Securities Law

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**CASENOTES**


The finding of an implied private right of action under section 10(b) of the Securities Exchange Act of 1934 served as the genesis of prodigious federal corporate litigation. In an effort to circumscribe the sweeping language of section 10(b) and rule 10b-5 promulgated thereunder, courts

1. The implied private right of action under section 10(b) and rule 10b-5, see notes 2, 4 infra, was first held to exist in Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946). Without discussing its rationale, the Supreme Court, in passing, confirmed the existence of that implied private right of action in Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971). Nevertheless, the existence of such a right is not without its critics. See Ruder, Civil Liability Under Rule 10b-5: Judicial Revision of Legislative Intent?, 57 Nw. U.L. Rev. 627 (1963).


   It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

   (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

   (emphasis added).

3. As the Supreme Court noted in Securities and Exchange Commission v. National Securities, Inc., 393 U.S. 453 (1969): “§ 10(b) and Rule 10b-5 may well be the most litigated provisions in the federal securities laws . . . .” Id. at 465. For recent statistics regarding the number of section 10(b) securities class actions crowding federal dockets, see Schwartz, The Class Action: Its Incidence and the Eisen Case, 30 Bus. Law. 155 (1974 special issue).

4. SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1975), provides:

   It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

   (a) To employ any device, scheme, or artifice, to defraud,

   (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
adopted various limiting doctrines.\(^5\) Foremost among them has been the much maligned "purchaser-seller" requirement enunciated by the Second Circuit in \textit{Birnbaum v. Newport Steel Corp.}\(^6\) Attempting to limit standing, the \textit{Birnbaum} court held that only a plaintiff who had purchased or sold securities could maintain an action under section 10(b) and rule 10b-5.\(^7\) After 20 years of controversy among commentators and lower court judges, the Supreme Court, in \textit{Blue Chip Stamps v. Manor Drug Stores},\(^8\) granted certiorari in a case which enabled it to rule on the continued vitality of the \textit{Birnbaum} doctrine.

Pursuant to an antitrust consent decree, "Old Blue Chip" was to merge into a newly formed corporation, "New Blue Chip". Under the plan, New Blue Chip was required to offer its shares of common stock to retailers who had previously used the stamp service but who were not shareholders in the old company. The plan was adopted, the offering was registered with the SEC, and a prospectus was distributed to all offerees. Thereafter, Manor Drug Stores filed a class action on behalf of all former users of Blue Chip stamps alleging that, in a deliberate attempt to discourage it and others in the class from accepting the offer, Blue Chip intentionally distributed an overly pessimistic prospectus which was materially misleading. Manor sought to bring the action notwithstanding the fact that it had neither purchased nor sold Blue Chip securities. Indeed, the gravamen of the complaint was that because of, and in reliance on, the false and misleading prospectus, class

\(\text{(c) To engage in any act, practice, or course of business which operates as a fraud or deceit upon any person, in connection with the purchase or sale of any security.}\) (emphasis added).

\(^5\) Courts have applied such limiting concepts as reliance, \textit{e.g.,} List v. Fashion Park, Inc., 340 F.2d 457 (2d Cir.), \textit{cert. denied}, 382 U.S. 811 (1965); causation, \textit{e.g.,} Barnett v. Anaconda Co., 283 F. Supp. 766 (S.D.N.Y. 1965); scienter, \textit{e.g.,} Shemtob v. Shearson, Hammill & Co., 448 F.2d 442 (2d Cir. 1971); and privity, \textit{e.g.,} Joseph v. Farnsworth Radio & Television Corp., 99 F. Supp. 701 (S.D.N.Y. 1951). For an excellent discussion of these and other limiting doctrines as they may or may not apply to section 10(b) and rule 10b-5, see Comment, \textit{SEC Rule 10b-5: A Recent Profile}, 13 \textit{Wm. & Mary L. Rev.} 860 (1972).


\(^8\) 421 U.S. 723 (1975).
members failed to purchase the securities which were, by court decree, required to be offered to them. 9

The district court, relying upon Birnbaum, dismissed Manor's claim because the plaintiffs, who were neither purchasers nor sellers of the securities in question, lacked standing to sue. 10 On appeal, however, the Ninth Circuit determined that the peculiar facts in Blue Chip warranted an exception to the Birnbaum standing rule because the antitrust decree created a contractual relationship which essentially brought the plaintiffs within the definition of purchaser-seller. 11 Additionally, the Court noted that since the plaintiffs had a right to purchase securities at a fixed price and at fixed amounts, damages could be readily ascertained, thereby minimizing the problems of proof and causal connection between the alleged 10b-5 violation and the injury.

The Supreme Court, speaking through Mr. Justice Rehnquist, 12 reversed the Ninth Circuit, holding that an offeree of a stock offering who had neither bought nor sold any of the shares offered in an allegedly misleading prospectus could not maintain a private action for money damages under rule 10b-5. 13 The Court declined to remove the procedural roadblock to maintaining a private action under rule 10b-5 and affirmed the Birnbaum doctrine. The majority based its decision on an admittedly vague legislative intent, 20 years of lower court precedent, and what it termed "policy considerations." 14 Mr. Justice Blackmun, writing for the dissent, argued that the Birnbaum doctrine was an artificial mechanism which frustrated the broad antifraud purpose of section 10(b) and rule 10b-5. He suggested that the true test of a valid rule 10b-5 claim would be "the showing of a logical nexus between the alleged fraud and the sale or purchase of a security." 15 The divergence of opinion reflected by the majority and dissenting views is indicative of the confusion which section 10(b) and rule 10b-5 have generated among courts seeking to define their scope and intent.

9. Id. at 726.
11. 492 F.2d 136, 142 (9th Cir. 1974).
14. Id. at 749.
15. Id. at 770 (Blackmun, J., dissenting). Concurring in the dissent were Justices Brennan and Douglas.
I. THE SEARCH FOR LEGISLATIVE AND ADMINISTRATIVE INTENT

The Securities Act of 1933 and the Securities Exchange Act of 1934 were designed as broad proscriptions against the investor fraud permeating the securities markets of the 1920’s. Attempts to elucidate the meaning of section 10(b), which prohibits manipulation and deception in connection with the purchase or sale of a security and which is thought by many to be the broadest antifraud provision in the federal securities laws, have been numerous and generally unsatisfactory due to the dearth of specific information available regarding the congressional intent underlying its adoption. Indeed, section 10(b)’s specific role in the overall scheme of federal securities law remains a mystery. Conceived as a catch-all, section 10(b) has been acknowledged as such and has been liberally interpreted by the Supreme Court.

Realizing that it could not foresee and, therefore, could not legislate against every fraudulent securities practice, Congress specifically provided in section 10(b) that the SEC could make “rules and regulations ... as necessary and appropriate in the public interest.” Thereafter, in 1942, the SEC promulgated rule 10b-5. At the time the rule was issued, section

17. Id. §§ 78a-hh.
19. See generally Bromberg, supra note 18, §§ 4.7, 8.7.
20. See id. § 2.2(331).
21. Perhaps the most frequently cited authority on this point is a principal legislative draftsman, Thomas G. Corcoran:

   Subsection (c) [altered insignificantly to become Section 10(b)] says, “Thou shalt not devise any other cunning devices”. Of course subsection (c) is a catch-all clause to prevent manipulative devices.

Hearings Before the House Comm. on Interstate and Foreign Commerce on H.R. 7852 and 8720, 73d Cong., 2d Sess. 115 (1934). See also 3 L. Loss, Securities Regulation 1421-30 (2d ed. 1961).
25. For an informative analysis of what was then a relatively new rule 10b-5 and its relation to other sections of the 1933 and 1934 Acts, see Note, The Prospects for Rule X-10b-5: An Emerging Remedy for Defrauded Investors, 59 Yale L.J. 1120 (1950).
17(a) of the 1933 Act\textsuperscript{26} made it unlawful to defraud purchasers of securities, and section 15(c) of the 1934 Act\textsuperscript{27} proscribed fraud perpetrated by brokers or dealers in the purchase or sale of securities. Nothing in either Act provided liability for fraud perpetrated by purchasers or upon sellers by those other than brokers or dealers. It is generally accepted that the rule was designed to close this loophole and to extend liability to fraudulent purchasers of securities.\textsuperscript{28} In drafting rule 10b-5, the Commission virtually copied the language of section 17(a) of the 1933 Act. It did, however, substitute “any person” for “the purchaser” and added the phrase “in connection with the purchase or sale of any security.” More than one commentator has asked why, if the rule were intended to extend solely to fraud in the purchase of securities, it also refers to sales.\textsuperscript{29} As with section 10(b), the lack of specific language in rule 10b-5 has left its intent beclouded and its scope indefinite.

II. THE BIRNBAUM DOCTRINE: EXCEPTIONS AND REJECTION

Accepting the fact that there was an implied private right of action under section 10(b)\textsuperscript{30} and faced with the vagueness of the section, Judge Augustus Hand, in the Birnbaum opinion, rationalized the court’s conclusions by relying on what he believed to be the SEC’s intent in promulgating rule 10b-5.\textsuperscript{31}

\begin{footnotes}
\item[26] Section 17(a) of the 1933 Act proscribes fraud “in the offer and sale of securities.” 15 U.S.C. § 77q (1970).
\item[27] Section 15(c)(2) of the 1934 Act, 15 U.S.C. § 78o(c)(2) (1970), provides in pertinent part:
\begin{quote}
No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security . . . in connection with which such broker or dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation.
\end{quote}
\item[28] After adopting rule 10b-5, the SEC issued a press release explaining its purpose:
\begin{quote}
The Securities and Exchange Commission announced the adoption of a rule prohibiting fraud by any person in connection with the purchase of securities. The previously existing rules against fraud in the purchase of securities applied only to brokers and dealers. The new rule closes a loophole in the protections against fraud administered by the Commission by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase.
\end{quote}
\item[29] Compare Comment, 37 Mo. L. REV., supra note 6, at 491-92, with Comment, 13 WM. & MARY L. REV., supra note 5, at 865.
\item[30] See note 1 supra.
\item[31] Hand specifically cited the SEC Release, see note 28 supra, in support of his con-
\end{footnotes}
Although he admitted that the rule "may have been somewhat loosely
drawn,"2 Hand reasoned that since the purpose of the rule was to close the
loophole between sections 17(a) and 15(c) to include nonbroker-dealer
purchasers, the SEC did not intend to protect all persons from securities
fraud, including would-be investors.3 According to the Birnbaum court's
analysis, section 10(b) was directed solely at that type of misrepresentation
or fraudulent practice usually associated with the sale or purchase of
securities rather than at fraudulent mismanagement of corporate affairs, and
rule 10b-5 extended protection only to the defrauded purchaser or seller.4
Although little remains today of two aspects of the original three-pronged
Birnbaum test,5 the standing requirement that in order to bring suit under
section 10(b) and rule 10b-5 a plaintiff must be either a purchaser or seller
of securities, has survived.6

Because the Birnbaum doctrine may result in an injured party being

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2. 193 F.2d at 463. Professor Loss contends that the Birnbaum court's reliance
on the SEC's enunciated purpose in promulgating rule 10b-5 was incorrect,
since the rule was in conflict with the broader congressional intent of the 1934
Act to protect all investors. Such a conflict, he believes, must be resolved in favor
of the congressional purpose unless the statute specifically provides otherwise. 3 L. Loss,
supra note 21, at 1469.
32. 193 F.2d at 463.
33. In Birnbaum, the president and controlling stockholder of Newport Steel declined
a merger which would have been profitable to Newport's minority shareholders and, in-
stead, sold his controlling block of stock at a premium to a third party who wished to
use Newport as a captive source of supply in a tight steel market. Alleging that this
premium sale constituted fraud in violation of section 10(b), the minority shareholders
sued. 34. 193 F.2d at 464.
35. The "usually associated with" limitation was virtually extinguished in A.T. Brod & Co. v. Perlow, 375 F.2d 393 (2d Cir. 1967), in which the court stated:

We believe that 10(b) and Rule 10b-5 prohibit all fraudulent schemes in
connection with the purchase or sale of securities whether the artifices em-
ployed involved a garden type variety of fraud, or present a unique form of
deception.

