 1079 (1955). According to § 3-419, Comment 5, "Subsection (3) which is new, is intended to adopt the rule of decisions which has held that a representative, such as a broker or depositary bank, who deals with a negotiable instrument for his principal in good faith is not liable to the true owner for conversion of the instrument or otherwise, except that he may be compelled to turn over to the true owner the instrument itself or any proceeds of the instrument remaining in his hands. . . ." While at least three cases where brokers were protected from liability because they acted in good faith have been found, First Nat. Bank v. Goldberg, 340 Pa. 337, 17 A.2d 377 (1941); Gruntal v. National Surety Co., 254 N.Y. 468, 173 N.E. 682 (1930); Pratt v. Higginson, 230 Mass. 256, 119 N.E. 661 (1918), none of the few cases protecting depositary banks gave good faith as the reason. Fernon v. Capital Bank & Trust Co., 190 So. 2d 504 (La. Ct. App. 1966) and M. Feitel House Wrecking Co. v. Citizens' Bank & Trust Co., 159 La. 752, 106 So. 292 (1925)-check never paid because not accepted by drawee bank or collecting bank so payee's remedy was against drawer; Soderlin v. Marquette Nat. Bank, 8 N.W.2d 331 (Minn. 1943)-collecting bank not liable because not unjustly enriched.

34. ANN. CAL. CODES, v. 23B, § 3419 (West 1964); FLA. STAT. ANN., v. 19B, § 673.3-419 (1966); ILL. ANN. STAT., ch. 26, § 3-419 1(963); ANN. IND. STAT., v. 5, § 19-3-419 (1964); IOWA CODE ANN., v. 35A, § 554.3419 (1967); CONSOL. LAWS OF N.Y. ANN., bk. 62½, § 3-419 (McKinney 1964); OKLA. STAT. ANN. title 12A, § 3-419 (West 1963); PA. STAT. ANN., Title 12 A, § 3-419 (West 1970); CODE OF S.C. ANN., v. 2A, § 10.3-419 (1966); REV. CODE OF WASH. ANN., title 62A, § 62A.3-419 (1966); WIS. STAT. ANN. v. 40B, § 403.419 at 289 (West 1964).

35. BAILEY, *supra* note 20, at 496.

draftsmen assured a payee recourse against a drawee bank which takes a check on a forged endorsement through section 3-419(1)(c).[36]

The *Cooper* court, in assuming that the U.C.C. draftsmen would have been more explicit had they intended to change pre-code law, and in finding that the comments to section 3-419(3) showed no change, either misread or misinterpreted the California comment and the Official Comment.[37] By using a collecting bank's liability to the drawee bank under its warranty as evidence that the draftsmen intended that the collecting bank should be liable to the payee,[38] the court ignored Comments 5 and 6 to section 3-419(3). Taken together, these express the opinion that a collecting bank should have a ready defense against the payee despite its liability to the drawee bank.[39]

When the *Cooper* court evaded the draftsmen's intent, it had much company,[40] since only one other case has been found which used section 3-419(3) as its draftsmen intended.[41] Most courts have found the collecting bank liable under the U.C.C. While the *Ervin* and *Cooper* cases are the only ones which analyzed section 3-419(3), other courts, where the situation was ripe for the application of that subsection, did not mention it.[42] In still other instances of judicial scrutinizing, it was found that the collecting bank did not observe reasonable commercial standards.[43]

Conclusion

The weaknesses in the *Cooper* court's reasoning emphasize the groping quality of its efforts to follow pre-code law and to flauntingly evade the section 3-419(3) draftsmen's intent by using an erroneous definition of

36. "An instrument is converted when (c) it is paid on a forged indorsement." U.C.C., § 3-419(1)(c).

37. 9 Cal. 3d at 132-34, 507 P.2d at 617-18, 107 Cal. Rptr. at 8-9. *See* Comment 5, *supra* note 33. The California Code comment 5 reads: Subdivision (3) is now statutory law. Its basic premise that a person dealing in good faith with the property of another is not liable for conversion is consistent with prior California law on the tort of conversion." ANN. CAL. CODES, v. 23B, § 3419 at 395 (West 1964).

38. 9 Cal. 3d at 133, 507 P.2d at 617, 107 Cal. Rptr. at 9.

39. U.C.C., § 3-419, Comment 6 states that the collecting bank is still liable under its warranty even though it is not liable to the owner of the instrument.

40. *See* discussion in J. WHITE AND R. SUMMERS, *supra* note 2, at 504, 508.

41. Messeroff v. Kantor, 261 So. 2d 553 (Fla. Dist. Ct. App. 1972).

42. Von Gohren v. Pacific National Bank, 8 Wash. App. 245, 505 P.2d 467 (1973); Miss. Bank and Trust Co. v. County Supplies and Diesel Service, Inc., 253 So. 2d 828 (Miss. 1971); Harry H. White Lumber Co. v. Crocker-Citizens National Bank, 61 Cal. Rptr. 381 (Cal. App. 1967); Huntingdon Co. v. First-Grange National Bank, 20 Pa. D. & C. 2d 418 (1959).

43. F.D.I.C. v. Marine National Bank, 431 F.2d 341 (5th Cir. 1970); Belmar Trucking Corp. v. American Bank and Trust Co., 316 N.Y.S.2d 247 (Civil Ct., N.Y. Cty. 1970); Salsman v. National Community Bank, 102 N.J. Super. 482, 246 A.2d 162 (1968).

"proceeds." It is highly questionable that the "proceeds" in section 3-419(3) was intended by the draftsmen to be the same as the proceeds encompassed within constructive trusts theory. Why would the draftsmen include a provision in Article 3 that would shield a collecting bank only in the unlikely event of its funds dwindling below the amount of an instrument? In addition, it is difficult to understand how the court could have reasoned[44] that section 3-419(3) applies only to situations involving investment brokers and not to the typical bank collection transaction,[45] since it is doubtful that a subsection on investment brokers would be placed in Article 3.[46]

On the other hand, the advantages given by the court for holding a collecting bank liable are sound—avoidance of circuitous action, the likelihood that the collecting bank will be geographically close to the payee, and the payee's having to sue only one collecting bank as opposed to many drawee banks.[47] But it must also be considered that the collecting bank can assert the defenses of sections 4-207(4) and 4-406(5)[48] against the drawee bank, defenses not assertable against the payee.[49]

The tendency of courts to follow pre-code law by holding collecting banks liable, coupled with the likelihood that the faulty *Cooper* opinion, as one of only two cases to analyze section 3-419(3), will be used in the future as support for more evasion of the true purpose of section 3-419(3), make manifest the imperative need for a redrafting of that subsection. Such redrafting should leave no room for contrived interpretations that will avoid the subsection's purpose of protecting a collecting bank that takes a check on a forged endorsement.

Judy Hoffman

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44. As did the Ervin Court, 3 U.C.C. Rep. at 319.

45. 9 Cal. 3d at 134, 507 P.2d at 618, 107 Cal. Rptr. at 10.

46. Article 3 applies to drafts, checks, certificates of deposit and notes. U.C.C., § 3-103, Comment 1. *See also* U.C.C., § 3-101, Comment.

47. ADVANCED ALI-ABA COURSE OF STUDY, *supra* note 23, at 54.

48. U.C.C., § 4-207(4): "Unless a claim for breach of warranty under this section is made within a reasonable time after the person claiming learns of the breach, the person liable is discharged to the extent of any loss caused by the delay in making claim." U.C.C., § 4-406(5): "If under this section a payor bank has a valid defense against a claim of a customer upon or resulting from payment of an item and waives or fails upon request to assert the defense the bank may not assert against any collecting bank or other prior party presenting or transferring the item a claim based upon the unauthorized signature or alteration giving rise to the customer's claim."

49. Stone and Webster Engineering Corp. v. First National Bank & Trust Co., 184 N.E.2d 358, 363 (Mass. Sup. Jud. Ct. 1962). This case gives the same reasons for not allowing the drawer to sue a collecting bank.

CONSTITUTIONAL LAW—Eleventh Amendment—State Sovereign Immunity Bars Employee Suits In Federal Court Under the Fair Labor Standards Act. Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279 (1973).

Sovereignty

The power of Congress under the commerce clause[1] to condition state participation in a regulated activity on amenability to suit in the federal courts has become a controversial issue of judicial and legislative concern. The basis of the controversy can be found in the Constitution itself, in which the concept of state sovereignty is protected by the eleventh amendment, while, at the same time, the plenary nature of the power granted Congress under the commerce clause is reinforced by judicial interpretation. The inevitable confrontation sets the power of Congress to regulate interstate commerce under the commerce clause against the eleventh amendment right of the states to be free from federal court suit, absent consent. In *Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare*[2] (hereinafter *Missouri Employees*) the Supreme Court attempted to reconcile these countervailing views.

Petitioners, employees of various Missouri state institutions,[3] brought a class action suit in the United States District Court for the Western District of Missouri to recover unpaid overtime compensation allegedly due them under Section 16(b)[4] of the Fair Labor Standards Act (FLSA).[5] The trial court sustained defendants'[6] motion to dismiss the complaint on the ground

1. U.S. CONST. art. 1 § 8.
2. 411 U.S. 279 (1973).
3. Plaintiffs were employees of five mental hospitals and a cancer hospital owned and operated by the State of Missouri, and employees of the state training school for girls operated under the Department of Corrections of the State of Missouri.
4. 29 U.S.C. § 216(b) (1970) reads:
> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. . . .
5. 29 U.S.C. §§ 201-219 (1970).
6. Defendants were the Department of Public Health and Welfare of the State of Missouri, the State Board of Training Schools and various officials having supervision over the state hospitals and training schools who were sued in their official capacities and as individuals.

of the state's eleventh amendment immunity to suit.[7] A panel for the Court of Appeals for the Eighth Circuit reversed,[8] but on the filing of a petition for rehearing, the Court of Appeals sitting *en banc*[9] vacated the panel decision and affirmed the judgment of the district court, holding that the suit was barred by the eleventh amendment and that Missouri had not waived its sovereign immunity nor consented to the suit.

Before the Supreme Court on certiorari, petitioners presented the Court with the issue of whether the 1966 amendments to the FLSA[10] barred the defense of eleventh amendment immunity to suit, absent the State's express consent. The Court responded by holding that although the 1966 amendments to the FLSA extended statutory coverage of the Act to employees of state owned hospitals and related institutions, the amendments did not deprive a state of its constitutional immunity to suit in a federal forum by employees of its nonprofit institutions.

Justices Marshall and Stewart concurred with the Court's decision, stating that the issue was one of "the susceptibility of the State to suits before federal tribunals,"[11] and that Missouri had neither consented to suit, nor waived its constitutional immunity to be sued. Mr. Justice Brennan dissented vigorously and found that, "under our constitutional system . . . a State is not the sovereign of its people. Rather, its people are sovereign,"[12] citing as evidence of this principle the trend toward limitation of the defense of governmental immunity.