Id. at 397 (emphasis added). As for the prohibition against bringing suit under rule
10b-5 for fraudulent corporate mismanagement, it has been largely undermined by the
Supreme Court's landmark decision in Superintendent of Ins. v. Bankers Life & Cas. Co.,
404 U.S. 6 (1971). A discussion of the great impact which Bankers Life has had on
the potential liability of defendants for fraudulent corporate mismanagement is beyond
the scope of this article. The interested reader should see Fleischer, Federal Regulation
of Internal Corporate Affairs, 30 BUS. LAW. 179 (1974 special issue).
36. In Heit v. Weitzen, 402 F.2d 909 (2d Cir. 1968), it was established that the de-
fendant need not be a purchaser or seller for a 10b-5 action to lie against him. This
was confirmed in Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971),
in which the Supreme Court held that "§ 10(b) bans the use of any deceptive device
in the 'sale' of any security by 'any person.' " Id. at 10 (emphasis added).
denied recourse to federal court,37 lower courts have generally not hesitated to interpret liberally the terms "purchaser" and "seller."38 Accordingly, such diverse persons as beneficiaries of testamentary trusts,39 beneficial shareholders in debenture redemption plans,40 trustees in bankruptcy,41 issuers of stock,42 minority shareholders in short-form mergers,43 merging corporations,44 shareholders in liquidation proceedings,45 and personal rep-

37. A disappointed federal litigant may seek relief under a state statute or under the common law theory of fraud in state courts. However, an action under rule 10b-5 provides distinct advantages (e.g., procedural advantages, application to broader class of persons, and easier standards of proof). BROMBERG, supra note 18, § 4.7(1), at 83.


The rationale behind the courts' expansive interpretation of purchase and sale was aptly stated in Herpich v. Wallace, 430 F.2d 792 (5th Cir. 1970):

We do not say that only those who are purchasers or sellers in the "strict common law traditional sense" . . . may maintain an action for damages under Rule 10b-5. . . . In deciding whether a plaintiff has standing, we search for what will best accomplish the congressional purpose. . . . Thus we construe the "in connection with the purchase or sale of any security" clause found in both the section and the rule broadly and flexibly to effectuate that purpose.

. . . The "purchaser"-"seller" standing requirement is to be similarly construed . . . so that the broad design of the section and the rule is not frustrated by the use of novel or atypical transactions.

Id. at 806-07.

representatives of purchasers and sellers have all been permitted to sue under rule 10b-5. Courts have also developed the “aborted seller” doctrine, which permits plaintiffs who but for the defendant’s fraudulent conduct would have sold their stock to maintain a 10b-5 action. Similarly, plaintiffs who have a contractual right to buy or sell, but who are misled into inaction, may maintain a suit under 10b-5. Moreover, if a plaintiff is misled into inaction because of the fraudulent misrepresentations of the defendant, but later purchases or sells, that purchase or sale has been held to satisfy the Birnbaum requirement. When a plaintiff seeks injunctive relief, the purchaser-seller requirement has been abandoned altogether. This trend of broadly construing the terms of purchaser and seller was seen by many as

47. See A.T. Brod & Co. v. Perlow, 375 F.2d 393 (2d Cir. 1967). See also Mount Clemens Indus., Inc. v. Bell, 464 F.2d 339 (9th Cir. 1972), in which the Ninth Circuit declared that there may be an aborted seller only when there “is the existence of a contractual relationship between the parties which elevate[s] the plaintiffs to the status of statutory purchasers or sellers.” Id. at 345 & n.11. In Blue Chip, the Ninth Circuit attempted to use the aborted seller doctrine to permit the plaintiffs standing by reasoning that the antitrust consent decree created the functional equivalent of a contract to buy or sell. For an interesting article discussing the evolution and importance of the contractual relationship in 10b-5 actions as the Ninth Circuit perceives it, see Comment, Chipping Away at the Birnbaum Doctrine, 8 Loyola U. (L.A.) L.J. 171 (1975). See Forseter, Rule 10b-5 Violations in the Ninth Circuit: “I Know It When I See It.”, 30 Bus. Law. 773 (1975), for a critical analysis of the confusion which reigns in the Ninth Circuit regarding the interpretation of securities law in general.
50. In Mutual Shares Corp. v. Genesco, Inc., 384 F.2d 540 (2d Cir. 1967), the court reasoned that the Birnbaum limitation was primarily designed to ensure that the plaintiff could prove damages and causation. However, since suits for injunctive relief do not require proof of damages, the court felt that there was no reason to insist on the purchaser-seller requirement. Compare Tully v. Mott Supermarkets, Inc., 337 F. Supp. 834 (D.N.J. 1972) (retrospective injunctive relief granted to nonpurchaser-seller), with Lutgert v. Vanderbilt Bank, 508 F.2d 1035 (5th Cir. 1975) (questioning the wisdom of departing from the Birnbaum doctrine even for immediate injunctive relief). Regarding the possibility of prospective injunctive relief, see Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787 (2d Cir. 1969). No purchaser-seller limitation is imposed on the SEC in its enforcement actions. See, e.g., SEC v. National Sec. Inc., 393 U.S. 453 (1969).
an erosion of the Birnbaum doctrine and was welcomed as a harbinger of its demise.\textsuperscript{51}

What might have been the final blow to the vitality of the doctrine appeared to come in 1973 in \textit{Eason v. General Motors Acceptance Corp.},\textsuperscript{52} in which the Seventh Circuit disregarded the purchaser-seller requirement completely and declared that "[the Birnbaum doctrine] is not part of the law of this circuit."\textsuperscript{53} Rather than expand the definition of purchaser-seller to fit yet another unique situation,\textsuperscript{54} the Eason court rejected altogether the notion that the plaintiffs need be characterized as sellers to maintain an action under section 10(b). Instead, to determine whether or not the plaintiffs should have standing to sue, the court examined the rationale underlying the implied private right of action established in \textit{Kardon v. National Gypsum Co.}\textsuperscript{55} \textit{Kardon} held that a civil action could be maintained by a member of a class "for whose special benefit the statute was enacted."\textsuperscript{56} The Birnbaum court interpreted the class of those protected by section 10(b) through rule 10b-5 to be only purchasers and sellers.\textsuperscript{57}

The Eason court, however, reasoned that since neither the congressional history, the statute, the rule, nor any Supreme Court decision signified that only purchasers or sellers of securities have legal rights protected by rule 10b-5, the correct interpretation of the standing requirement for a 10b-5 action is the constitutional question of whether the plaintiff whose standing is challenged is the proper person to request adjudication of the particular issue.\textsuperscript{58} Essentially, the court utilized the two-pronged standing test enunc-

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  \item \textsuperscript{51} See, e.g., Lowenfels, \textit{The Demise of the Birnbaum Doctrine: A New Era for Rule 10b-5}, 54 Va. L. Rev. 268 (1968).
  \item \textsuperscript{52} 490 F.2d 654 (7th Cir. 1973), cert. denied, 416 U.S. 960 (1974).
  \item \textsuperscript{53} 490 F.2d at 661.
  \item \textsuperscript{54} In Eason, the plaintiffs were shareholders in Bank Service Corporation, which entered into an agreement to purchase the leasing division of Dave Waite Pontiac, Inc. As consideration for the business, Bank Service issued stock to Waite and assumed the liabilities of the leasing business. Bank Service assumed Waite's notes payable to GMAC, and the individual plaintiffs delivered a guarantee on those notes. Bank Service defaulted; GMAC brought suit to recover on the guarantees and the plaintiffs counter-sued alleging fraud under section 10(b) and rule 10b-5.
  \item \textsuperscript{55} 69 F. Supp. 512 (E.D. Pa. 1946).
  \item \textsuperscript{56} \textit{Id.} at 514. Noting that there was no express civil action stated in section 10(b) in contrast to those stated in sections 9, 16 and 18 of the 1934 Act, the Kardon court rested its decision primarily on a basic common law theory of statutory tort liability, \textit{i.e.}, a person injured by violation of a statute enacted for the benefit of persons in his position is entitled to recover damages. \textit{Cf.} Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916). \textit{Compare Restatement of Torts} \$ 286 (1934) (upon which the Kardon court relied), \textit{with Restatement (Second) of Torts} \$ 286 (1965).
  \item \textsuperscript{57} See pp. 406-07 supra.
  \item \textsuperscript{58} 490 F.2d at 657-58. \textit{See Flast v. Cohen}, 392 U.S. 83, 95, 99 (1968) (standing permitted only when the dispute is in an adversary context and in a form historically
ated in Association of Data Processing Service Organizations, Inc. v. Camp. According to that decision, a plaintiff must allege that the actions he is complaining of have, in fact, caused him injury and that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question." Having established that the plaintiffs had a sufficient interest in the dispute to satisfy the article III case or controversy standard, the Eason court then decided that the plaintiffs did, indeed, belong to the class for whose benefit rule 10b-5 had been adopted. The court found support for its decision not only in its conclusion that the Birnbaum doctrine had been so frequently circumvented that it lacked "integrity," but more importantly, in the broad language of several recent Supreme Court decisions regarding section 10(b) and rule 10b-5. Primary among them was Superintendent of Insurance v. Bankers Life & Casualty Co. In Bankers Life, the court specifically stated that section 10(b) "must be read flexibly, not technically and restrictively." Significantly, the Court emphasized the fact that section 10(b) "outlaws the use 'in connection with the purchase or sale' of any security of 'any manipulative or deceptive device . . . . '" It concluded that the plaintiff "suffered an injury as a result of deceptive practices touching its sale of securities as an investor." Encouraged by the "touching" test in Bankers Life, which indicated an extremely liberal interpretation of the "in connection with" language of section 10(b) and rule 10b-5, the Eason court devised its "investor injury" criteria under which all "persons who, in their capacity as investors, suffer significant injury as a direct consequence of fraud in connection with a

viewed as capable of judicial resolution); Baker v. Carr, 369 U.S. 186, 204 (1962) (party seeking adjudication must have a personal stake in the issue). 59. 397 U.S. 150 (1970). 60. Id. at 152. 61. Id. at 153. 62. 490 F.2d at 657-58. 63. Id. at 659. 64. 404 U.S. 6 (1971), rev'g 430 F.2d 355 (2d Cir. 1970). The Eason court also cited Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972), in which the Court dealt primarily with the reliance requirement in 10b-5 actions and stressed a broad interpretation of the securities laws. Like Bankers Life, Affiliated Ute has had far-ranging implications on section 10(b) and rule 10b-5 actions. For a thoughtful analysis of how far beyond the common law the Court has gone in defining the nature, scope and requirements of a federal action under rule 10b-5, see Note, The Reliance Requirement in Private Actions Under SEC Rule 10b-5, 88 Harv. L. Rev. 584 (1975). 65. 404 U.S. at 12. 66. Id. at 10. 67. Id. at 12-13 (emphasis added). See also note 35 supra.
securities transaction”68 shall have standing to sue. In making its determination, the Eason court was not persuaded by the frequently advanced policy arguments that the purchaser-seller requirement is necessary to prevent an “unmanageable flood of federal litigation,”69 nor by the need to preserve national consistency in the interpretation of federal securities law; rather, it called upon the Supreme Court to resolve the conflicts which existed throughout the circuits regarding the use of the Birnbaum doctrine.70

III. THE SUPREME COURT RESPONDS

Blue Chip is, indeed, a direct response to Eason and a complete rebuttal of the investor injury standing criteria enunciated therein. Rather than broadly construing the “in connection with” language of section 10(b), the Supreme Court in Blue Chip declared that the language must be read narrowly as it relates to plaintiffs who are purchasers or sellers. Although the Court confirmed that it previously decided that there is an implied private right of action under section 10(b),71 the language in Blue Chip suggests that the Court was questioning the wisdom of that decision and was seeking to limit its magnitude. Nevertheless, having accepted an implied private right of action under section 10(b), the Court was then faced with the problem of delimiting those who might bring suit under rule 10b-5. The Court, like lower courts before it, found that affirmation of the Birnbaum purchaser-seller doctrine established the appropriate boundary.

To justify use of the doctrine, the Court reasoned that section 17(a), after which section 10(b) was patterned, specifically prohibits fraud “in the offer or sale” of a security. On the other hand, section 10(b) makes no mention of offer, but only proscribes fraud in connection with the “purchase or sale” of securities. Therefore, the Court concluded that when a remedy was

68. 490 F.2d at 659. The Eason court apparently glossed over the Supreme Court's strained attempt to characterize the plaintiff in Bankers Life as a seller. See 404 U.S. at 9-10. For an excellent discussion of the investor injury theory causation approach to standing taken in Eason, see Note, Standing to Sue in 10b-5 Actions: Eason v. GMAC and Its Impact on the Birnbaum Doctrine, 49 NOTRE D. LAW. 1131 (1974).

69. 490 F.2d at 660.

70. Id. at 661.

71. 421 U.S. at 730, citing Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971). In the landmark decision of J.I. Case Co. v. Borak, 377 U.S. 426 (1964), the Supreme Court confronted, for the first time, the question of whether an implied private right of action exists under the 1934 Act. In determining that there is such a right under section 14(a) of the Act, 15 U.S.C. § 78 (1970), the Court relied on the statutory tort benefit theory and demanded that federal courts “‘adjust their remedies so as to grant the necessary relief’ where federally secured rights are invaded.” 377 U.S. at 433, quoting Bell v. Hood, 327 U.S. 678, 684 (1946). See also Wyandotte Trans. Co. v. United States, 389 U.S. 191 (1967).
intended for those who neither purchased nor sold securities, Congress expressly provided for one.\textsuperscript{72}

Admitting that the legislative intent of section 10(b) is "not conclusive," the Court sought to lend further support to its conclusion that the purchaser-seller requirement is vital to maintaining an action under section 10(b) by examining the rationale behind the implied private right of action. Rather than focusing on the statutory tort benefit theory expounded in \textit{Kardon},\textsuperscript{73} the Supreme Court noted that one of the justifications advanced for an implied private right action under section 10(b) was found in section 29(b) of the 1934 Act,\textsuperscript{74} which provides that an individual who makes a contract in violation of any provisions of the 1934 Act may void that contract. Without the presence of a contract of sale or of an actual purchase or sale of securities, however, the rescission remedy granted by section 29(b) would not be applicable; thus, the section 29(b) justification is absent. Moreover, the Court argued that since the provisions of the Act which do provide for an express private civil remedy do so only for individuals who have, in fact, purchased or sold securities, it would be incongruous to ascribe to Congress an intent to establish broader liability under an implied cause of action.\textsuperscript{75} The Court reasoned that when there is no purchase, no sale, and no contractual right created, there is simply no justification for a private right of action under section 10(b).\textsuperscript{76} Disagreeing with the Ninth Circuit, the Supreme Court

\textsuperscript{72} 421 U.S. at 734. The Court also noted that, although section 10(b) does not,

\textsuperscript{73} See \textit{Bromberg}, supra note 18, § 2.4(1), at 27. Similar arguments disputing the existence of a civil remedy under section 10(b) and rule 10b-5 have been rejected by lower courts. See, e.g., Fratt v. Robinson, 203 F.2d 627, 631-32 (9th Cir. 1953); Baird v. Franklin, 141 F.2d 238, 245 (2d Cir.) (dissenting opinion), \textit{cert. denied}, 323 U.S. 737 (1944).


\textsuperscript{76} Id. at 735. For further justification for limiting the use of rule 10b-5 to purchasers or sellers the Court noted that in both 1957 and 1959 the SEC sought from Congress an amendment of section 10(b), changing its wording from "in connection with the purchase or sale of any security" to "in connection with the purchase or sale of, or any attempt to purchase or sell, any security." Id. at 732 (citations omitted). On both occasions Congress refused the SEC's request, thereby suggesting to the Court that Congress did not intend section 10(b) to cover anyone but actual pur-
held that the antitrust decree did not create a contractual relationship between the parties which would elevate Manor Drug to the status of a purchaser or seller.

Conceding that the statutory interpretation arguments could not offer conclusive guidance regarding congressional intent as "to the contours of a private cause of action," the Court noted that since the judiciary itself had implied and developed the cause of action, it must assume the burden of delimiting those who might bring suit under rule 10b-5. In affirming the Birnbaum doctrine, the Court recognized that the doctrine has as a disadvantage the preclusion of some worthy claims. Nevertheless, the Court thought that countervailing policy considerations were more weighty. The Court was concerned that without a purchase or sale requirement, the evidence of a plaintiff's injury would be highly subjective, damages would be speculative, and the outcome of the trial would hinge upon unreliable oral testimony. Moreover, summary judgment would be largely unavailable and since frivolous claims and strike suits could not be weeded out before trial, defendants might be forced into unjustified settlements to avoid protracted discovery.

Although the policy considerations voiced by the majority are certainly worthy of consideration, the soundness of utilizing them to bar potential

chasers and sellers of securities. For an excellent discussion of whether or not there should be an implied private right of action under section 17(a), upon which section 10(b) is modeled, see Horton, Section 17(a) of the 1933 Securities Act—The Wrong Place for a Private Right, 68 Nw. U.L. Rev. 44 (1973).

In its amicus briefs, the SEC has consistently urged the courts to abandon the purchaser-seller requirement in order to further the broad remedial purpose of the 1934 Act. See, e.g., Brief for SEC as Amicus Curiae at 23-33, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1974).

77. 421 U.S. at 737.
78. The Court noted:
When we deal with private actions under rule 10b-5 we deal with a judicial oak which has grown from little more than a legislative acorn.

Id. at 737, 749.
79. While the Eason court discounted the notion stressed by Judge Hufstedler in her lower court dissent in Blue Chip that the abandonment of the Birnbaum doctrine would create an unmanageable caseload for the federal dockets and would increase the potential for strike suits and "bad cases", 490 F.2d 660 n.25, citing Manor Drug Stores v. Blue Chip Stamps, 492 F.2d 136, 146 (9th Cir. 1973) (Hufstedler, J., dissenting), the Court in Blue Chip agreed with Hufstedler and expressed grave concern over the danger of "vexatious litigation," a problem it saw as particularly indigenous to securities law. 421 U.S. at 740.
plaintiffs from relief granted under the implied private right of action is highly questionable. Whenever a right to sue exists, the danger is present that persons with a less than worthy claim will abuse the judicial process. Certainly the pendency of a lawsuit with the attendant imposition of liberal discovery of documents and depositions of corporate officers provided for under the new Federal Rules of Civil Procedure may frustrate and delay the normal course of business activity of defendants, as the majority suggested. The inconvenience may, in fact, press a defendant into a pretrial settlement of a spurious claim. However, these problems are no different from those faced by any corporation engaged in litigation. Similarly, regarding the question of speculative damages, it is true that when there has been neither the purchase nor sale of securities, determining the damages suffered by a would-be investor might be extremely difficult. However, as the majority admits, even though a determination of damages may prove difficult, it has not precluded a defrauded investor from recovery if his losses are based on a demonstrable number of shares traded. Whether or not a plaintiff can prove he has been so injured is a question for the jury to determine, and the fact that the jury's verdict may eventually hinge on purely conflicting oral testimony, as feared by the Court, is no different from the situation faced by most litigants.

The majority's narrow reading of section 10(b) and rule 10b-5 stands in marked contrast to that of the dissent, which views the securities laws of 1933 and 1934 as broad proscriptions against all forms of fraud in the marketplace. Reviewing the same legislative history found to be inconclusive by the majority, the dissent noted that section 10(b) and rule 10b-5 specifically direct attention to the question of whether "fraud was employed . . . by 'any person . . . in connection with the purchase or sale of any security.'" The dissenters thus adopted the Eason investor injury approach, which provides that as long as the plaintiff can show a logical nexus between the alleged fraud and the sale or purchase of a security he shall not automatically be barred from the courtroom, but rather, shall have the burden of proving the substantive elements of a 10b-5 action. In evaluating
the policy considerations relied upon by the majority, the dissent disapprovingly noted that the Court "exhibit[ed] a preternatural solicitousness for corporate well-being and a seeming callousness toward the investing public quite out of keeping . . . with our own traditions and the intent of the securities laws." Nevertheless, in rejecting the Eason nexus approach, the majority arbitrarily denied standing to investors who are not purchasers or sellers of securities but who might prove, if given the opportunity, that they suffered demonstrable loss because of alleged fraudulent statements on the part of corporate officers.

IV. CONCLUSION

Blue Chip is important not only because the Supreme Court has finally decided the viability of the Birnbaum doctrine, but also because of the tone which the Court employed in so doing. Conceivably, Blue Chip may be nothing more than an effort to establish an objective standing test by which the plaintiff class in 10b-5 actions may be limited and the already voluminous litigation under section 10(b) and rule 10b-5 may be discouraged. However, by failing to adopt an Eason-like approach to standing, the Court in Blue Chip strongly suggests that it is making a deliberate attempt to pull back from the broad readings which lower courts have given to its decision in Bankers Life.

It is too early to ascertain what impact Blue Chip will have on the numerous "exceptions" courts have hitherto found when applying the Birnbaum doctrine. Since Blue Chip affirmed the Birnbaum doctrine only in the context of an action for money damages, the question remains as to its applicability in cases calling for purely private-party injunctive relief.