State sovereign immunity from suit by individuals has traditionally been grounded in the eleventh amendment,[13] which ostensibly does not bar suits against a State by its own citizens. Nevertheless, the Supreme Court, in *Hans v. Louisiana*,[14] held that such suits were not ones to which the judicial power

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7. U.S. CONST. amend. XI provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Although the eleventh amendment does not mention suits brought by a citizen against his own state, it has been construed as a bar to such suits. *See* notes 13-17 *infra* and accompanying text.

8. No. 20,204 (8th Cir., April 2, 1972).

9. Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 452 F.2d 820 (8th Cir. 1971).

10. 29 U.S.C. §§ 201-219 (1970). *See* notes 25-37 *infra* and accompanying text.

11. Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 294 (1973) (Marshall & Stewart, J.J., *concurring*).

12. *Id.* at 322-23 (Brennan, J., dissenting).

13. The eleventh amendment was passed as a reaction to the decision in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), in which the Court held that it had jurisdiction to hear a suit brought against a state by citizens of another state.

14. 134 U.S. 1 (1890). In *Hans*, the plaintiff as an individual attempted to sue his own state and argued that the eleventh amendment did not apply to such a suit. It is unclear whether the decision was based on the eleventh amendment or on common law sovereign immunity. The majority discussed at length the eleventh amendment

extends. Thus, suits by citizens against their own state were precluded by this expansion of the eleventh amendment. A steady change of opinion, however, has gradually undermined the exception of the sovereign's freedom from ordinary legal responsibility.[15] Recent use of the doctrine of implied consent or waiver has been employed where Congress has preconditioned state participation in a regulated activity on the state's amenability to suit in the federal courts.[16] Specifically, in the instant case, the issue arose whether, under *Parden v. Terminal Railway of the Alabama State Docks Department*,[17] a state is deemed to have waived its eleventh amendment immunity to citizen-employee suits when it continues to engage in activities brought under congressional regulation.

While the issue of state immunity to suit in *state* courts was admittedly left unresolved, this article will concern itself solely with an examination of state immunity vis-a-vis federal court suits and will discuss relevant case law, legislative history, and the bases upon which the Court rejected the *Parden* rationale.

The Effect of Parden on Traditional Notions of State Sovereign Immunity

In *Parden*, Alabama citizens sued an Alabama state-owned railway in federal court to recover damages under the Federal Employers' Liability Act

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and its implications and, as a result, it was generally assumed that the holding was based on the eleventh amendment. 17 VILL. L. REV. 713, 714 (1972). *See, e.g.*, United States v. Mississippi, 380 U.S. 128, 140 (1965); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945); Ex Parte Young, 209 U.S. 123, 150 (1908).

15. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 627, 708 (1949) (Frankfurter & Burton, J.J., dissenting). A state may waive immunity at pleasure, Missouri v. Fiske, 290 U.S. 18 (1933); by a general appearance in a case, Clark v. Barnard, 108 U.S. 436 (1883); or by statute, Ford Motor Co. v. Department of Treas., 323 U.S. 459 (1945). In Principality of Monaco v. Mississippi, 292 U.S. 313 (1934), the Court discussed the question of immunity which arises in several distinct classes of cases: suits brought against a state (a) by another state of the Union; (b) by the United States; (c) by the citizens of another state or by the citizens or subjects of a foreign state; (d) by citizens of the same state or by federal corporations; and (e) by foreign states. 292 U.S. at 328. Generally, waiver must be knowingly, voluntarily and intelligently given. *See* Johnson v. Zerbst, 304 U.S. 458 (1938); Fay v. Noia, 372 U.S. 391 (1963). *But cf.* Parden v. Terminal Ry. of the Ala. State Docks Dep't, 377 U.S. 184 (1964); Briggs v. Sagers, 424 F.2d 130 (10th Cir. 1970).

16. The states are not immune from federal regulation under the commerce power of Congress. In Parden v. Terminal Ry. of the Ala. State Docks Dep't, 377 U.S. 184 (1964), the Court subjected a state-owned railway to the Federal Employer's Liability Act. In United States v. California, 297 U.S. 175 (1936), the Court subjected a state-owned railroad to the Federal Safety Appliance Act. Board of Trustees v. United States, 289 U.S. 48 (1933), required a state university to pay federal custom duties on educational equipment it imported. In Sanitary District v. United States, 266 U.S. 405 (1925), a state was prohibited from diverting water from the Great Lakes necessary to ensure navigability, a phase of commerce.

17. 377 U.S. 184 (1964).

(FELA)[18] for personal injuries sustained while employed by the defendant. The issue involved was whether a state that owned and operated a railroad in interstate commerce could successfully plead sovereign immunity in a federal court suit brought against the railroad by its employees under the FELA. After finding that the Act authorized suits in federal district against state-owned as well as privately-owned common carriers operating in interstate commerce,[19] the Court examined Alabama's contention that Congress was without power, in view of the doctrine of sovereign immunity, to subject a state to suit.

The Court noted that while a state's immunity from suit by a citizen without its consent is rooted in " 'the inherent nature of sovereignty,' . . . the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce."[20] Thus, a state's operation of a railroad in interstate commerce must be in subordination to the power granted Congress under the Commerce Clause[21] and, as a result, the states necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation.[22]

The Court concluded that an individual's right of action under the FELA could not be precluded by sovereign immunity. The states, by venturing into a federal realm, assumed the conditions that Congress attached and thereby subjected themselves to federal regulation as fully as would a private person or corporation.[23] Congress, in the exercise of its power under

18. 45 U.S.C. §§ 51-60 (1970).

19. 377 U.S. at 191.

20. *Id.*, citing as evidence of the first proposition the statement contained in Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 56 (1944). *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), which is authority for the nature of the power granted Congress under the Commerce Clause:

> This power [the commerce power] like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having as its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. 22 U.S. (9 Wheat.) at 196-97.

21. 377 U.S. at 191. *See* United States v. California, 297 U.S. 175, 184 (1936), where the Court found that "[t]he sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution."

22. 377 U.S. at 192. By engaging in the railroad business a state cannot withdraw the railroad from the power of the federal government to regulate commerce. New York v. United States, 326 U.S. 572, 582 (1946) (opinion of Frankfurter, J.).

23. 377 U.S. at 196. Thus, consent to suit rested upon conditions Congress attached to the state's action, and actual consent need not be given. In so ruling, the Supreme Court relied in part upon its earlier decision in Petty v. Tennessee-Missouri Bridge Comm'n., 359 U.S. 275 (1959), where the Court permitted a Jones Act claim

the Commerce Clause could, therefore, force the states to choose between entering the area of regulated activity and thereby waive immunity to suit, or retain immunity by avoiding activity in the regulated area entirely.[24]

The Fair Labor Standards Act

As was true of the legislation involved in *Parden*, the FLSA was enacted by Congress pursuant to its constitutional power to regulate interstate commerce.[25] The overriding purpose of the Act was to correct and eliminate "conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and [the] general well-being of workers. . . ."[26] The Act's basic provisions established minimum wage[27] and maximum hours[28] requirements and discouraged oppressive child labor practices.[29]

As originally enacted,[30] the FLSA defined the term "employer" so as to exclude the "United States or any State or political subdivision of a State. . . ."[31] In 1966, Congress modified the definition of "employer" in order to remove the exemption of the states and their political subdivisions with respect to employees of hospitals, institutions and schools.[32] At the same time, Congress expanded the definitions of "enterprise"[33] and "enter-

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against a bi-state authority created by an interstate compact. Employees of the Dep't. of Pub. Health & Welfare v. Department of Pub. Health and Welfare, 452 F.2d 820, 829 (8th Cir., 1971).

24. 17 VILL. L. REV. 713, 715 (1972).
25. 29 U.S.C. § 206(b) (1970).
26. *Id.* § 202.
27. *Id.* § 206.
28. *Id.* § 207.
29. *Id.* § 212.
30. 52 Stat. 1060.
31. Act of June 25, 1938, Pub. L. No. 718, §§ 1-19, 52 Stat. 1060 (codified at 29 U.S.C. §§ 221-27 (1940).
32. In 1966, section 3(d) of the Act was amended and reads as follows:
> Employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State (except with respect to employees of a state or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section. . . . 29 U.S.C. Section 203(d) (1970).

33. Section 3(r) of the Act defines "enterprise" and was also amended in 1966 to include:
> the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution or school is public or private or operated for profit or not for profit). . . . 29 U.S.C. Section 203(r) (1970).

prise engaged in commerce or the production of goods for commerce"[34] so as to include hospitals and related institutions whether operated privately or publicly, for profit or not for profit.

In *Maryland v. Wirtz*,[35] twenty-eight states, including Missouri, challenged the constitutionality of the 1966 amendments to the FLSA insofar as they affected hospitals and schools operated by states and their political subdivisions. The Court sustained the legislation as a proper exercise of congressional power under the Commerce Clause.[36] However, the Court considered it unnecessary to decide the very question of whether employees may sue in federal court to vindicate rights established by the 1966 amendments. Thus, "interests of the United States, the problems of immunity, agency and consent to suit" were left for resolution in appropriate future cases.[37]

Sovereign Immunity and the FLSA: The Tenth Circuit Approach

The effect of the 1966 amendments to the FLSA and the breadth of the waiver theory enunciated in *Parden* were examined in *Briggs v. Sagers*,[38] where employees of a state-owned institution for the treatment of the mentally ill instituted suit pursuant to the FLSA to recover unpaid overtime compensation and an additional amount as liquidated damages. The Court of Appeals for the Tenth Circuit was faced with a question concerning the scope of congressional authority to create a private cause of action to recover wages due from state employers and to make that right immediately effective on preexisting activities.[39]

Although the *Briggs* suit was brought under the auspices of the *Parden* decision, the State of Utah attempted to distinguish the case on two grounds: (1) the regulated activity in *Parden* was proprietary rather than governmental in nature; and (2) operation of the railway in *Parden* commenced some twenty years after the enactment of the FELA; whereas Utah's operation of the institution began prior to the passage and effective date of the 1966 amendments. The court stated that "the Federal Government, when acting within a delegated power, may override countervailing state inter-

34. The new language in § 203(r) was also added to subsection 203(s) which defines "enterprise engaged in commerce or the production of goods for commerce." *See* note 33 *supra*.

35. 392 U.S. 183 (1968).

36. The Court held that "labor conditions in schools and hospitals can affect [interstate] commerce." *Id.* at 194. Moreover, "valid general regulations of commerce do not cease to be regulations of commerce because a state is involved." *Id.* at 196-197.

37. *Id.* at 200.

38. 424 F.2d 130 (10th Cir. 1970).