Moreover, the dissent forebodingly commented that the use of such policy considerations may set a dangerous precedent. Id. at 771. Lastly, like the Eason court, the dissent affirmed its confidence in the ability of the federal courts "to protect the worthy and shut out the frivolous." Id.

83. In all probability, the courts will take their cue from the literal language of the opinion and will demand that there be an actual purchase or sale of securities in which the plaintiff is directly involved. Thus, a trustee in bankruptcy who has neither purchased nor sold securities may no longer bring suit for an alleged 10b-5 violation. Compare Thomas v. Roblin Indus. Inc., [1975 Transfer Binder] CCH FED. SEC. L. REP. ¶ 95,259 (3rd Cir. 1975), with Bailes v. Colonial Press, Inc., 444 F.2d 1241 (5th Cir. 1971). Cf. Madison Fund, Inc. v. The Charter Co., [1975 Transfer Binder] CCH FED. SEC. L. REP. ¶ 95,295 (S.D.N.Y. 1975).

84. The Court noted that it has previously held that the purchaser-seller rule does not limit the right of the SEC to seek injunctive relief. 421 U.S. at 751 n.14, citing SEC v. National Sec. Inc., 393 U.S. 453 (1969).
Moreover, the fact that the Court specifically held that the consent decree did not create a contractual relationship between the parties indicates that at least the aborted seller exception to *Birnbaum* may still be valid even though there is no actual purchase or sale.\(^8\)

Nevertheless, *Blue Chip* appears to be an omen of future action by the Court to limit the scope and application of other securities laws. The Court’s concern for protecting corporate well-being from vexatious litigation, as well as its lack of confidence in the adequacy of the jury system, are concerns easily transferred to private enforcement of the securities laws generally. The effect of *Blue Chip* on implied private actions under other provisions of the federal securities laws remains unclear, but the language and tone of *Blue Chip* leave little doubt that, when given the opportunity, the Court will take a restrictive view of such provisions.\(^8\)

*Carol Berlin Manzoni*

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**EXCLUSIONARY ZONING—STANDING TO SUE—Excluded Plaintiffs Must Focus Their Complaint on Specific Disputed Housing Project Demonstrably Within Their Means to Establish Standing in Federal Court. *Warth v. Seldin*, 422 U.S. 490 (1975).**

The United States Supreme Court, in its first case involving alleged “exclusionary zoning,”\(^7\) handed down a decision which effectively denies

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8. It is important to note that the Court specifically stated that section 3(a) of the 1934 Act, 15 U.S.C. § 78c(a), grants the status of “purchasers” and “sellers” to holders of puts, calls, options and other contractual rights or duties to purchase or sell securities. These persons, therefore, automatically meet the standing requirement of the *Birnbaum* rule. 421 U.S. at 750-51. *But see Gauer v. Genesco, Inc.*, [1975 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 95,344 (N.D. Cal. 1975) (purchaser-seller status extended to those holding a contractual right to buy or sell; however, right to join one’s shares with those of issuer, to “come along”, may not be equated with a right to sell).

86. At least one lower court has already extended the *Blue Chip* rationale to other provisions of the 1934 Act. In *Myers v. American Leisure Time Enterprises Inc.*, [1975 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 95,286 (S.D.N.Y. 1975), the court held that the implied private right of action under section 13(d) of the 1934 Act would extend only to actual purchasers or sellers of securities. Explaining its decision, the court stated “such a holding would seem to follow logically [from *Blue Chip*.]” *Id.* at 98,466.

1. Exclusionary zoning is a general term for zoning practices that have the effect of excluding low and moderate income groups from the zoned area. *See Moskowitz,*
federal court access to numerous potential plaintiffs in such actions. In *Warth v. Seldin*, a divided Court held that nonresident plaintiffs representing low and moderate income groups allegedly excluded by a challenged ordinance will not be allowed standing to sue in federal court unless they can focus their suit on a specific excluded housing project which is viable and which they affirmatively show to be within their financial means.

In 1972, the plaintiffs, individuals of low and moderate incomes residing in the metropolitan area of Rochester, New York, along with individuals and organizations representing a wide variety of separate and distinct interests, brought an action for declaratory and injunctive relief against the suburban town of Penfield and members of its zoning, planning, and town boards. They claimed that the town's zoning ordinance, as written and as enforced, made it unfeasible to build low-cost single or multiple family dwellings in Penfield. Thus, they argued, Penfield's zoning practices effectively excluded the plaintiffs and others similarly situated in violation of their first, ninth and fourteenth amendment rights and of the Civil Rights Acts of 1866 and

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*Standing of Future Residents in Exclusionary Zoning Cases*, 6 Akron L. Rev. 189 (1973). Among the various zoning "devices" that can have an exclusionary effect are minimum lot sizes, minimum house sizes, prohibitions against multifamily dwellings or attached housing, and the discretionary power of the zoning authority to grant special exceptions. Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 Syracuse L. Rev. 509, 520-22 (1971).

2. 422 U.S. 490 (1975). *Warth* is only the second zoning decision issued by the Court since 1928. In Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), it upheld the constitutionality of a zoning ordinance which prohibited more than two unmarried persons from residing in the same dwelling.

3. These plaintiffs were also members of racial and ethnic minorities. 422 U.S. at 493 n.1.

4. Other original plaintiffs, none of whom were accorded standing at any level of the proceedings, included Rochester property owner-taxpayers and Metro-Act of Rochester, a not-for-profit corporation concerned with the housing shortage. The taxpayer plaintiffs claimed that the defendant town of Penfield's exclusionary practices forced Rochester to provide a disproportionate share of low income housing, thereby raising the city property taxes to the plaintiffs' financial detriment. 422 U.S. at 508-09. Metro-Act asserted standing on behalf of its membership of excluded low and moderate income persons, Rochester taxpayers, and residents of Penfield deprived of the opportunity to reside in an integrated community. *Id.* at 512.

5. The plaintiffs also asked for an award of $750,000 in compensatory and punitive damages. *Id.* at 496.

6. The ordinance was claimed to be exclusionary on its face in that it set allegedly unreasonable lot size, setback, and floor area requirements for single family housing; set low density requirements for multifamily housing; and allocated only 0.3 percent of residential property for multifamily structures. Moreover, the plaintiffs claimed that proposals for low-cost housing were inordinately delayed and arbitrarily denied and that the town neglected to provide adequate support services for such housing. *Id.* at 495.
1871. None of these plaintiffs alleged a current legal or equitable interest in property within Penfield, nor did they claim to have made specific attempts to obtain a building permit, variance, or rezoning of a particular site. They did produce evidence of such attempts by third parties, however, and attempted to join as parties plaintiff associations representing builders and developers whose attempts to develop low-cost housing in Penfield allegedly had been thwarted. The plaintiffs asked that the existing ordinance be declared unconstitutional and that Penfield be ordered to enact a new ordinance aimed at rectifying its past discriminatory actions.

Faced with this extraordinary array of plaintiffs, the United States District Court for the Western District of New York dismissed the action for want of standing and failure to state a claim upon which relief could be granted. The Second Circuit affirmed on the basis of lack of standing, finding as to the low income plaintiffs that the failure to focus on a particular housing project deprived their claim of the required "concrete adverseness." The builders' associations received similar treatment, having failed to cite specific actions taken by the town which had injured their members.

On June 25, 1975, in an opinion written by Mr. Justice Powell, the Supreme Court affirmed, holding that the low and moderate income plaintiffs had failed to demonstrate that their inability to find housing in Penfield had been caused by the town's zoning practices. The crucial missing link


8. The record revealed that several multifamily projects had been proposed and rejected. Apparently only two of these were specifically alleged to have been intended for use by persons of low and moderate incomes. 422 U.S. at 505-06 n.15; 495 F.2d at 1189.

9. The original plaintiffs attempted to join Housing Council in the Monroe County Area, Inc., a not-for-profit corporation representing groups trying to develop low and moderate cost housing in the Rochester vicinity. One of its members, Penfield Better Homes, had applied for and been denied a zoning variance to build low and moderate cost housing in Penfield in 1969. Rochester Home Builders Association, representing its membership of local builders and claiming lost profits on their behalf, tried to intervene. 422 U.S. at 497.

10. 495 F.2d at 1190.


12. 495 F.2d at 1192. The phrase is taken from Baker v. Carr, 369 U.S. 186 (1962), and reads more fully as "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Id. at 204.

13. 495 F.2d at 1195. The court did imply that Penfield Better Homes would have met with more success by suing in its own behalf. See 495 F.2d at 1194.

14. 422 U.S. at 504-07.
in the chain of causation was a showing that the plaintiffs could have afforded to live in the housing projects which had been rejected by the Penfield Planning Board. Absent such a demonstration, said the majority, the court's intervention is unwarranted and it is impossible to frame appropriately narrow relief. The builders' claim of standing, moreover, failed for want of a controversy over a specific project viable at the time the complaint was filed.

Justice Brennan, joined in his dissent by Justices White and Marshall, expressed indignation that the majority had "turn[ed] the very success of the allegedly unconstitutional scheme into a barrier to a lawsuit seeking its invalidation." Recognizing that a "pattern-and-practice claim is at the heart of the controversy," he specifically would have granted standing to both the low income plaintiffs and the builders' associations, since their allegations were sufficient to clear the threshold standing hurdle in such a claim.

Warth is one of a number of exclusionary zoning challenges that has been heard in the federal courts in recent years and is the first such suit to reach the Supreme Court. Although the standing of the plaintiffs rather than the merits of their claim was at issue, the case may be expected to have a significant impact on exclusionary zoning litigation. This article will examine Warth's potential impact and will focus particularly on the role of the "excluded plaintiff," a person of low or moderate income unable to find housing in the zoned area.

I. ZONING CHALLENGES AND THE EVOLUTION OF THE EXCLUDED PLAINTIFF

Fifty years ago, in Village of Euclid v. Ambler Realty Co., the Supreme Court manifested a judicial deference to the wisdom of local zoning

15. Id. at 505-06.
16. In addition, the taxpayer plaintiffs were denied standing on the grounds that any increased taxes would be the result of decisions by the Rochester taxing authority rather than by Penfield's zoning board. The standing claims of Metro-Act suffered from the same defects as those of its individual members. To the extent that Metro-Act represented residents of Penfield deprived of an integrated environment, the Court chose to exercise its discretionary power to refuse standing to those attempting to raise the rights of third parties. Id. at 514.
17. Id. at 523 (Brennan, Marshall, White, JJ., dissenting).
18. Id. at 530.
19. Justice Douglas, dissenting separately, would have granted standing to the associational plaintiffs to the extent that they represented "the communal feeling of the actual residents." Id. at 518 (Douglas, J., dissenting).
authorities that has been adhered to in state and federal courts ever since. The strong presumption of validity accorded zoning decisions, which stems from their source in the police power, creates a "formidable obstacle" to due process attacks. The issue in such a case, as formulated in *Euclid,* is whether the practices complained of "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." If the validity of the ordinance or decision is even "fairly


24. 272 U.S. at 395. This "rational basis" test was recently applied by the Court in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (challenge to zoning on due process and other grounds). The burden of showing that the zoning authority had no rational basis for making a particular zoning decision is made heavier by the authority's virtual immunity from questioning as to its motive. See City of Fairfield v. Superior Court, 14 Cal. 3d 768, 537 P.2d 375, 122 Cal. Rptr. 543 (1975) (application in zoning context of United States v. Morgan, 313 U.S. 409 (1941), which held that official performing administrative function cannot be examined as to the process by which his conclusions were reached).