39. *Id.* at 131.

ests whether these be described as 'governmental' or 'proprietary' in character."[40]

In answering the state's second contention, the Tenth Circuit found that:

> Since the FLSA was enacted through the authority of the Commerce Clause, and inasmuch as the right of action imposed by the FLSA is fully within the congressional regulatory power, it would be incongruous to deny Congress the power to name a prompt, effective date for such amendments. To suppress that corresponding power would run counter to the plenary nature of the constitutionally defined regulatory authority and could, in part, defeat the purpose of urgently required legislation.[41]

The language of *Parden*, therefore, and the express intent of Congress to create a private cause of action against recalcitrant states were held to control. As a result, when Utah continued its operation of the institution knowing of the passage of the 1966 amendments, it waived its immunity to the remedies provided in the Act.[42]

Sovereign Immunity and the FLSA: The Supreme Court

In *Missouri Employees*,[43] a case strikingly similar to *Briggs*, the Supreme Court was faced with the question of whether the eleventh amendment applied to suits brought by individuals against states under the FLSA. Following the decision in *Hans v. Louisiana*, the Court found that "the history and tradition of the Eleventh Amendment indicate that by reason of that barrier a federal court is not competent to render judgment against a nonconsenting state."[44] Thus, the central issue before the Court became whether Missouri had, in fact, waived its immunity to suit through its continued participation in a regulated activity.

The *Parden* and *Briggs* decisions should have acted as persuasive authority for the conclusion that the doctrine of sovereign immunity could not preclude private suits brought under the aegis of an appropriate federal regulatory statute.[45] The Court, however, went to great lengths to distinguish

40. *Id.* at 133, *quoting* Maryland v. Wirtz, 392 U.S. 183, 195 (1968).

41. 424 F.2d at 133.

42. *Id.* at 134. "Although *Parden* does rely in part upon an intervening lapse of twenty years [between the time of enactment of the FELA and the date of operation of the railway], it is not so crucial to the principles involved as to cause reversal absent that fact." *Id.* The dissent in *Parden* did not view the opinion as pivoting on the fact of an intentional waiver. Rather, the dissenting justices understood the majority to hold "that with regard to sovereign immunity, waiver of a constitutional privilege need be neither knowing nor intelligent." 377 U.S. 184, 200 (1964).

43. 411 U.S. 279 (1973).

44. *Id.* at 284.

45. The *Parden* and *Missouri Employees* cases "have in common that each is an action for damages in federal court brought against a State by citizens of the State in

Parden from *Missouri Employees*, "leading eventually to the conclusion that sovereign immunity must be given greater weight than the Congressional legislation."[46]

The Court first found that state hospitals and related institutions are governmental functions and, as such, are not proprietary in nature. Yet, the distinction has been repeatedly discredited, most recently in *Maryland v. Wirtz*,[47] and was aptly criticized by Mr. Justice Frankfurter as "so fine-spun and capricious as to be almost incapable of being held in the mind for adequate formulation."[48]

Secondly, the Court emphasized that "[b]y holding that Congress did not lift the sovereign immunity of the states under the FLSA, we do not make the extension of coverage to state employees meaningless."[49] The Court noted that Section 16(c)[50] gives the Secretary of Labor authority to bring suit for unpaid minimum wages or unpaid overtime compensation under the FLSA and, further, that Section 17 gives the Secretary the power to enjoin violations of the Act and to obtain restitution on behalf of employees.[51]

Yet, the Court failed to recognize that Section 16(b)[52] is an important weapon for the enforcement of the FLSA because "it puts directly into the hands of the employees who are effected by violation, the means and abil-

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its employ under the authority of a regulatory statute founded on the Commerce Clause. *Parden* held that a federal court determination of such suits cannot be precluded by the doctrine of sovereign immunity because the States surrendered their sovereignty to that extent when they granted Congress the power to regulate commerce. 377 U.S. at 191. That holding fits precisely this FLSA lawsuit. . . ." *Id.* at 299 (Brennan, J., dissenting).

46. 17 VILL. L. REV. 713, 718 (1972).

47. 392 U.S. 183, 195 (1968). *See also* United States v. California, 297 U.S. 175 (1936), wherein the Court held that "Commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned. No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute. . . ." 297 U.S. at 185. The Court in Maryland v. Wirtz found the principle enunciated in United States v. California to be controlling. "[This court] will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the States for the benefit of their citizens." 392 U.S. at 198-99.

48. Brief for Appellant at 10, Employees of the Dep't. of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279 (1973).

49. 411 U.S. at 285. The *Parden* Court stated that it would be surprising to learn that Congress made state railroads liable to employees under the FELA while providing "no means by which that liability may be enforced." 377 U.S. at 197. The Court, therefore, viewed the *Parden* decision as resting on the absence of alternative remedies to private employees' suits. Brief for Appellant at 10, Employees of the Dep't. of Pub. Health and Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279 (1973).

50. 29 U.S.C. § 216(c) (1970).

51. *Id.* § 17.

52. *See* note 4 *supra.*

ity to assert and enforce their own rights, thus avoiding the assumption by Government of the sole responsibility to enforce the act."[53] Therefore, the alternative remedies provided are not adequate substitutes for, but rather complement, Section 16(b) in the task of enforcing the FLSA against close to two million enterprises.[54]

The effectiveness of private employee suits under the FLSA is enhanced by the double damages provision contained in § 16(b).[55] Upon examination of this provision, the Court found that although such a measure would be both an important and effective method of disciplining recalcitrant private employers, it would be far too harsh on the states and would disrupt the "pursuit of a harmonious federalism."[56]

Examination of the legislative intent, however, indicates that the 1966 amendments were enacted to insure the economic well-being of the American people. The Supreme Court has consistently held that § 16(b) is not penal in nature; rather, it provides compensation to the injured workman for damages which cannot be specifically ascertained.[57] Thus, the underlying policy of the Act, as well as the inclusion of the double damages provision, demonstrates that "Congress contemplated the financial burden that the Amendments could cause for the States."[58] This legislative determination was made within constitutional bounds, and therefore, should not be disturbed by the judiciary.[59]

Finally, the Court examined the 1966 amendments to the FLSA and noted that although Congress desired to bring employees of hospitals and related institutions under the purview of the Act, it did not amend the language of Section 16(b) so as to deprive a state of its constitutional immunity to suit.[60]

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53. Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 706 n.15 (1945), where it was stated that Section 16(b) has the virtue of "minimizing the cost of enforcement by the Government. It is both a common-sense and economical method of regulation." *Id.*

54. *Id.* at 707-12 (1945); Hodgson v. Wheaton Glass Co., 446 F.2d 527, 529-32 (1971); McComb v. Frank Scerbo & Sons, 177 F.2d 137, 139 (1949).

55. *See* note 4 *supra.*

56. 411 U.S. at 286. In essence it appears that the Court has attempted to balance the interest of the state in maintaining a strong fiscal base which would presumably complement the public need for state institutions and services, against the interest of the state's own employees in remaining economically solvent.

57. *See, e.g.*, Brooklyn Savings Bank v. O'Neil, 324 U.S. at 707-08 (1945); Overnight Motor Transport Co. v. Misel, 316 U.S. 572, 583-84 (1942).

58. 424 F.2d 130, 134 (10th Cir. 1970).

59. *Id.*

60. "It would be surprising . . . to infer that Congress deprived Missouri of her constitutional immunity without changing the old Section 16(b) under which she could not be sued or indicating in some way by clear language that the constitutional immunity was swept away." 411 U.S. at 285. Presumably the Court is referring to the old and well known rule that statutes which in general terms divest preexisting rights

Contrary to the Court's interpretation of the FLSA, congressional debates and reports show that exempting the states from section 16(b) would have defeated the objectives of the 1966 amendments. The section 16(b) remedy not only protects employees by affording them the opportunity to enforce their own legal interests, but is essential to insure restoration of the worker to the statutory minimum standard of well-being.[61] Moreover, the legislative history unequivocally indicates that in order to avoid "unfair competition," states and private parties were to be treated identically in their operation of enterprises covered by the Act.[62] To effectuate this congressional policy of uniformity, the Section 16(b) remedy must be made available against all employers subject to the Act.

Conclusion

It has been said that as to the states, "legal irresponsibility was written into the Constitution by the eleventh amendment."[63] Yet, in varying degrees and at different times the momentum of the doctrine of sovereign immunity has been arrested or deflected by an unexpressed feeling that governmental immunity runs counter to prevailing notions of reason and justice. Concepts of public morality are offended when a state may escape legal redress for its wrongs; the decisions of *Parden, Briggs* and the host of cases which deal with the limitations placed on the defense of governmental immunity have given credence to this view.

It appears, however, that the Supreme Court has attempted to halt the erosion of the doctrine of sovereign immunity. Specifically, its rejection of the *Parden* rationale would seem to indicate a distaste for the notion that states must choose between entering an area of regulated activity and thereby waive immunity to suit, or retain immunity by avoiding activity in the regulated area entirely. When viewed in this light, it can be seen that the Court is, perhaps, not disturbed by faltering notions of sovereign immunity *per se*, but is instead expressing a discomfort with the fictional doctrine of implied consent as a means of circumventing the explicit intent of the eleventh amendment.

Regardless of the theory the Court may eventually develop in order to re-

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or privileges will not be applied to the sovereign without express words to that effect." United States v. Mine Workers of America, 330 U.S. 258, 272 (1947).

61. *See* Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707-08 (1945).

62. 29 U.S.C. § 202 (1970). The overriding aim of this chapter is to secure for employees covered thereby benefits of congressional economic policy that competition in interstate commerce can not be fueled by exploitative wage practices. *See also*, Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 710 (1945).

63. Larson v. Foreign and Domestic Commerce Corp., 377 U.S. 682, 708 (1949) (Frankfurter & Burton, J.J., dissenting).

lease the federal courts from the confines of state immunity, it is clear that the legal emasculation of injured citizen-employees necessitates a re-evaluation of the concept of sovereign immunity. However valid this doctrine may have been, increased state participation in areas traditionally belonging to the private sector requires that effective regulations be established so as to coincide with current notions of governmental responsibility.

Charlene Barshefsky

TORTS: Governmental Immunity—Board of Commissioners of the Port of New Orleans and Other Such Boards and Agencies Are No Longer Immune from Suit in Tort. Board of Commissioners v. Splendour S. & E. Co., 264 La. —, 273 So. 2d 19 (1973)

"Generations have genuflected before the divine altar of sovereign immunity,"[1] but in determining that the Dock Board of the Port of New Orleans no longer enjoyed sovereign immunity from suit in tort, the Supreme Court of Louisiana has launched a regicidal attack on the ancient maxim "the King can do no wrong." The legal community is thus forced to ponder whether the advocates of the immunity doctrine can mobilize enough strength to bring the Court to task.

In *Board of Commissioners v. Splendour S. & E. Co.*[2] respondent Dock Board filed an action in Louisiana District Court against appellant Splendour, a shipping company, for recovery of damages incurred when appellant's vessel collided with the Florida Avenue Bridge spanning the Inner Harbor Navigational Canal, owned and operated by the Dock Board. Splendour answered and reconvened[3] for damages caused to the vessel, alleging that the Dock Board failed to properly design, construct, maintain and repair the bridge and canal, thereby constituting an obstruction and hazard to navigation. Dock

1. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476 (1953).

2. 264 La. —, 273 So. 2d 19 (1973); *rehearing denied*, 273 So. 2d 30 (La. App. 1973).

3. Black's Law dictionary defines "reconventional demand" as any plea by a defendant which constitutes more than mere defense and amounts to counterclaim.

Board filed an exception of no right of action, alleging that it was immune from suit in tort under the sovereign immunity of the state. The exception was maintained, the reconventional demand dismissed, and Splendour appealed. The Court of Appeals affirmed,[4] holding the Dock Board, as an agency of the state, immune from suit in tort.

After granting *certiorari,* the Louisiana Supreme Court reversed, holding that the Dock Board, and other such administrative boards and agencies of the state, were not immune from suits in tort. The court recognized that prior cases had held that the Board was immune from suit and that such was the intent of the state legislature in creating the Board. Furthermore, the court acknowledged, despite the vigorous arguments of petitioners to the contrary, that the Board did not waive its immunity by bringing suit against Splendour. Yet the majority declined to continue to clothe the Board with immunity, citing decisions rendered in other jurisdictions abrogating the doctrine. The Court declared that policy considerations required the termination of the Board's immunity and held that immunity was unfair, tended toward governmental irresponsibility, and was an unnecessary exception to the policy of the state as expressed in the Louisiana Constitution. Justice McCaleb, concurring, found that the Board waived its immunity by seeking redress in its own courts. The dissent, filed by Justice Summers, found that the Court had usurped the prerogative of the legislature and the will of the people in determining the wisdom of a constitutional enactment.

Origins of the Doctrine: Common Law and Statutory Bases

It has long been the practice of many states to empower the legislature to authorize a particular claimant to sue the state or its subdivisions in a state court and to appropriate funds for judgment subject to the outcome of the authorized suit. Identical provisions setting forth the procedure and effect of any adjudication "[w]henever the General Assembly shall authorize a suit against the state . . ." could be found in the Louisiana constitutions of 1898 and 1921.[5] Nevertheless, the doctrine of sovereign immunity was a creature of jurisprudence, antedating the state constitution. As early as 1854, in *Stewart v. City of New Orleans,*[6] the courts exempted a governmental agency from liability for tort committed by its employees. Almost forty years and numerous decisions later, in *State ex rel. Hart v. Burke,* the doctrine was cited with approval and its common law origins affirmed. When the

4. Board of Commissioners v. Splendour S. & E. Co., 255 So. 2d 869 (La. App. 1972).
5. LA. CONST. art. 192 (1898); LA. CONST. art. 3, § 35 (1921).
6. 9 La. Ann. 461 (1854).

judiciary department of the government was instituted to expound the law and to distribute justice among individuals, the State was not subject to its authority.[7] Judicial approval of the doctrine was as consistent as the flood waters of the Delta; the doctrine was "elementary, fundamental, and ancient."[8]

The constitutional provision authorizing the legislature to provide for suits against the state, implemented by separate legislative enactments giving an individual claimant the right to sue in a designated court, were interpreted by the courts as merely permittting suits to be filed without conceding substantive liability;[9] therefore, enactment of a separate bill admitting liability remained necessary for recovery. Only in suits enforcing already existent tort liabilities of the state was consent to sue the state readily given; recovery was thus permitted in limited areas as piecemeal enactments to various complainants left others in the dark. A comprehensive scheme for tort recovery against the state was non-existent. Only where a state subdivision was granted the power to "sue and be sued" in its legislative grant of incorporation could a claimant sue that subdivision in tort without legislative authorization.

Variations on the theme afforded no comfort to potential litigants. The dubious governmental-proprietary function distinction provided that consent to sue in tort was limited only to actions resulting from profit-making ventures of the state or its agencies. Where injury resulted from a governmental activity of the state no action could lie.[10]

The immunity enjoyed by the Dock Board was well established. As a state agency, it could not be sued without the state's consent. Created for the single purpose of administering the Port of New Orleans, the Board, in effect, was the alter-ego of the state: the property under its authority was public property; the state, as soverign and master, exercised dual authority over the Board.[11] Possessing many rights and privileges of a public cor-

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7. 33 La. Ann. 498 (1891).

8. 264 La. at —, 273 So. 2d at 28.

9. *See* Duree v. State, 96 So. 2d 854 (La. App. 1957); *rev'd* Duree v. Maryland Casualty Co., 238 La. 166, 114 So. 2d 594 (1959). *See also* Stephens v. Natchitoches Parish School Board, 238 La. 388, 115 So. 2d 793 (1959).

10. *See* DAVIS, ADMINISTRATIVE LAW, § 25.01, at 468 (7th ed. 1972) [hereinafter cited as DAVIS] for a critical analysis of the governmental-proprietary distinction:

> Streets, sidewalks and bridges are often proprietary, and police and fire departments are almost always governmental. Parks, swimming pools and recreation centers may be either. . . . At least one state has both governmental manholes and proprietary manholes; surely some state must have mixed manholes.

11. State ex rel. Tallant v. Board of Commissioners, 161 La. 361, 108 So. 770 (1926).

poration, the Board lacked the crucial "sue and be sued" provision.[12] Thus, all plaintiffs claiming injury due to the Board's negligence were denied recovery; without legislative consent for suit they lacked standing to contest the Board's immunity.

Recent Developments

Although the doctrine of sovereign immunity was firmly entrenched in case law and statute, its recent history could be characterized, at best, as chaotic. The constitutional provision requiring legislative authorization for suit against the state proved unworkable[13] and was completely rewritten in 1946. It provided the following:

> Whenever the legislature shall authorize suit to be filed against the State . . . . The procedure in such suits . . . shall be the same as in suits between private litigants. . . . No judgment for money rendered against the State shall be satisfied except out of monies appropriated by the legislature for the purpose. . . . Except as otherwise specifically provided in this section, the effect of any authorization shall be nothing more than a waiver of the State's immunity from suit.[14]

A decade after ratification the courts were called on to construe the provision in a wrongful death suit against the state. In *Duree v. Maryland Casualty Co.*[15] the Supreme Court reversed a judgment for plaintiff's decedent and held that under Article III, Sec. 35, as amended, the legislature could not constitutionally waive the state's immunity from liability for the negligence of an employee; waiver of immunity from suit did not constitute waiver of immunity from liability.[16]

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12. Fouchaux v. Board of Commissioners, 193 La. 182, 190 So. 373 (1939): The Court held that a public board of the state, though it may engage in the performance of functions usually designated as proprietary, may not be sued for the results of its operations unless the sovereignty has granted permission that suits of that character may be brought. *See also* Miller v. Board of Commissioners, 199 La. 1071, 7 So. 2d 355 (1942), where the court clarified any doubts that might have been created in *Fouchaux* by holding that the Dock Board was not engaged in a profit-making or proprietary function.

13. The 1921 Constitution, art. 3, § 35 provided only the following:

> Whenever the Legislature shall authorize suit to be filed against the State, it shall provide a method of procedure and the effect of the judgments which may be rendered therein.

The State, by consenting to suit, was signing a blank check for any judgments rendered against it; neither the amount payable on the judgment nor the date on which it would be due were known. The only check on legislative irresponsibility was the gubernatorial veto, rendered unconstitutional in Lewis v. State, 207 La. 194, 20 So. 2d 917 (1945).

14. LA. CONST. art. 3, § 35 (1946).

15. See note 9 *supra.*

16. The court in *Duree* based its decision on the wording of the legislative authorization for suit:

This curious and strained interpretation was immediately overruled by a 1960 amendment to Article III, Sec. 35.[17] The intent of the ratifiers was now clear: each legislative authorization for suit against the state necessarily waived the state's immunity from suit and liability. Such intent was manifested and expanded in *Hamilton v. City of Shreveport*[18] where the Supreme Court held that the constitutional amendment empowered the legislature not only to waive immunity from tort actions resulting from proprietary functions, but also to waive traditional immunity of the state and its subdivisions in tort actions resulting from governmental activities where a state subdivision (in this case a municipality) was granted the power to sue and be sued.

The End of An Era

The Dock Board was never successfully subjected to suit in tort. There could be no successful prosecution against the Board without legislative authorization. How then, did the *Splendour* court justify its abrogation of the Board's immunity where the Board itself sued for damages against the Shipping Company? Several approaches were offered. Justice McCaleb, concurring, asserted that the Dock Board, as plaintiff, had effected a waiver of its right to claim immunity when defendant Splendour pleaded a counterclaim alleging damages to its vessel through the Board's negligence. Such a demand was viewed as an exception to the constitutional provision requiring legislative authorization to effect a waiver:

> [W]henever the public agency seeks redress in its own Courts, it

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> That nothing in this act shall be construed as conferring on [Mrs. Duree] any different or greater claim or cause of action then she . . . may have had before the passage of this act; the purpose of this act being merely to waive the State's immunity from suit insofar as the suit herein authorized is concerned.

See LA. ACTS 1956, House Bill No. 387 of 1956.

Plaintiff could not have sued the state in tort prior to the legislative authorization, and that under the authorization, the legislature had not waived its immunity from liability. If the authorization was construed to waive the state's immunity from liability, it was unconstitutional (The Court believed that the purpose of the 1946 amendment was to overrule Crain v. State, 23 So. 2d 336 (La. App. 1945), which held that the legislature could constitutionally provide a remedy—recovery in tort—which wasn't available to the claimant at the time of his injury, his only remedy being workmen's compensation), so as to preclude the legislature from authorizing a suit on a cause of action unavailable to the claimant prior to the authorization.

17. *See generally* McMahon and Miller, *The Crain Myth—A Criticism of the Duree and Stephens Cases,* 20 LA. L. REV. 449 (1960) for an exhaustive analysis of the *Duree* ruling. The authors maintain that there was no evidence to support the assumption that the purpose of the 1946 amendment was to overrule *Crain.* Analysis of legislative history, contemporaneous legal history, newspaper editorials, and legislative construction all support a contrary intention—to require a uniform and adequate procedure for suit against the state, and to require judgments be paid through legislative authorization subject to gubernatorial veto.

18. 247 La. 784, 174 So. 2d 529 (1965).