In the context of exclusionary zoning, the plaintiff's burden would seem to be considerably lightened in the few states that have adopted the view that the "general welfare" to be considered by the zoning authority encompasses that of communities outside the zoned area. A leading case espousing this "regional interests" doctrine is Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), petition for cert. filed, 44 U.S.L.W. 3074 (U.S. Aug. 8, 1975). In *Mount Laurel,* the New Jersey Supreme Court found that under the "general welfare" provision of the state constitution, the zoning authority had an affirmative obligation to consider the housing needs of the surrounding region and its failure to do so rendered the exclusionary provisions of the zoning ordinance presumptively invalid. See also Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970) (two and three acre minimum lot sizes unconstitutional). Several authorities have suggested that a judicial regional approach would facilitate successful due process attacks. See, e.g., Marcus, Exclusionary Zoning: The Need for a Regional Planning Context, 16 N.Y.L.F. 732 (1970); Sager, supra note 21, at 793. Others, however, believe that a regional approach would have precisely the opposite effect. See Burchell, Litoskin & James, Exclusionary Zoning: Pitfalls of the Regional Remedy, 7 The Urban Lawyer 262 (1975).
Nevertheless, zoning challenges traditionally have been grounded in due process, and occasionally a plaintiff will sustain his burden of showing that the zoning regulation or practice is arbitrary and capricious.

Essential to the classic due process attack is the classic plaintiff, one with a proprietary interest claimed to be injured by the zoning practice. Generally, but with at least one notable exception, state courts, which are the traditional forum for zoning suits, have restricted standing to persons having at the minimum a pecuniary interest, and usually a proprietary interest in zoned land which is demonstrably affected by a specific challenged zoning decision.

A concurrent thread in the history of zoning challenges is found in the consistent invalidation of ordinances which patently exclude racial minorities. As long ago as 1917, in Buchanan v. Warley, the Supreme Court struck down a Louisville, Kentucky ordinance which prohibited whites or blacks from moving into property on blocks predominantly inhabited by members of the opposite race. While the Court's language made it clear that the abhorrent feature of the ordinance was the infringement on the rights of the excluded black person, the plaintiff was in fact a white property owner and the sole ground for standing was the injury to his property rights. This circuitous means of providing equal protection for

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27. See generally 3 R. ANDERSON, supra note 22, §§ 21.05-07.
29. See 3 R. ANDERSON, supra note 22, §§ 21.05-07. Many state enabling statutes have adopted the approach of the STANDARD STATE ZONING ENABLING ACT, supra note 22, which grants standing to "[a]ny person or persons, jointly or severally, aggrieved" by a decision of the zoning authority. Id. § 7. See, e.g., CONN. GEN. STAT. ANN. § 8-8 (Supp. 1975); TENN. CODE ANN. § 13-706 (1973). Clearly this broad terminology leaves the substantive rules of standing largely within the discretion of the courts. Cf. A MODEL LAND DEVELOPMENT CODE § 9-103 to -04 (Proposed Off. Draft, 1975).
30. See, e.g., Jackson v. State, 132 Md. 311, 103 A. 910 (1918) (ordinance forbidding blacks to live on all-white blocks violates due process).
31. 245 U.S. 60 (1917).
32. Id. at 76, 77, 79.
racial minorities by invoking the due process rights of third parties was for years the prime method of attack on racially discriminatory zoning ordinances. In contrast, the invalidation of certain zoning practices which, while not directly racially discriminatory, exclude low and moderate income groups from the zoned area, is largely a development of the last decade. As the phrase implies, the focus of exclusionary zoning suits is on the rights of the excluded persons, and a host of innovative constitutional and statutory theories have been invoked in their behalf. Supporters of these zoning challenges have emphasized the importance of the equal protection clause with its attendant possibilities for a stricter standard of review than is afforded by the traditional Euclid due process analysis. Accordingly, they have argued that housing is a fundamental right and that the poor constitute a suspect class. Alternatively, they have attempted to bring the excluded low and moderate income groups within the strict scrutiny cloak applicable to racial minorities by demonstrating a high statistical incidence of racial and ethnic minorities within the excluded economic class.

The equal protection attacks on exclusionary zoning have met with a certain degree of success in the lower federal courts, although it appears that in nearly every case there has been a showing of racial discrimination to

34. For a list of articles on the subject of exclusionary zoning in addition to those cited herein, see Willistown Township v. Chesterdale Farms, Inc., 7 Pa. Cmwlth. 453, 463-64, 300 A.2d 107, 112-13 nn. 3 & 4 (1973).
36. See Flippen, supra note 23, at 22; Sager, supra note 21, at 798-800.
37. As was illustrated in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), the "rational basis" test is also applied in equal protection claims, if no fundamental right or suspect classification is involved.
38. See Flippen, supra note 23, at 23-25.
39. See Sager, supra note 21, at 785-87.
40. Although courts have repeatedly stated that a mere statistical correlation is insufficient to transform an economic classification into a racial one, e.g., Metropolitan Housing Corp. v. Village of Arlington Heights, 517 F.2d 409, 413 (7th Cir. 1975), cert. granted, 95 S. Ct. 560 (1975); Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250, 253 (9th Cir. 1974); English v. Town of Huntington, 448 F.2d 319, 324 (2d Cir. 1971), an apparent shifting of emphasis in the racial discrimination cases from motive to effect, see Metropolitan Housing Corp. v. Village of Arlington Heights, supra; United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975), provides the advocate with a convenient sleight of hand to reach the same result.
trigger the "strict scrutiny" analysis.\textsuperscript{41} Whether the discrimination is felt to be economic or racial, however, the decisions more clearly than ever before focus on the inability of the excluded persons to find housing within the zoned area and the attendant infringement on their constitutional rights.\textsuperscript{42} Although there has almost invariably been a specific disputed housing project at the core of the lawsuit, the plaintiffs have often tried to establish evidence of a pattern and practice of exclusionary zoning. The courts have looked to the past practices of the municipality, the unavailability of housing in the surrounding areas, the existing racial and economic mix of the zoned area and its environs, and the predictive future effect of the court's failure to grant the requested relief.\textsuperscript{43} As a consequence, the relief granted has on occasion gone well beyond the particular project that initiated the dispute and has assumed the nature of a judicial command that the municipality affirmatively undertake to rectify past discrimination.\textsuperscript{44}

The focus on the excluded persons' rights has been facilitated by the advocates' creative joinder of parties. In most cases there has been at least one plaintiff who fit within the traditional zoning-standing conceptual mold,\textsuperscript{45} commonly a nonprofit corporation that has been formed for the specific purpose of developing low-cost housing, has obtained an option\textsuperscript{46} or contract\textsuperscript{47} to purchase a site for such development, and has requested and

\textsuperscript{41} See, e.g., Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir.), cert. granted, 95 S. Ct. 560 (1975) (refusal by white suburb of Chicago to rezone for low and moderate income housing violates equal protection).


\textsuperscript{43} See, e.g., Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971).

\textsuperscript{44} See Southern Alameda Spanish Speaking Organization v. City of Union City, 357 F. Supp. 1188, 1199-1200 (N.D. Cal.), aff'd, 424 F.2d 291 (9th Cir. 1970) (city ordered to encourage, and implement if possible, various means of providing low-cost housing within specified time period); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), aff'd, 457 F.2d 788 (5th Cir. 1972) (county ordered to study area housing problems and to take steps "toward full compliance with the national housing policy of balanced and dispersed public housing."); 332 F. Supp. at 395). Cf. United Farmworkers of Fla. Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974) (order to issue sewer permit); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970) (order to rezone tract of land). This "single development decisionmaking" has been criticized as not addressing the real problem. See Moskowitz, supra note 1, at 209-14.

\textsuperscript{45} See notes 27-29 & accompanying text supra.

\textsuperscript{46} See, e.g., Southern Alameda Spanish Speaking Organization v. City of Union City, 357 F. Supp. 1188 (N.D. Cal.), aff'd, 424 F.2d 291 (9th Cir. 1970).

\textsuperscript{47} See, e.g., Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971). The owner of the property, who unde-
been denied the cooperation of the zoning authority. Occasionally, a builders' association has been joined, claiming lost profits on behalf of its members and lost dues and membership on its own behalf. Almost universally present, however, is the excluded plaintiff, a person of low or moderate income, often a member of a racial or ethnic minority, claiming injury by virtue of his inability to find satisfactory housing within the political subdivision. He is a named party to the suit, often on behalf of his excluded class, and his interests are occasionally represented as well by a civic organization. He clearly lacks the classic "proprietary interest" which traditionally has been required; thus he has been a key figure in a new generation of standing cases.

The excluded plaintiff has met with remarkable success in gaining access to the lower federal courts. Most of the opinions do not devote extensive analysis to the issue. The standing of the excluded party is occasionally assumed without discussion or is rather peremptorily affirmed. In Park View Heights Corp. v. City of Black Jack, however, the Eighth Circuit

The doctrine of standing in the federal courts springs from two sources. The Constitution limits the power of those courts to the consideration of an actual "case or controversy." U.S. Const. art. III. Generally, this mandate is interpreted to require that the plaintiff show "injury in fact." Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 151-54 (1970). Second, the Supreme Court, for prudential reasons, has created certain rules under which it limits itself and the lower federal courts in the exercise of jurisdiction. E.g., Barrows v. Jackson, 346 U.S. 249, 255-56 (1953). The most important of these, for purposes of this article, is the refusal, except under certain defined circumstances, to allow parties to raise the rights of third parties to protect themselves against a particular injury. E.g., Tileston v. Ullman, 318 U.S. 44 (1943). Exceptional circumstances include situations in which the third parties are unable to defend their own interests, e.g., Doe v. Bolton, 410 U.S. 179 (1973), and in which there is an existing relationship between the parties adversely affected by the challenged action. E.g., Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969).


54. 467 F.2d 1208 (8th Cir. 1972).
discussed at length the standing claims of a fairly representative array of plaintiffs. The reasoning of that opinion may well indicate the unspoken rationale of the other federal courts in similar exclusionary zoning cases.

The plaintiffs in *Park View Heights* were nonprofit corporations and eight individuals of low and moderate incomes desiring to live in the zoned area. One of the corporations, Inter-Religious Center for Urban Affairs, Inc., an organization interested in urban problems, had expended time and seed money on a low-cost housing project to be built in the zoned area; Park View Heights Corporation had been formed to manage the project and held title to the proposed site. The district court had dismissed as to all plaintiffs except Park View Heights, which was to be allowed to litigate only its due process claim. Reversing and reinstating all the plaintiffs, the appeals court held that each had a judicially cognizable injury and that the two corporations could litigate the constitutional and statutory claims of the individual plaintiffs. In discussing the equal protection claim, the court emphasized that “[t]he interests of the corporate and individual plaintiffs coincide because both desire to be free from the discriminatory zoning.” The court characterized the interest of the corporate plaintiffs as a desire to build “racially integrated rental housing in a better economic, educational, and recreational environment.” Thus, the corporations were not forced to overcome the *Euclid* “rational basis” hurdle, and the exclusion of the low income groups assumed the central role in the lawsuit.