> would seem but just and meet to conclude that it necessarily waives its immunity from any claim of the defendant cognate with the main demand.[19]

The majority did not agree as they found no waiver; the Board's immunity required that Splendour's counterclaim be dismissed. In fact, all of Splendour's arguments calling for abrogation of immunity were rejected. Legislative policy enunciated in the 1960 amendment, and reaffirmed in *Hamilton* was not applicable to the Board. The distinguishing feature in *Hamilton* was a municipal charter granting the City of Shreveport the right to sue and be sued, yet no such provision existed with respect to the Board. However, the majority felt that mere legal theory was insufficient justification for the continuance of the obnoxious doctrine. Legislative policy, the unpopular decision in *Duree*, and persuasive authority from other jurisdictions led the majority, per Justice Dixon, to withdraw the Board's immunity:

> [T]here are three reasons which move us to withdraw from the Board the immunity with which the court has previously insulated it from tort suits. It is unfair. It tends toward governmental irresponsibility. It is an unnecessary exception to the policy of the State . . . as expressed in . . . our Constitution.[20]

The majority apparently took heed to Judge Lemmon's concurring opinion in the lower court affirmation of the Dock Board's immunity from suit. Agreeing that the immunity rule probably controlled, he asserted the belief that there was never any rational or legal basis for the existence of the rule in the state, and that to apply the rule, in light of the recent trend limiting its applicability, would result in gross arbitrariness and discrimination.[21]

If one were inclined to analyze the reasons given in previous decisions why the doctrine should not be abrogated, he would find the following factors nearly always present: First, a nebulous mass of legal theory concerning the nature of sovereignty, usually self-contradictory and always contradicted by modern legal facts of life—the Federal Tort Claims Act, the laws of other modern nations, and lesser reforms in other states; Second, legislative and judicial inertia in an area lacking political pressure groups calling for changes in the law; Last, financial concern, justified or not, that the state or its subdivisions cannot afford to pay out what they would be required to pay if governmental tort liability were accepted.[22]

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19. 264 La. at —, 273 So. 2d at 27.
20. *Id.* at —, 273 So. 2d at 25.
21. 255 So. 2d at 873.
22. *See generally* Leflar and Kantrowitz, *Tort Liability of the States,* 29 N.Y.U. L. REV. 1363 (1954) for a comparative analysis of the treatment of sovereign immunity among the several states.

Theoretical confusion has plagued the doctrine since its inception. Application of the maxim "the King can do no wrong" in a democratic state founded on the ideal of governmental responsibility has caused much judicial rationalization, both state and federal.[23] It has been difficult to explain to a litigant that he could not recover for negligently inflicted injuries because an English subject was not allowed to sue the King in the thirteenth century. In Louisiana, the doctrine was a creature of jurisprudence, "an anachronism without rational basis, which . . . existed by force of inertia."[24] It is no wonder then, why the *Splendour* majority resorted to arguments of public policy in overruling the immunity rule, while conceeding all the substantive aspects of law and precedent.

Splendour is most significant as a reversal of that same inertia which the courts and the legislature had previously propounded. The 1960 amendment, asserting that authorization to be sued necessarily implied a waiver of the State's immunity from liability, meant that recovery could more easily be obtained. But the concept of waiver of consent provided its own contradictions. The distinction between state agencies—whether or not they had a "sue and be sued" clause in their governing statutes—meant that fortuitous circumstances dictated where a litigant would be able to collect:

> I cannot justify to the losing litigant in this case an explanation that if his claim were against the Department of Highways he could pursue it, but since it was against the Dock Board (which does not have a "sue and be sued" clause), he cannot.[25]

The potential for discrimination and arbitrariness inherent in this situation was too much for the *Splendour* majority. Ignoring stare decisis and legislative prerogative over the strong objections of one dissent, the majority was moved by the responsibility for doing justice. In reality legislative intent regarding the immunity doctrine was not usurped—the legislature never expressed an intent about the basic doctrine. Specific legislation regarding the Dock Board[26] was defeated by policy expressed in the 1960 amendment. Where commentators, scholars, lawyers, and other courts were independently

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23. *See* Pugh, *supra* note 1, at 481-93 for a chronological discussion of the more important sovereign immunity cases that have come before the United States Supreme Court. Prof. Pugh traces the development of the doctrinal bases of immunity and asserts that its basic inapplicability to the American political experience has caused profound judicial confusion and rationalization.

24. Muskopf v. Corning Hospital District, 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961).

25. 255 So. 2d at 875.

26. The Dock Board was created by Act 70 of 1896. Its provisions are found in Article 6, Sections 16 and 17 of the Louisiana Constitution and in LSA—R.S. 34:1-44. LSA—R.S. 34:21 sets forth the rights and powers of the Board.

moving in the direction of abrogation of the doctrine, responsibility to sound legal development compelled the majority to act against immunity.[27]

The once all-powerful motivation, financial fear of tort liability, was discarded:

> No agency that we know of has been bankrupted by the torts of its employees nor submerged in litigation. The agencies function. . . . The Department of Highways works . . . . Charity Hospital serves. . . . School Boards run schools. . . . The Sewerage and Water Board performs its functions. . . . Shreveport is still a good place to live. . . .[28]

Conclusion

The doctrine of sovereign immunity in Louisiana has been dealt a fatal blow by the *Splendour* court. Holding the Dock Board and other such agencies no longer immune from suit in tort, the court has stripped the previously enjoyed immunity from those agencies lacking a "sue and be sued" clause in their legislative grant. More than a century of case law and constitutional enactment have been relegated to the lowly status "of historical interest only," notwithstanding constitutional provisions to the contrary.

Whether the Louisiana legislature will rise to challenge the authority of the court through subsequent enactments remains a matter of surmise and speculation, but it should be noted that the national trend away from immunity has been characterized by the recurrent problem of alleged judicial usurpation of legislative prerogative.[29] Those adhering to the proposition that sovereign immunity is a creature of the common law believe the matter is thus amenable to change by judicial action. Contrary views are held as strongly: courts cannot legislate, no matter how desirous the end may be.

Whether or not the *Splendour* court has usurped the legislative function, there is good reason to believe that the legislature will not disturb the ruling; the judiciary, taking the initiative, has abolished a doctrine of dubious value

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27. For recent cases abrogating the doctrine of sovereign immunity in other states *see* the following: Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P.2d 107 (1963); Muskopf v. Corning Hospital District, *supra* note 29; Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957); Smith v. State, 93 Idaho 795, 473 P.2d 457 (1961); Carroll v. Kittle, 203 Kan. 841, 457 P.2d 21 (1969); Haney v. City of Lexington, 386 S.W.2d 738 (Kentucky, 1964); and Brown v. City of Omaha, 183 Neb. 430, 160 N.W.2d 805 (1968).

28. 264 La. at —, 273 So. 2d at 25.

29. *See* DAVIS 470-73, for a discussion of the various problems encountered when judicial action overturns the common law immunity doctrine embodied in legislative and constitutional enactments.

and universal condemnation. Logic and concern for the development of a just method for recovery against the state requires that the legislature do no less.

Barry Schwartz

TORTS—Products Liability—Manufacturer Held Negligently Liable For Failure To Warn of Ethical Drug's Dangers By "Watering Down" Its Warning And Overpromoting Its Drug. Stevens v. Parke, Davis & Co., 9 Cal. 3d 51.

The liability of ethical drug manufacturers for the side effects of their products has, in the last decade, troubled courts throughout the nation.[1] The California Supreme Court recently dealt with this issue and held, in *Stevens v. Parke, Davis & Co.*,[2] that for "watering down" its printed warnings and vigorously overpromoting its drug a manufacturer may be held liable for negligently failing to warn of the drug's dangers.

Shortly after Chloromycetin[3] was marketed, reports appeared associating its use with various blood disorders, most frequently aplastic anemia.[4] The Food and Drug Administration (FDA) continued its certification[5] only on the condition that a warning[6] be included with the product. Parke, Davis then sent letters to all physicians informing them of the FDA's study and recommendations.[7]

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1. *See* cases cited note 27 *infra*.
2. 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973).
3. Chloromycetin is the defendant's trade name for chloramphenicol, a broad spectrum antibiotic.
4. Aplastic anemia is a rare though serious disease causing depression or destruction of the blood forming element of bone marrow. The fatality rate exceeds 50%. S. REP. No. 448, 87th Cong., 1st Sess. 192 (1961) [hereinafter cited as *Kefauver Report*].
5. Unless otherwise exempted, antibiotics may not be marketed without certification of the drug's safety and efficacy by the Secretary of Health, Education and Welfare. 21 U.S.C. § 357(a) (1970).
6. The label warned that serious blood dyscrasias could occur after short or long-term use and advised that "[i]t is essential that adequate blood studies be made during treatment with the drug." 9 Cal. 3d at 56-57 n.3, 507 P.2d at 655-56 n.3, 107 Cal. Rptr. at 47 n.3.
7. These letters are easily overlooked in the great bulk of promotional mail physicians receive. Stevens v. Parke, Davis & Co., 9 Cal. 3d at 67, 507 P.2d at 662, 107 Cal. Rptr. at 48; KEFAUVER REPORT 164.

Parke, Davis, however, still retained considerable freedom in advertising and promoting Chloromycetin, for prior to a 1962 amendment[8] to the Food, Drug and Cosmetic Act,[9] warnings were not required on advertising materials.[10] The amended Act did not compel oral warnings by drug company salesmen, known as detail men, during their frequent promotional visits to physicians.[11]

Parke, Davis made maximum use of the promotional leeway given it by the statute, both by minimizing the dangers of Chloromycetin whenever possible[12] and by omitting warnings when the letter of the law, if not the health of consumers, did not require them.[13] Detail men were not instructed by Parke, Davis to verbally inform physicians of Chloromycetin's side effects. Moreover, the manufacturer told them to inform skeptical doctors that the drug had "officially cleared" FDA tests and had passed three intensive investigations.[14]

That Parke, Davis' actions failed to impress the drug's dangers upon the medical profession is illustrated by the conduct of Dr. Beland, the co-defendant. The doctor prescribed Chloromycetin for the plaintiffs' deceased, a 40 year old housewife, after she underwent lung surgery. Although Dr. Beland testified that he was cognizant of the possibility that aplastic anemia could result from either intermittent or prolonged use of Chloromycetin and that frequent blood studies were recommended, he renewed the prescription three times during the next six months while neglecting to test Mrs. Stevens for blood disorders. Mrs. Stevens soon developed aplastic anemia and died from its effects within a year.

The plaintiffs brought a wrongful death action against both Parke, Davis and Dr. Beland on the grounds of negligence, strict liability in tort and breach of implied warranty. Although the trial court granted Parke, Davis' motion for a nonsuit on the strict liability and warranty counts, the plaintiffs were awarded a $400,000 jury verdict against both defendants on the negligence count.[15]

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8. 21 U.S.C. § 352(n) (1970), *amending* 21 U.S.C. § 352 (1958).
9. 21 U.S.C. §§ 301-92 *et. seq.* (1970).
10. Side effects must be fully stated on labels, but may be briefly summarized in advertisements. 21 U.S.C. § 352(n) (1970).
11. An unadopted version of the 1962 amendments would have included oral clauses as advertisements. S. 1552, 87th Cong., 1st Sess. unreported (1961).
12. KEFAUVER REPORT 194-98.
13. Since the Food, Drug and Cosmetic Act does not require warning in advertisements that do not include recommendations as to proper dosages and uses of the drug, 21 U.S.C. § 352(n), 21 C.F.R. § 1.105(e) (1972), Parke, Davis published "reminder" advertisements without warnings. Stevens v. Parke, Davis & Co., 9 Cal. 3d at 58, 507 P.2d at 656, 107 Cal. Rptr. at 48 (1973).
14. KEFAUVER REPORT 198.
15. The plaintiffs refused a requested remittitur by the trial court and the court

The court of appeals[16] concluded that the evidence did not support the verdict against Parke, Davis. Dr. Beland's admitted independent knowledge of the drug's dangers, in the absence of evidence that he was personally induced to prescribe Chloromycetin by the defendant's overpromotion, was held to be an independent intervening cause of Mrs. Stevens' death.

The Supreme Court reversed the lower court, holding that Parke, Davis, by "watering down" its warnings and overpromoting its product, negligently caused physicians to prescribe Chloromycetin unnecessarily.[17] The opinion implied that an oral warning to physicians by Parke, Davis' detail men would have fulfilled the duty to warn.[18]

Parke, Davis' liability was based on Section 388 of the RESTATEMENT (SECOND) OF TORTS which states that:

> One who supplies . . . through a third person a chattel for another to use is subject to liability . . . for physical harm caused by use of the chattel . . . if the supplier . . . .
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition . . . .[19]

Even though the evidence established that the label and a printed insert sold with the drug did contain warnings, the court noted that the jury could find that such warning[20] was nullified by the manufacturer's overpromotion which may have caused the prescribing physician to disregard these warnings.

Parke, Davis' contention that Dr. Beland's negligence was an independent intervening cause of Mrs. Stevens' death was rejected by the Supreme Court. Whether Dr. Beland was induced to prescribe the drug because of Parke, Davis' overpromotion, the court noted, was a question of fact for which there was adequate circumstantial evidence to support the jury's inference.[21] Moreover, if the defendant's negligence was a substantial factor in causing the plaintiffs' injury, the intervening negligence of a third party

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granted a new trial on the issue of damages. Plaintiffs and defendants then filed appeals.

16. Stevens v. Parke, Davis & Co., 101 Cal. Rptr. 64 (1972).

17. 9 Cal. 3d at 66, 507 P.2d at 662, 107 Cal. Rptr. at 54.

18. *Id.*

19. Liability has been based upon § 388 in similar cases. *See, e.g.*, Sterling Drug, Inc. v. Yarrow, 408 F.2d 978 (8th Cir. 1969); Love v. Wolf, 226 Cal. App. 2d 378, 38 Cal. Rptr. 183 (Dist. Ct. App. 1964).

20. "The warnings given in this case were not so clearly effective as to defeat, as a matter of law, the inference that they were nullified by overpromotion." 9 Cal. 3d at 67, 507 P.2d at 662, 107 Cal. Rptr. at 54.

21. The court followed the Pennsylvania Supreme Court's holding in Incollingo v. Ewing, 444 Pa. 263, 282 A.2d 206 (1971) in permitting evidence of overpromotion to the medical profession, rather than to the prescribing physician, to form the basis upon which the jury could decide whether Parke, Davis' overpromotion caused Dr. Beland to prescribe Chloromycetin.

would not insulate the defendant from liability when the third party's negligence was reasonably forseeable.[22] Dr. Beland's prescription of Chloromycetin was not only reasonably forseeable, the court reasoned, but was the "desired result" of Parke, Davis' advertising practices.

Duty To Warn

The law governing a drug manufacturer's duty to warn of side effects is well settled. There is a "continuous duty cast upon the manufacturer of an ethical drug to warn physicians of the dangers incident to prescribing the drug . . . ."[23] That duty exists even though only a small percentage of ingesting patients will react to the drug.[24] Whether the defendant's warnings are adequate is a question of fact and not one of law;[25] moreover, mere compliance with applicable governmental regulations does not constitute due care per se, for the standards set are minimal.[26] At least prior to *Stevens*, whether the physician's independent knowledge of the product's dangers insulates the manufacturer from liability was a matter of disagreement among courts.[27]

Strict Liability

A manufacturer may be held liable for failing to warn of its product's side effects on the basis of strict liability in tort.[28] Several courts have declined to hold a drug manufacturer strictly liable on the ground that comment *k, unavoidably unsafe products,* to section 402 A of the RESTATEMENT exempts prescription drugs from strict liability.[29] More probing courts,

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22. *See* McCue v. Norwich Pharmaceutical Co., 453 F.2d 1033 (5th Cir. 1972).

23. Schenebeck v. Sterling Drug, Inc., 423 F.2d 919, 922 (8th Cir. 1970); *see also* Tinnerholm v. Parke, Davis & Co., 285 F. Supp. 432 (S.D.N.Y. 1968). The manufacturer need warn only the physician, not the patient. Stottlemire v. Cawood, 213 F. Supp. 897 (D.D.C. 1963).

24. Sterling Drug, Inc. v. Cornish, 370 F.2d 82 (8th Cir. 1966).

25. Love v. Wolf, note 19 *supra;* Incollingo v. Ewing, note 21 *supra.*

26. Stromsodt v. Parke, Davis & Co., 257 F. Supp. 991 (D. N.D. 1966), *aff'd,* 411 F.2d 1390 (8th Cir. 1969).

27. Schenebeck v. Sterling Drug, Inc., note 23 *supra* [manufacturer liable]; Sterling Drug, Inc., v. Cornish, note 24 *supra* [manufacturer liable]; Yarrow v. Sterling Drug, Inc., 263 F. Supp. 159 (D. S.D. 1967); *aff'd,* 408 F.2d 978 (8th Cir. 1969) [manufacturer liable]; Magee v. Wyeth Laboratories, Inc., 214 Cal. App. 2d 340, 29 Cal. Rptr. 322 (Dist. Ct. App. 1963) (manufacturer not liable); Mulder v. Parke, Davis & Co., 288 Minn. 332, 181 N.W.2d 882 (1970) (manufacturer not liable); Oppenheimer v. Sterling Drug, Inc., 7 Ohio App. 2d 103, 219 N.E.2d 54 (Ct. App. 1964) (manufacturer not liable). For an analysis of when the physician's negligence should exempt the manufacturer from liability see Rheingold, *Products Liability—The Ethical Drug Manufacturer's Liability,* 18 RUTGERS L. REV. 947, 988-89 (1964).

28. RESTATEMENT (SECOND) OF TORTS § 402 A (1965).

29. O'Hare v. Merck & Co., 381 F.2d 286 (8th Cir. 1967); Yarrow v. Sterling Drug, Inc., note 27 *supra;* Lewis v. Baker, 243 Ore. 317, 413 P.2d 400 (1966). For a de-

however, have correctly held that comment *k* does not exempt an ethical drug manufacturer from strict liability when there has been a failure to warn of the drug's dangers.[30] Comment *k* states that its exception to strict liability applies only to products that are "accompanied by proper directions and warning . . . ." Comment *h* notes that "[w]here . . . [the manufacturer] has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, [the manufacturer] may be required to give adequate warning of the danger . . . and a product sold without such a warning is in a defective condition." Thus an ethical drug manufacturer that overpromotes its product and thereby nullifies its warnings is subject to strict liability for marketing a product in a defective condition that is unreasonably dangerous to the consumer.

Furthermore, the preceeding interpretation of the applicability of Section 402 A to manufacturers of ethical drugs is reasonable in light of strict liability's well known policy basis[31] of imposing the cost of accidental injuries on the party who can best absorb it by treating it as a cost of production. If such policy is to be fulfilled, there cannot be a strict liability exception merely because the manufacturer produces a socially useful product. Social utility alters neither the plaintiff's loss nor the defendant's ability to disperse the cost of the injury. A strict application of comment *k* "would tend to eliminate the great bulk of warranty-non-negligence actions which it is intended to cover."[32]

To uphold a verdict based on negligence, the court was forced to make unwarranted and unnecessary inroads into negligence standards of liability. Parke, Davis contended that the intervening acts of Dr. Beland superseded its negligence. As heretofore stated, the court rejected this argument, noting that the doctor's negligence was a forseeable result of Parke, Davis' acts. A more reasonable analysis would be that the doctor's knowledge of the dangers should relieve the original supplier from liability.[33] For if it is forseeable that he would ignore warnings given by the FDA is it not also

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fense of these cases *see* Cassiday, *The Prescription Drug Exception To the Doctrine of Strict Liability*, 58 ILL. B.J. 268 (1969).

30. Singer v. Sterling Drug, Inc., 461 F.2d 288 (7th Cir. 1972); Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968); Toole v. Richardson-Merrel Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (Dist. Ct. App. 1967).

31. RESTATEMENT (SECOND) OF TORTS § 402 A, comment *c* (1965).

32. Rheingold, note 27 *supra* at 1001 n.304; *see* Comment, *The Manufacture, Testing and Distribution of Harmful New Drugs: The Applicability of Strict Liability*, 28 U. PITT. L. REV. 37 (1966).

33. Love v. Wolf, 226 Cal. App. 2d at 399-400, 38 Cal. Rptr. at 196; Incollingo v. Ewing, 444 Pa. at 286, 282 A.2d at 219; *see generally*, W. PROSSER, THE LAW OF TORTS § 44 at 289 (1971).

forseeable that he would ignore the manufacturer's warnings? If this were so, no warning could be adequate to protect the manufacturer from liability. The court, while wrapping its words in the cloak of negligence theory, would thus make the manufacturer an insurer of the consumer's health—a situation undesired by even the most ardent proponents of strict liability.

Questions of intervening negligence are generally matters of public policy.[34] Policy considerations may require that Parke, Davis be punished for its dangerous and misleading action in promoting Chloromycetin. Compensation of innocent plaintiffs for their losses is also a primary function of tort liability. Although the *Stevens* decision attempts to fulfill these twin goals of punishment and compensation, it is inadequate because it permits a situation in which neither goal is accomplished. The court ignores the possibility that an unreasonably defective product may be manufactured, promoted and sold without negligence on the part of its producer.[35] In this circumstance the manufacturer, though guilty of foisting a defective product on unsuspecting consumers, will remain unpunished while the plaintiff, though injured, will be unable to meet his burden of proof in negligence and will therefore be uncompensated for his losses.

Had Parke, Davis been held strictly liable for its conduct, the court would have ensured the fulfillment of these policy goals in future cases. Drug manufacturers would be held liable for inadequate warnings of a drug's side effects and compensation of plaintiffs would be further guaranteed by eliminating the burden of proving the defendant's negligence, always a formidable task in products liability litigation. Moreover, there would be little need to strain pervailing interpretations of intervening negligence in order to hold the manufacturer liable, for California case law holds all parties in the product's distributive chain strictly liable.[36]

The court's decision is disappointing in still another respect—its solution to the problem of inadequate warnings. It suggests, following a recent line of cases,[37] that detail men be used to convey oral warnings. Presumably, these verbal warnings, supplemented by warning-laden literature, will discharge the manufacturer's duty to warn. If this is the court's prescription, one might wonder if it is any freer of side effects than Chloromycetin. How effective a verbal warning can be expected from those who have the most

34. PROSSER, note 33 *supra*, § 41 at 237.

35. *See, e.g.*, Parke, Davis & Co. v. Mayes, 124 Ga. App. 224, 183 S.E.2d 410 (Ct. App. 1971); Nolan v. Dillon, 261 Md. 516, 276 A.2d 36 (Ct. App. 1971) and cases cited note 27 *supra*.

36. Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).

37. Yarrow v. Sterling Drug, Inc., note 27 *supra;* Love v. Wolf, note 19 *supra;* Incollingo v. Ewing, note 21, *supra*.

direct financial stake in continued sales of the drug?[38] Proof of the oral warning's content and adequacy will inevitably arise at trial. And if it is understandable that busy physicians forget or overlook printed warnings, will it not also be understandable if they forget the salesman's oral admonitions?

Conclusion

Despite its shortcomings, *Stevens* does provide consumers with needed protection from pharmaceutical corporations which relegate consumer safety to a subsidiary position behind corporate profits. The court has attempted to make clear to manufacturers the real cost of inadequate warnings, both in terms of human life and litigation costs, by permitting a large recovery awarded the plaintiffs to stand. Although its use of a negligence standard of liability in place of strict liability will reduce the situations in which injured plaintiffs will recover, *Stevens* nevertheless supplies a needed step in the path to consumer protection.

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CONSTITUTIONAL LAW—Judicial Power—D.C. Court Reorganization Act—D.C. Local Courts Created Under Article I—Judges Exempt from Salary and Tenure Constraints of Article III. Palmore v. U.S., 36 L. Ed. 2d 342 (1973)

Few constitutional law issues are as confusing and unpredictable as the doctrine of "constitutional" versus "legislative" courts. When this issue was combined with the settled principles concerning Congress' plenary power over the District of Columbia in *Palmore v. United States*, the Supreme Court had the ingredients for a crucial challenge sure to have significant theoretical and practical consequences. A bewildering opinion signals what appears to be almost limitless justification for congressional authorization of inferior courts wholly exempt from the salary and tenure constraints imposed by Article III of the Constitution. It portends great constitutional mischief for the future.

38. KEFAUVER REPORT 191.

In January, 1971, two District of Columbia Metropolitan police officers, while making a "spot check" of a motorist's drivers license and car rental agreement, observed a gun protruding from the front seat of a car being driven by Roosevelt F. Palmore. They arrested the driver and later charged him with the felony of carrying an unregistered weapon in the District after having previously sustained a felony conviction, in violation of section 22-3204 of the District of Columbia Code.[1] After a bench trial, Palmore was found guilty by the Superior Court of the District of Columbia. The District of Columbia Court of Appeals affirmed,[2] rejecting the defendant's argument that only a court "ordained and established" under Article III of the Constitution could try a felony prosecution arising under the laws of the United States, albeit a law applicable exclusively to the District of Columbia. Defendant appealed this issue to the Supreme Court, pursuant to the provisions of 11 D.C. Code §102[3] and 28 U.S.C. §1257(2).[4] The Supreme Court,

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1. D.C. CODE ANN. § 22-3204 (1967) provides:
No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

2. Palmore v. United States, 290 A.2d 573 (D.C. Ct. App. 1972).

3. D.C. CODE ANN. § 11-102 (1970) provides:
"The highest court of the District of Columbia is the District of Columbia Court of Appeals. Final judgments and decrees of the District of Columbia Court of Appeals are reviewable by the Supreme Court of the United States in accordance with section 1257 of title 28, United States Code." (July 29, 1970, Pub. L. 91-358, Title I, § 111, 84 Stat. 475).

4. 28 U.S.C. § 1257 (1970) provides:
Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.
For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals.
(June 25, 1948, ch. 646, 62 Stat. 929; July 29, 1970, Pub. L. 91-358, title I, § 172(a)(1), 84 Stat. 590.)

which postponed consideration of its jurisdiction to review the case by appeal until a hearing on the merits,[5] affirmed the decision,[6] treating the jurisdictional statement as a petition for writ of certiorari pursuant to 28 U.S.C. §2103.[7] In an 8 to 1 decision, the Court held that, for purposes of appeal under 28 U.S.C. §1257(2), a statute passed by Congress applicable exclusively to the District of Columbia is not a "statute of any State," making review by the Supreme Court possible only by writ of certiorari. It further held that citizens convicted under provisions of the D.C. Code have no right to have their cases heard by Article III judges, *i.e.* judges protected by life tenure and undiminishable salary. In a fervent dissent, Justice Douglas argued for reversal of the judgment below, asserting that the decision deprives residents of the District of "that judicial independence which helps insure fearless and evenhanded dispensation of justice."[8]

This note will discuss how *Palmore* signals a marked divergence from established constitutional principles by dangerously extending the permissible scope of congressional authority to legislate for the District of Columbia.

Reorganization Act

Palmore is the first Supreme Court case to decide the constitutionality of the "local" court system established by the District of Columbia Court Reform and Criminal Procedure Act of 1970.[9] The Superior Court of the District of Columbia, which took over the functions of the three former trial courts (Juvenile Court, Tax Court and the Court of General Sessions), exercises criminal jurisdiction "of any criminal case under any law applicable exclusively to the District of Columbia."[10] Decisions of the local appeals court, the Dis-

5. 409 U.S. 840 (1972).
6. Palmore v. United States, 36 L. Ed. 2d 342 (1973).
7. 28 U.S.C. § 2103 (1962) provides:
> If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs. (Sept. 19, 1962, Pub. L. 87-669, § 1, 76 Stat. 556).
8. 36 L. Ed. 2d at 364.
9. 84 Stat. 473. For congressional background materials on the Act, *see* H.R. REP. No. 907, 91st Cong., 2d Sess. (1970) and S. REP. No. 405, 91st Cong., 1st Sess. (1969).
10. D.C. CODE ANN. § 11-923(b)(1) (1970). The only instance in which the U.S. District Court for the District of Columbia exercises jurisdiction over local criminal laws is when a local offense "is joined in the same information or indictment with any Federal offense." D.C. CODE ANN. § 11-502(3) (1970).

trict of Columbia Court of Appeals, are no longer subject to review by the United States Court of Appeals, but are directly reviewable by the Supreme Court "in accordance with section 1257 of title 28, U.S.C."[11] Furthermore, the enumeration of courts which are vested with "judicial power" by Congress as set forth in the Act includes the Superior Court, unlike the former enumeration in the 1967 D.C. Code.

The Superior Court and the District of Columbia Court of Appeals are said to have been established pursuant to Article I of the Constitution, whereas the Supreme Court and the federal trial and appellate tribunals in the District of Columbia were established pursuant to Article III.[12] All judges of the local courts are appointed by the President for 15 year terms (subject to mandatory retirement at age 70), are subject to removal by the newly-created District of Columbia Commission on Judicial Disabilities and Tenure, and are not given statutory or constitutional protection against diminution in their salaries.

28 U.S.C. § 1257 sets forth the circumstances by which the Supreme Court may review final judgments rendered by the highest court of a state. The Reorganization Act[13] provides that for purposes of § 1257, the District of Columbia Court of Appeals is to be considered the "highest court of a State." Therefore, in the matter *sub judice*, a right of appeal would lie to the Supreme Court only if the provision of the D.C. Code under which the appellant was convicted were to be considered "a statute of any state."[14]

At first glance, congressional investiture of "judicial power" in non-Article III courts seems to be expressly forbidden by the Constitution which, in Article III, § 1 provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Article I, § 8, cl. 9 provides, "The Congress shall have Power: To constitute Tribunals inferior to the Supreme Court;"

The question immediately arises: May Congress constitutionally vest "judicial power" in courts (here, the Superior Court and the District of Columbia Court of Appeals) not "ordained and established" under Article III of the

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11. D.C. CODE ANN. § 11-102 (1970).
12. D.C. CODE ANN. § 11-101 (1970).
13. § 172(a)(1), 84 Stat. 590, *amending* 28 U.S.C. § 1257 (1964).
14. *See* note 4 *supra*.

Constitution as it purports to do in the Reorganization Act?[15] If so, may it create non-Article III courts which are not subject to the salary and tenure constraints of Article III merely by designating the District Clause of Article I as its source of power rather than Article III?[16]

"Constitutional" versus "Legislative" Courts

A long line of decisions by the Supreme Court spanning the nation's history has established a curious distinction between "constitutional" and "legislative" courts. The distinction has produced not only much confusion and controversy, but also a constant parley between the Court and Congress as to the authority by which Congress has established inferior courts.[17] The term "legislative court," coined by Chief Justice Marshall in *American Insurance Co. v. Canter*,[18] defines that category of inferior courts established by Congress pursuant to any of its non-Article III powers throughout the Constitution. Whether these legislative courts may exercise the judicial power of Article III or "another species of judicial power wholly separate and apart from [Congress'] authority under Article III to confer judicial power on inferior federal courts"[19] is the crux of *Palmore*.

Canter held that legislative courts (in that case, Florida territorial courts created by the territorial legislature) are "incapable" of exercising the judicial power of the United States as defined in Article III:

> They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that

15. For the argument that article III "is the complete catalog of federal judicial power," *see* 1 J. MOORE, FEDERAL PRACTICE ¶ 0.4[4], at 71 (2d ed. 1953).

16. For arguments in the negative, *see* Note, *The Distinction Between Legislative and Constitutional Courts and Its Effect on Judicial Assignment*, 62 COL. L. REV. 133 (1962) (hereinafter cited as 62 COL. L. REV.) and National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582, 605 (1949) (Rutledge and Murphy, J.J., concurring).

17. For example, in Ex Parte Bakelite Corp., 279 U.S. 438 (1929) and Williams v. United States, 289 U.S. 553 (1933), the Supreme Court held the Court of Customs Appeals (now the Court of Customs and Patent Appeals) and the U.S. Court of Claims to be legislative courts, respectively. Subsequently, Congress, by Act of August 25, 1958, § 1, 70 Stat. 848, declared the Court of Customs and Patent Appeals a constitutional court; by Act of July 28, 1953, § 1, 67 Stat. 226, declared the Court of Claims to be a constitutional court, and; by Act of July 14, 1956, § 1, 70 Stat. 532, declared the Customs Court a constitutional court. In Glidden Co. v. Zdanok, 370 U.S. 530 (1962), the Supreme Court, by a three-member majority, overruled *Bakelite* and *Williams*, holding both courts to be created pursuant to article III and ruling that their judges could validly serve in U.S. Courts of Appeals or U.S. District Courts under 28 U.S.C. § 293(a). For critical comment, *see* Note, *Legislative and Constitutional Courts: What Lurks Ahead for Bifurcation*, 71 YALE L. J. 979 (1962) and Watson, *The Concept of the Legislative Court: A Constitutional Fiction*, 10 GEO. WASH. L. REV. 799 (1942).