Since it is the rights of the excluded plaintiffs which are “most seriously at stake,” observers have urged that they be granted standing irrespective of any existing property interest in the zoned area. Until *Warth*, however, the excluded plaintiff has been coupled with a traditional “proprietary interest” plaintiff, and the charge of a pattern and practice of exclusionary zoning has usually had a specific disputed housing project at its core.

56. 467 F.2d at 1213.
57. *Id.* at 1214.
60. *But see* Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975) (attack on a newly passed ordinance alleged to be exclusionary on its face); Confederacion de la Raza Unida v. City of Morgan Hill, 324 F. Supp. 895 (N.D. Cal. 1971) (plaintiffs' option to purchase a tract of land for development of low-cost housing had expired but they claimed a continuing intent to pursue such projects).
II. *Warth:* **The Supreme Court Draws the Line**

In *Warth*, the Supreme Court was asked both to approve and to extend the evolving standing principles found in the lower federal court exclusionary zoning cases. While *Warth* was clearly in the genre of *Park View Heights* and the other exclusionary zoning cases, the suit was atypical in two important ways. First, although specific housing projects were mentioned both in the pleadings and in the record, they were there only for the purpose of illustrating the overall pattern and practice of discrimination. The plaintiffs alleged a purposeful continuing policy of exclusion by the town of Penfield and asked that an injunction be issued requiring the town to draw up a new ordinance which would mitigate the effects of its past discrimination. Thus, there was no focus on a particular project and no request that a particular action of the zoning body be declared invalid.

Second, the independent standing of the excluded plaintiffs was put to a crucial test. None of the co-plaintiffs alleged the kind of proprietary interest which had been the keystone of previous litigation; the excluded plaintiffs in *Warth* would not be able to attain standing on the strength of another party's interest. The low income and minority group plaintiffs were at center stage in *Warth* and their standing allegations would have to succeed or fail on their own merits.

**A. The Failure to Focus on a Specific Project**

The failure to focus on a particular housing project was fatal to the standing claims of the excluded plaintiffs. The majority objected to the plaintiffs' failure to allege that they could have afforded to live in the specific projects referred to in the record. Because of that omission, the majority

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61. Although the plaintiffs did allege that the Penfield ordinance was unconstitutional on its face, their claim focused on the pattern of denied variances and building permits. See 422 U.S. at 522 (Brennan, Marshall, White, JJ., dissenting).

62. Cf. authorities cited note 44 supra.

63. 422 U.S. at 503-07. The lack of a focal housing project was also fatal to the builders associations' claims; the Court held that they had failed to show injury of "sufficient immediacy and ripeness to warrant judicial intervention." Id. at 516. The other plaintiffs' claims were also struck down, but for different reasons. See note 16 supra.

64. The majority chose not to infer that the excluded plaintiffs could have afforded to live in the rejected projects despite the plaintiffs' claim that they were persons of low and moderate incomes and that the projects were intended for use by persons in that category. 422 U.S. at 506-07 n.16. Although the record revealed in dollar figures the incomes and budgets of the plaintiffs as well as the projected unit costs for at least one of the housing projects, the majority and three of the dissenters reached opposite conclusions as to whether the plaintiffs had thereby shown that they could afford to live in the projects. See id. at 527-28 n.7 (Brennan, Marshall, White, JJ., dissenting). Justice Douglas suggested that "the Court reads the complaint and the record with antagonistic eyes." Id. at 518 (Douglas, J., dissenting).
felt that the plaintiffs had failed to demonstrate any direct injury caused by
the complained of zoning practices. The dissenters recognized, however,
that the thrust of the Warth complaint was not that a specific housing project
had been rejected, but that the town's practices effectively excluded all such
projects. 65 Justice Brennan, dissenting, felt that the pleadings and the
record painted a portrait of "total, purposeful, intransigent exclusion of
certain classes of people from the town, pursuant to a conscious scheme
never deviated from." 66 Thus, implicit in the majority's requirement of
specificity is a rejection of the pure "pattern and practice" lawsuit in the
context of economic exclusionary zoning.

There is discernible in the majority opinion a concern over the problem of
framing appropriate relief in a suit which focuses on no particular housing
development. The excluded plaintiff is asked to demonstrate "that he
personally would benefit in a tangible way from the courts' intervention" and
that "relief can be framed 'no broader than required by the precise facts to
which the court's ruling would be applied.'" 67 It would appear that the
broad affirmative relief granted by lower federal courts on at least two
occasions is no longer a viable remedy after Warth. Rather, the opinion
implies that the most a plaintiff can ask of a federal court is that it remove
whatever stumbling blocks the zoning authority has placed in the way of a
particular project. 68

B. The Independent Standing of the Excluded Plaintiff

The excluded plaintiff did win one small victory in Warth. The Court
recognized that, "in a proper case," 69 a low income or minority group party
has standing to challenge an exclusionary zoning action. 70 Although the
excluded plaintiff commonly has been a party in federal court zoning
challenges, his position has been a tenuous one. 71 It would seem, however,

65. Id. at 522-23 (Brennan, Marshall, White, JJ., dissenting).
66. Id. at 523. Although the majority opined that the real villain was "the economics
of the area housing market," id. at 506, it did not refute Justice Brennan's reading
of the complaint.
67. Id. at 508, quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S.
208, 221-22 (1974).
68. Cf. cases cited note 44 supra.
69. 422 U.S. at 510.
70. One need not allege a contractual interest in the focal housing project. Id.
at 508 n.18.
71. The United States Court of Appeals for the Second Circuit, when it considered
Warth, declined to decide whether the plaintiffs' personal lack of interest in land was
alone sufficient to defeat the standing claims of the excluded parties. 495 F.2d at 1192.
that after *Warth*, the excluded plaintiff no longer needs to employ the "sham" of joining with a plaintiff who fulfills the traditional "proprietary interest" requirement.\(^{72}\)

The Court considered each category of plaintiff as an independent entity, focusing in each instance on the particular injury alleged and the particular constitutional or statutory protection available to that party. This rigorous method of analysis is in dramatic contrast to the *Park View Heights* approach.\(^{73}\) Under the latter analysis, the courts have recognized a community of interwoven interests with the common goal of elimination of illegal barriers to low-cost housing. Once a plaintiff could demonstrate a personal injury stemming from the zoning practice, he was able to litigate the claims of his co-plaintiffs as well, and the standard of judicial review was determined by the constitutional rights of the excluded group. The *Warth* Court made it clear, however, that each plaintiff would have to clear the standing hurdle on his own. More importantly, it would appear that third parties will be unable to raise the claims of the excluded group unless an existing relationship between them is demonstrably harmed by the challenged practice.\(^{74}\)

Thus, the plaintiff by plaintiff approach in *Warth* will make it substantially more difficult for the "proprietary interest" plaintiff, whose injury is grounded in due process rights, to trigger the equal protection standard of review. The excluded plaintiff is no longer relegated to a secondary role in these lawsuits; in fact, his presence may well be essential to a successful zoning attack. This long overdue recognition of the excluded plaintiff's central role in exclusionary zoning challenges is a mixed blessing, however, if others who are economically motivated and better able to institute a lawsuit can no longer raise his constitutional rights.


\(^{73}\) *See* notes 55-59 & accompanying text *supra*.

\(^{74}\) The Rochester taxpayers and Metro-Act of Rochester, Inc. were both specifically denied standing to litigate the claims of the excluded group. The Court noted that no relationship between the parties was alleged to be damaged and that the excluded group could assert its own rights in a proper case. 422 U.S. at 514 n.22. *See note 52 supra.* A contractual connection, a classic focal point in racial zoning suits, *see* Buchanan v. Warley, 245 U.S. 60 (1917), would be the clearest example of such a relationship.

In *Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), the court held that, in light of *Warth*, landowners and builders' associations could not litigate the "right to travel" claim of the excluded group. Since there were no representatives of the excluded class in the suit, the court applied a "rational basis" test and reversed the trial court's invalidation of the exclusionary aspects of the challenged ordinance.
C. Practical Considerations

For the excluded plaintiff considering a lawsuit in federal court, the mandate of Warth is clear: the suit must focus on a particular housing project.75 The project should be viable at the outset of the lawsuit and it must be one in which the named plaintiffs intend to and can afford to live. As a practical matter, this requirement will necessitate the cooperation of a builder or developer ready to invest time and money in a speculative cause and willing as well to risk retaliatory moves by the local housing authority.76 The nonprofit corporation created for the specific purpose of developing low-cost housing is still a viable tactic, although the expense of the undertaking has undone at least one such venture.77 Moreover, the excluded plaintiff would be well advised to join the developer as co-plaintiff lest the action be dismissed for failure to show the continuing intent of the developer to proceed with the project.78

It should be noted that there may still be certain exceptions to the requirement of a focal housing project. First, a pure “pattern and practice” claim alleging purposeful racial discrimination under the Fair Housing Act79

75. Arguably, the focal housing project is not a sine qua non: A particularized personal interest may be shown in various ways which we need not undertake to identify in the abstract. But usually the initial focus should be on a particular project. 422 U.S. at 508 n.18.

76. The builders’ association in Warth was threatened with retaliation against its members. 422 U.S. at 497 n.7.


78. The excluded party might also consider entering into a contractual relationship with the developer. This would strengthen his claim of “particularized personal interest,” 422 U.S. at 508 n.18, and the developer would presumably be able to litigate the claims of the excluded class. See note 74 & accompanying text supra.

79. 42 U.S.C. §§ 3601-10 (1970). The Court believed that no such claim was raised in Warth even by implication. It reasoned that a claim under the Fair Housing Act would have to allege prosecutorial racial discrimination and that the Warth plaintiffs claimed only purposeful economic discrimination with the resulting effect of racial exclusion. 422 U.S. at 513 & n.21. Cf. cases cited note 40 supra.

With respect to the task of showing purposeful racial or economic discrimination, consider the following: . . . we can comfortably predict that communities will find increasingly sophisticated means of obscuring racial motivation in the context of land use decisions. Concern for the environment presents a rationale as broad as all outdoors for nearly any specific governmental choice. The pants-down vaudeville of the city of Lackawanna or Fulton County [losing parties in prior exclusionary zoning suits] will soon be a thing of the past.
is not altogether precluded by *Warth*. The potential of the Housing and Community Development Act of 1974\(^80\) should be explored by potential litigants faced with the standing problem. Furthermore, it may still be possible to challenge an ordinance as exclusionary on its face without having to cite the rejection of a particular project,\(^81\) since the claims in *Warth* rested largely on the manner in which the Penfield zoning authority exercised its discretionary functions. Most important, however, is the fact that standing in the traditional forum of the state court is unaffected by the holding in *Warth*.\(^82\)

### III. Conclusion

The archetype of the successful standing claim outlined in the preceding section is a familiar one. Most of the exclusionary zoning challenges in federal courts in recent years have fit that model. Thus, strictly speaking, *Warth* does not overrule the standing aspects of those cases. Yet the decision does seem calculated to put a halt to the increasing receptivity in lower federal courts to such lawsuits. Just how far this policy of reluctance will erode the gains already made by exclusionary zoning litigants remains to

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81. *See* Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), discussed note 74 *supra*. The Petaluma court, familiar with the principles enunciated in *Warth*, recognized the standing of landowners and builders to challenge a recently enacted ordinance restricting growth. It has been suggested that such "per se challenges" will rarely succeed. Sager, *supra* note 79, at 27-30.

be seen. One message is clear: unless the excluded plaintiff can demonstrate the existence of a live controversy over a specific viable housing project, he may not look to the federal courts for the vindication of his rights.