18. 1 Pet. 511 (1828).

19. Palmore v. United States, 290 A.2d at 577.

> clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territory of the U.S.[20]

Canter thus opened a Pandora's Box of litigation by which the Supreme Court has sanctioned Congress' creation of inferior federal courts whose classification has depended upon judicial interpretation of the power which Congress used to create them.[21]

The District Clause

Three well-settled principles established by the Supreme Court regarding Congress' plenary power "[T]o exercise exclusive Legislation in all cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States . . ."[22] which had direct bearing on *Palmore* are the following:

1. Congress' rule-making power over the District of Columbia is subject to the constraints of the Constitution and its amendments.[23]
2. Congress possesses "dual authority" over the District—that of the federal government and a state legislature—and may, therefore, "clothe the courts of the District not only with the jurisdiction and powers of Federal courts in the several states, but with such authority as a state may confer on her courts."[24]
3. Congress has authority to confer legislative or administrative powers upon the constitutional (federal) courts of the District which it may not vest in federal courts outside the District.[25]

The intersection of these three principles was presented to the Supreme

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20. 1 Pet. at 546.

21. *See generally*, 1 J. MOORE, FEDERAL PRACTICE ¶ 0.4[1], (2d ed. 1953) *passim.*

22. U.S. CONST., art. I, § 8, cl. 17.

23. District of Columbia v. Thompson, 346 U.S. 100, 109 (1953); O'Donoghue v. United States, 289 U.S. 516, 545 (1933); Downes v. Bidwell, 182 U.S. 244, 260-61 (1901); and Callan v. Wilson, 127 U.S. 540, 550 (1888). *See also* Act of Feb. 21, 1871, c. 62, 16 Stat. 419, 426, § 34 which specifically extended the Constitution and the laws of the United States to the District of Columbia.

24. Kendall v. United States, 12 Pet. 524, 619 (1838). *See also*, Stoutenburgh v. Hennick, 129 U.S. 141, 147 (1889); Capital Traction Co. v. Hof, 174 U.S. 1, 5 (1899); Keller v. Potomac Electric Power Co., 261 U.S. 428, 442-43 (1923); and Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693, 700 (1927). For a discussion of the "hybrid" category of federal courts in the District which have qualities of both constitutional and legislative courts, see 1 J. MOORE, FEDERAL PRACTICE at ¶ 0.4[4].

25. Butterworth v. Hoe, 112 U.S. 50 (1884); Baldwin v. Howard Co., 256 U.S. 35 (1921).

Court in *O'Donoghue v. U.S.*[26] Pursuant to a ruling by the Controller General under the Legislative Appropriation Act,[27] the disbursing officer of the Department of Justice reduced the annual compensation of two District of Columbia federal judges. The judges brought suit in the Court of Claims to recover the deductions made, and the Supreme Court, on certificates from the Court of Claims, examined (1) the applicability of Article III, § 1 of the Constitution to the federal courts in the District and (2) the lawfulness of Congress' attempt to diminish their salaries. Distinguishing the special reasons for Congress' authorization of judges with limited tenure in the "outlying territories" from the peculiarly vulnerable status of courts in the District, the Court held that both the then Supreme Court of D.C. and the United States Court of Appeals are Article III courts whose judges hold office during good behavior and whose salaries may not be diminished during their continuance in office.

> . . . [T]he reasons . . . which impelled the adoption of the constitutional limitation, apply with even greater force to the courts of the District than to the inferior courts of the U.S. located elsewhere, because the judges of the former courts are in closer contact with, and more immediately open to the influences of, the legislative department . . . .[28]

The *O'Donoghue* Court, citing the dual authority Congress exercises over the District, added:

> The two powers are not incompatible; and *we perceive no reason for holding that the plenary power given by the District clause of the Constitution may be used to destroy the operative effect of the judicial clause within the District, where, unlike the territories occupying a different status, that clause is entirely appropriate and applicable.*[29]

Is There More Than One Source of Judicial Power?

In *Palmore*, the Court held that, *O'Donoghue* notwithstanding,[30] Congress lawfully exercised its dual authority over the District of Columbia when it

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26. 289 U.S. 516 (1933).

27. § 107(a)(5), 47 Stat. 402 (1932). The section reduced "the salaries and retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office)." The salaries of an associate justice of the Supreme Court of the District of Columbia (predecessor to the U.S. District Court of the District of Columbia) and an associate justice of the U.S. Court of Appeals were subsequently reduced.

28. 289 U.S. at 535.

29. *Id.* at 546 [emphasis added].

30. The Court held *O'Donoghue* was not controlling since it involved courts in which the disposition of local matters was incidental, a distinction that, at least arguably, did not have to be made. *See* Brief for Appellant at 30-31 n.3, Palmore v. United States, 36 L. Ed. 2d 342 (1973).

created a local court system staffed with judges of limited tenure. Its argument rested heavily upon the fact that, for nearly 100 years after the Constitution was ratified, state courts having judges with only limited tenure were the sole forum for federal question jurisdiction and for hearing cases involving selected federal criminal laws. The Court cited Congress' lawful exercise of its Article IV power to regulate the territories and its Article I, § 8, cl. 14 power to regulate the land and naval forces in creating territorial courts and courts-martial whose judges regularly try criminal cases but are not afforded salary and tenure protection. Without specifying the source of the "judicial power" conferred on the Superior Court, the Court said:

> It was under the judicial power conferred on the Superior Court by the 1970 Reorganization Act that Palmore was convicted for violation of § 22-3204 of the District of Columbia Code (1967). The conviction was clearly within the authority granted Congress by Article I, § 8, cl. 17 . . . .[31]

And without deisgnating what "proper circumstances" necessitate or justify congressional exemption of local courts in the District from salary and tenure protection, the Court held:

> . . . [T]he requirements of Article III . . . must in proper cirstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment.[32]

Conclusion

Several commentators presaged the predictable quandary the Court would be in when faced with appeal of a felony conviction under the D.C. Code by an Article I court.[33] At least insofar as serious felony prosecutions were involved, as in *Palmore*, many agreed that the judiciary needed particularly effective measures to insure their insulation from the political or ideological pressures which might come to bear on them.[34] A timely comment on the local court system established by the Reorganization Act observed:

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31. 36 L. Ed. 2d at 352.

32. *Id.* at 357-58.

33. For an incisive look at the options which were to face the Court in National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949) (the case which was to decide the propriety of Congress' granting to citizens of the District of Columbia the right to sue in any federal court on diversity grounds) *see* Rathvon & Keeffe, *Washingtonians and Roumanians*, 27 NEB. L. REV. 375 (1948).

34. "The general reasons for article III guarantees seem applicable with special force to serious criminal prosecutions, whether under laws of national scope or under local enactments. There appear to be no practical reasons, such as exist for courts dealing with minor civil and criminal matters, for not applying article III to bodies trying such cases." 62 COL. L. REV., 154 n.149. *See also* Brown, *The Rent in Our Judicial Armor*, 10 GEO. WASH. L. REV. 127 (1941).

> If it actually is "judicial Power" that is being vested in the District's legislative courts, the question persists as to whether Congress in its capacity as a legislature for the District, may ignore any or all of the constraints imposed by the Constitution, especially those in article III covering tenure and salary. Inasmuch as the competence of the new local court system extends to grave criminal offenses, it becomes of vital interest whether the attributes of judicial independence guaranteed by article III are inviolable, personal rights.[35]

Though there is little if any practical difference to individual litigants resulting from the Court's determination that it may review convictions under the D.C. Code only on petition for ceritiorari,[36] certainly the Court's broadening of congressional authority to create non-Article III courts exempt from tenure and salary constraints will seriously disturb advocates of constitutional orthodoxy. Nowhere in the Constitution is there any indication that, as *O'Donoghue* said, Congress' plenary power over the District "may be used to destroy the operative effect of the judicial clause in the District,"[37] but this seems to be exactly what the Court has permitted. More importantly, however, the mischievous business which Chief Justice Marshall began in *Canter* when he sanctioned the chipping away of the constitutional provisions designed to guarantee judicial independence has been dredged up again and given new life. Where will it end? Is the limitation imposed on the federal judiciary no limitation at all when Congress provides any meager excuse for exempting courts of its creation? If eight justices of the Supreme Court are satisfied with having a real estate appraiser and an undertaker sitting in judgment on the conduct of judges in the federal segment of our nation, what other constitutional protections will be nullified whenever Congress recites its litany of powers?[38]

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35. Williams, *District of Columbia Court Reorganization, 1970,* 59 GEO. L. J. 477, 491-92 (1971).

36. Insofar as summary affirmances have precedential value which denials of certiorari do not, Palmore may limit the effect of Supreme Court rulings on D.C.C.A. cases. *See* STERN & GRESSMAN, SUPREME COURT PRACTICE, at 326-27 (4th ed. 1969).

37. *See* text accompanying note 29 *supra.*

38. An analogous situation in Reid v. Covert, 354 U.S. 1 (1957) where the Court struck down a congressional attempt to expose civilians to trials by military courts-martial is worth recalling. There, the Government urged that the Necessary and Proper Clause when read together with Congress' art. I, § 3, cl. 14 power to regulate the land and naval forces, authorized Congress to subject civilian wives of American officers to courts-martial. Justice Black said:

> It is true that the Constitution expressly grants Congress power to make all rules necessary and proper to govern and regulate those persons who are serving in the 'land and naval forces'. But the Necessary and Proper Clause cannot operate to extend military jurisdiction to any group of persons beyond that class described in Clause 14—'the land and naval Forces' . . . Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury

Had the Supreme Court in *Palmore* indicated by what metaphysical leap Congress has created its new source of "judicial power" or had it justified its reasons for allowing Congress to step on the independence of the judiciary in the District,[39] its holding might have been more enlightening. Congress now has an unexpected and forthright basis by which to justify its almost limitless power to create inferior federal courts with judges exempt from those constitutional guarantees of independence which the Founding Fathers cherished. And by some mysterious form of judicial alchemy, the Supreme Court has re-opened a dangerous breach in the "bulwark" of our constitutional protections.

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trial and of other treasured constitutional protections. Having run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper Clause cannot extend the scope of Clause 14.

354 U.S. at 20-21. *See also* Toth v. Quarles, 350 U.S. 11 (1955).

39. "The ideals of Article III and the Bill of Rights provide the mucilage which holds majorities and minorities together in the federal segment of our Nation, and make tolerable the existence of non-conformists who do not walk to the measure of the beat of the Chief Drummer. . . . No federal court exercising Art. III judicial power should be made a minion of any cabal that from accidents of politics comes into the ascendancy as an overlord of the District of Columbia. That effort unhappily succeeds today and is in disregard of one of our most cherished constitutional provisions." 36 L. Ed. 2d at 364 (Douglas, J., dissenting).