Sally M. Armstrong


Although the National Labor Relations Board (NLRB) has been increasingly willing to exercise its discretion to seek temporary injunctive relief pending final determination of cases involving unfair labor practices, the parameters for the issuance of interim bargaining orders under section 10(j) of the National Labor Relations Act (NLRA) remain unclear. The unresolved question is whether a section 10(j) bargaining order is proper interim relief when there is reasonable cause to believe that an employer has engaged in substantial unfair labor practices and when a union, although not certified by an NLRB supervised election, claims to have had the support of a majority of employees as expressed through signed authorization cards.

1. 29 U.S.C. § 160(j) (1970) provides in relevant part:
   The Board shall have power, upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred . . . for appropriate temporary relief or restraining order. Upon the filing of any such petition the court . . . shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

2. The traditional and preferred route to the status of bargaining representative is through Board certification after an election by secret ballot, under procedures delineated in section 9(c) of the NLRA, 29 U.S.C. § 159(c) (1970). Since, however, section 9(a), 29 U.S.C. § 159(a) (1970), refers to the representative only as one “designated or selected . . . by the majority of the employees . . . ,” and since section 8(a)(5), 29 U.S.C. § 158(a)(5) (1970), makes it an unfair labor practice for an employer to “refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) . . . ,” other methods of ascertaining the bargaining representative
In Seeler v. Trading Port, Inc.,\(^3\) the United States Court of Appeals for the Second Circuit held that when a regional director of the NLRB makes a showing, based on authorization cards, that a union had a clear majority at one time and when the unfair labor practices by the employer are so substantial as to undermine majority strength and preclude the possibility of holding a fair election, the district court must issue an interim bargaining order. The United States Court of Appeals for the Fifth Circuit, in Boire v. Pilot Freight Carriers, Inc.,\(^4\) disagreed, determining that "[a]n interim bargaining order would . . . creat[e] by judicial fiat a relationship that has never existed."\(^5\) Fearful of making judicial inroads into the NLRB's primary statutory authority as investigator and adjudicator, the Pilot Freight court refused to force a bargaining relationship on the basis of still unproved unfair labor practice charges. In both cases, the courts affirmed lower court decisions to grant temporary injunctions of a prohibitory nature against the employers, finding the requisite reasonable cause to believe that violations of the Act had been committed. The two circuits differed principally on the use of mandatory injunctive remedies, such as bargaining orders and reinstatement of striking employees.\(^6\)

Trading Port, Inc., a wholesale and retail grocery business in Albany, New York, employed 49 warehousemen, 43 of whom signed authorization cards designating Local 294 of the Teamsters as their bargaining representative.\(^7\)

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3. 517 F.2d 33 (2d Cir. 1975).
4. 515 F.2d 1185 (5th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3428 (U.S. Jan. 14, 1976) (No. 75-1000). It is interesting to note that although both cases discuss similar issues, Pilot Freight makes no mention of the earlier Second Circuit decision in Trading Port.
5. Id. at 1194.
6. In Trading Port, the employer had complied with the administrative law judge's decision ordering reinstatement; therefore, that interim remedy was not at issue before the appeals court. 517 F.2d at 35 n.1. In Pilot Freight, the court based its refusal to consider the reinstatement issue on the Board's 3-month delay in petitioning for relief. 515 F.2d at 1193. For a discussion of the difference between prohibitory and mandatory injunctions and their effects, see Boire v. Pilot Freight Carriers, Inc., 86 L.R.R.M. 2976 (M.D. Fla. 1974). The issue of whether a higher burden of proof may be necessary to justify a mandatory injunction is discussed in Roth, Injunctive Relief and the NLRB, 43 St. John's L. Rev. 353, 388-89 (1969).
7. The administrative law judge found 42 cards to be valid expressions of majority support. He found that one had been obtained through improper inducements. 517 F.2d at 35 n.2. For a discussion of the Board's rule concerning the validity of cards, see Cumberland Shoe Corp., 144 N.L.R.B. 1268 (1963), enforced, 351 F.2d 917 (6th
After the president of Trading Port refused either to recognize the union or to allow a neutral third party to verify the union's majority, the warehousemen voted to strike. When they returned to work 20 days later, they were issued lay-off slips. Ten employees were subsequently rehired; 11 had returned to work during the strike, and 20 were permanently laid off. An NLRB election held after the strike produced only three votes for the union, whereupon the union filed objections to the election and charges of unfair labor practices allegedly occurring before, during and after the strike. While the hearing on the charges was in progress before an administrative law judge, the regional director petitioned the United States District Court for the Northern District of New York, under section 10(j), for an order enjoining Trading Port from engaging in conduct in violation of sections 8(a)(1), 8(a)(3) and 8(a)(5) of the NLRA, and directing the company to reinstate certain employees and to recognize and bargain with the union pending final disposition of the unfair labor practice charges.

The district court, finding reasonable cause to believe that Trading Port had committed section 8(a)(1) and 8(a)(3) violations, enjoined the employer from further violations of the employees' section 7 rights. The

Cir. 1965). The *Cumberland Shoe* doctrine was approved in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), in which the court reiterated the rule that if the card itself is unambiguous (i.e., states on its face that the signer authorizes the Union to represent the employee for collective bargaining purposes and not to seek an election), it will be counted unless it is proved that the employee was told that the card was to be used solely for the purpose of obtaining an election.

*Id.* at 584.

8. Unfair labor practices by employers are enumerated in 29 U.S.C. § 158(a) (1970), which provides in pertinent part:

> It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.


> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .
court refused, however, to issue a bargaining order because of the lack of a previous bargaining relationship.\footnote{11}

The Second Circuit agreed that there was reasonable cause to order injunctive relief but ruled further that such relief could also include a bargaining order. Relying on the landmark Supreme Court opinion in \textit{NLRB v. Gissel Packing Co.},\footnote{12} which upheld the use of a final bargaining order when a union claimed only a card majority and when the employer had committed unfair labor practices deemed substantial enough to impair the election process, the court in \textit{Trading Port} held that a cease and desist order as the sole interim relief would be insufficient, stating that “[o]nly if the district courts may issue interim bargaining orders can the union’s viability be maintained to the degree necessary to make final Board adjudication in the form of an election or a bargaining order meaningful.”\footnote{13}

While the lower court was reluctant to create a new relationship, the appeals court was concerned about “preserving or restoring the status quo as it existed before the onset of unfair labor practices.”\footnote{14} The Second Circuit considered such an order to be a necessary use of the district court’s power to “prevent irreparable harm to the union’s position in the plant, to the adjudicatory machinery of the NLRB, and to the policy of the Act . . . .”\footnote{18} In this instance, the case was remanded for a determination of whether the unfair labor practices were so serious as to warrant the issuance of a

\footnote{11. 88 L.R.R.M. 3293 (N.D.N.Y. 1973). The court agreed with the holding of Fuchs v. Steel-Fab, Inc., 356 F. Supp. 385 (D. Mass. 1974), that “petitioner . . . seeks to create a collective bargaining relation through an injunction. The set of rights and duties imposed does not exist and cannot be determined to have existed until the Board resolves the case.” \textit{Id.} at 387. The Board’s determination in \textit{Steel-Fab, Inc.}, 216 N.L.R.B. No. 25, 86 L.R.R.M. 1474 (1974), that a final bargaining order applies only as of the date of the Board’s unfair labor practices adjudication, was overruled in \textit{Trading Port, Inc.}, 219 N.L.R.B. No. 76, 89 L.R.R.M. 1565 (1975), in which the Board dated the obligation to bargain from the commencement of the unfair labor practices by the employer. \textit{See} pp. 443-44 infra.
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\footnote{13. 517 F.2d at 38. To show congressional support for this interpretation of section 10(j), the opinion also cited \textit{S. Rep. No. 105, 80th Cong., 1st Sess.} (1947), which noted that the relatively slow procedure of Board hearing and order . . . falls short of achieving the desired objectives . . . . Hence we have provided that the Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief . . . . \textit{Id.} at 8.
}

\footnote{14. 517 F.2d at 38 (emphasis in original). The court distinguished the status quo which should be protected by section 10(j) from what it termed “the illegal status quo which has come into being as a result of the unfair labor practices being litigated.” \textit{Id.}
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\footnote{15. \textit{Id.} at 39.
}
bargaining order.\footnote{Id. at 40. In a footnote, the court instructed the district court to consider the findings of the administrative law judge, which were not available at the time of the first trial. \textit{Id.} n.11.}

Less than two months later, the Fifth Circuit decided the issue quite differently in \textit{Pilot Freight}. After years of litigation, the Interstate Commerce Commission in 1970 gave Pilot Freight Carriers an extension of its freight operations into Florida. Pilot opened four Florida terminals, which it operated with approximately 140 nonsupervisory personnel. These Florida employees were not employed directly by Pilot but consisted of owner-operator truck drivers and dockworkers employed by independent labor contractors. Since 1964, Pilot had been a party to the National Master Freight Agreement (NMFA),\footnote{The NMFA is a collective bargaining contract periodically negotiated and renewed by the Teamsters Union and a multi-employer association of which Pilot is a member. At the time of this action, approximately 1,800 Pilot employees were covered by the NMFA. See Boire v. International Bhd. of Teamsters, 479 F.2d 778, 782-86 (5th Cir. 1973), for a more complete treatment of the factual setting of this case.} and all but one of its terminals outside Florida were represented by the Teamsters Union. When, after substantial arbitration under the NMFA and investigation by the NLRB, the Board decided in early 1974 that the Florida operation was not an accretion to the preexisting bargaining unit covered by the agreement,\footnote{Pilot Freight Carriers, Inc., 208 N.L.R.B. No. 138, 85 L.R.R.M. 1179 (1974).} immediate organizing activity by the Teamsters followed with equally swift responses by Pilot and its dock contractor, BBR of Florida, Inc. By mid-February the union claimed majority support as evidenced by signed authorization cards, but Pilot refused to recognize the Teamsters as the collective bargaining representative.

The union then filed unfair labor practice charges and the Board petitioned the district court, under section 10(j), to enjoin Pilot and BBR from future conduct in violation of the Act, for reinstatement of two employees allegedly discharged for union activity, and for a temporary bargaining order. The district court found,\footnote{86 L.R.R.M. 2976 (M.D. Fla. 1974).} and the appeals court agreed,\footnote{515 F.2d at 1191.} that there was reasonable cause to believe that Pilot and BBR had committed violations of sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act;\footnote{These sections are quoted in note 8 supra.} both courts, however, limited relief to a prohibitory injunction. Consistent with its position in \textit{Boire v. International Brotherhood of Teamsters},\footnote{479 F.2d 778, 789-92 (5th Cir. 1973) (when legal theories are substantial, even if "untested" or "novel", injunction should be granted when necessary to preserve the Board's jurisdiction).} in which it upheld the district court in issuing a 10(j) injunction to enjoin union
recognitional activity which had occurred before the accretion issue and unfair labor practice charges had been decided by the NLRB, the Fifth Circuit showed its concern for protecting the Board’s "powers and prerogatives." Since the parties had never entered into a formal bargaining relationship, the Pilot Freight court held that the status quo which should be preserved pending a final decision "is the last uncontested status which preceded the pending controversy." Two underlying issues emerge from these cases regarding interim bargaining orders: (1) at what point the status quo that section 10(j) is designed to protect arises, and (2) the proper role of the courts when asked by the Board to issue a temporary injunction. This article will focus on these issues as they relate to the history of labor injunctions and current Board policy.

I. THE LABOR INJUNCTION: AN EXTRAORDINARY REMEDY

As a result of the early abusive use of labor injunctions, Congress significantly restricted the federal courts' jurisdiction to grant such relief in the Norris-LaGuardia Act. Ex parte injunctions were outlawed except as emergency temporary procedures, and most activities growing out of a labor dispute were protected from any injunctive action. The view of injunctions as extraordinary remedies has remained a powerful force against their overuse.

When Congress moved to reintroduce the injunction as interim relief in sections 10(j) and 10(l) of the Taft-Hartley Amendments, the proposal

23. 515 F.2d at 1192. The court agreed with the district court that mandatory injunctive relief would have the effect of short-circuiting the NLRB's processes.
24. Id. at 1194, quoting Minnesota Mining & Mfg. Co. v. Meter, 385 F.2d 265, 273 (8th Cir. 1967).
26. The extraordinary remedy of injunction should not and cannot become the ordinary remedy in unfair labor practice cases. Congress delegated to the five-man National Labor Relations Board sitting in Washington, and not to the district courts, the duty to give an expert and experienced content and direction to the National Labor Relations Act.
27. 29 U.S.C. § 160(l) (1970) provides that on a finding that certain specified unfair labor practices have occurred, a mandatory filing for injunctive relief will follow. Because it is mandatory and has priority over other procedures, in order to expedite relief section 10(l) has been used much more frequently than section 10(j). See The Role of the Temporary Injunction in Reforming Labor Law Administration, 8 COLUM. J. LAW & SOC. PROB. 553, 563-66 (1972), for a comparison of 10(j) and 10(l) use in fiscal
provoked some controversy and rekindled old fears. Opponents of the amendments argued that to allow this remedy would be to transfer decision-making from the NLRB to the courts, and that a better solution would be to expedite Board procedures. 28 Congress believed, however, that such measures were called for because of the relatively slow hearing procedures of the Board, and because dangers inherent in large-scale use of injunctions would be obviated by the fact that only the Board, "acting in the public interest and not in vindication of purely private rights, may seek injunctive relief . . . ." 29 Congress, in the end, imposed no limitations on the Board's discretion to seek temporary injunctions when the Board perceived a need for such relief. 30

The Board was slow to use its new powers under section 10(j) and, although its use has steadily increased, 31 there has been a continuing realization of the need for injunctive relief to ensure compliance with the purposes of the Act pending final determinations of charges before the Board. The procedure of Board litigation is a lengthy one. From the filing of unfair labor practice charges to the Board's final order and ultimate enforcement by an appeals court, if necessary, may take years, during which time the original relationships may have changed radically. 32 Judge Friendly's comment in 1961 is still timely:

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year 1970. The courts have held that the same standards should apply in deciding whether to grant 10(j) and 10(l) relief. Danielson v. Joint Bd. of Coat, Suit & Allied Garment Workers, 494 F.2d 1230, 1242 (2d Cir. 1974).

28. S. REP. No. 105, 80th Cong., 1st Sess. pt. 2 (1947) (minority report) ("the clear result would be to throw a decision of the merits of such cases into the Federal district courts and thus to oust the Board of jurisdiction, since it is not to be supposed that district courts could act without some inquiry into the merits of the dispute . . . ." Id. at 18-19). The Fifth Circuit agreed with this argument. See 515 F.2d at 1193-94.


31. Between 1948 and 1961, 47 10(j) petitions were filed, and of these only 11 were against employers. Between 1961 and 1970, 150 10(j) petitions were filed and 77 were granted. The Role of the Temporary Injunction, supra note 27, at 564 n.97, 566 table 3. See Siegel, Section 10(j) of the National Labor Relations Act: Suggested Reforms for an Expanded Use, 13 B.C. IND. & COM. L. REV. 457, 461 (1972). In fiscal year 1975, there were 21 10(j) petitions filed, with 6 granted and 5 pending at the end of the year. 40 N.L.R.B. ANN. REP. 34 (1975). See also McCulloch, supra note 26, at 95-100, in which the then chairman of the NLRB promised a more extensive use of section 10(j) by the Board.

32. See P. Ross, THE GOVERNMENT AS A SOURCE OF UNION POWER: THE ROLE OF PUBLIC POLICY IN COLLECTIVE BARGAINING 170-72 (1965). Mr. Ross cites one case in which seven years elapsed between the time the enforcement decree was entered and the time the employer was adjudged in contempt. Id. at 171.
The one and a half years it takes the National Labor Relations Board to reach a decision . . . means that, apart from the cases being conducted under the shelter of a preliminary injunction, the ultimate decision almost never makes any practical difference to the labor relations between the parties.\textsuperscript{33}

A variety of factors explain the reluctance of the Board and the courts to make greater use of section 10(j). The procedure for obtaining an injunction is somewhat cumbersome: the original decision to seek section 10(j) relief must be made by the NLRB in Washington, D.C., while subsequent filing and litigation is conducted at the regional office level.\textsuperscript{34} Once filed, however, the procedure has priority over other litigation, and since hearings often proceed on the basis of affidavits, it can be disposed of expeditiously.\textsuperscript{35}

A more serious problem has been the lack of clear standards to test the necessity for relief. The statute speaks only of granting such relief as the court "deems just and proper" after Board issuance of an unfair labor practice complaint.\textsuperscript{36} Each court has decided on a case by case basis the question of what constitutes a "just and proper" remedy.\textsuperscript{37} Most are in

\begin{quote}

\[ \text{[w]hen the company is finally ordered to bargain with the union some years later, the union may find that it represents only a small fraction of the employees. . . . Thus the employer may reap a second benefit from his original refusal to comply with the law: he may continue to enjoy lower labor expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively.} \]

\textit{Id.} at 1249.

\textsuperscript{34} See \textit{AMERICAN BAR ASSOCIATION, THE DEVELOPING LABOR LAW} 850 (C. Morris ed. 1971).

\textsuperscript{35} See Roth, \textit{supra} note 6, at 358-61. In fiscal year 1970, the average time to process a 10(j) petition in the General Counsel's office was 11 days. Siegel, \textit{supra} note 31, at 460 n.23. For the internal procedures of the Board regarding section 10(j), see \textit{id.} at 458-63.


\textsuperscript{37} See, e.g., Minnesota Mining & Mfg. Co. v. Meter, 385 F.2d 265 (8th Cir. 1967), and cases cited therein. Reversing the grant of a 10(j) injunction, the court said:

\[ \text{[The courts] have resolved the question of the propriety of injunctive relief on the basis of the facts and circumstances peculiar to each case. While some courts have used language which, considered out of context, would indicate that a finding of "reasonable cause" alone is sufficient to grant injunctive relief, the force of such expressions is diminished when considered in light of the circumstances of the case . . . .} \]

\textit{Id.} at 270.
agreement that relief should be granted if the purposes of the Act will be frustrated without it.\textsuperscript{38} As can be seen from Trading Port and Pilot Freight, however, even when two courts decide to make preservation of the status quo a major component of that test, their perspectives, and thus their remedies, can vary greatly.\textsuperscript{39} Moreover, courts have generally been reluctant to intrude on the Board's statutory duty of investigation and adjudication. Quoting Board Chairman McCulloch's assertion that this power must be exercised "not as a broad sword, but as a scalpel, ever mindful of the dangers inherent in conducting labor management relations by way of injunction,"\textsuperscript{40} the court in \textit{McLeod v. General Electric Co.}\textsuperscript{41} held that without proof of an overwhelming need for an injunction, the Board would be abdicating its administrative duty to ask the courts to make interim decisions based on inadequate knowledge of the facts. A major problem with the use of injunctions is the lack of certainty as to their effectiveness. As was noted in a classic pre-NLRA treatise, "the injunction cannot preserve the so-called status quo; the situation does not remain in equilibrium awaiting judgment upon full knowledge."\textsuperscript{42}

All of these criticisms become more significant when the injunctive relief requested is not simply a cease and desist order but also contains some mandatory aspect, such as a bargaining order. There is strong concern that an interim bargaining order might so change the relationship of the parties

\textsuperscript{38} See, e.g., Wilson v. Milk Drivers & Dairy Employees Union, 491 F.2d 200 (8th Cir. 1974) ("The propriety of injunctive relief does not depend upon traditional equitable principles, but whether it is necessary to effectuate policy as announced by Congress." \textit{Id.} at 203); UAW v. NLRB (Ex-Cell-O Corp.), 449 F.2d 1046 (D.C. Cir. 1971) ("Enforcement of the employer's obligation to bargain is crucial for implementation of the policies of the Act, and the usually strict standards for equitable relief in private actions do not apply when these important public purposes are threatened." \textit{Id.} at 1051); Minnesota Mining & Mfg. Co. v. Meter, 385 F.2d 265, 270 (8th Cir. 1967) (district court should be able to conclude with reasonable probability from the circumstances of each case that the remedial purpose of the Act would be frustrated unless immediate action is taken); Angle v. Sacks, 382 F.2d 655 (10th Cir. 1967) (injunctive relief is necessary when there is "a reasonable apprehension that the efficacy of the Board's final order may be nullified, or the administrative procedures will be rendered meaningless . . . ." \textit{Id.} at 660.)

\textsuperscript{39} See 517 F.2d at 40; 515 F.2d at 1194.

\textsuperscript{40} Statement of Frank W. McCulloch, Chairman, NLRB, before the Eighth Annual Joint Industrial Relations Conference, Michigan State University, April 19, 1962, \textit{quoted in} \textit{McLeod v. General Electric Co.}, 366 F.2d 847, 849-50 (2d Cir. 1966).


\textsuperscript{42} F. FRANKFURTER & N. GREENE, \textsc{The Labor Injunction} 201 (1930). This was noted in a discussion of the effects of injunctions on unions, but the authors stated: "Judicial error is too costly to either side of a labor dispute to permit perfunctory determination of the crucial issues; even in the first instance, it must be searching." \textit{Id.}
that even in the event of a Board ruling adverse to the union, its new strength might be a fait accompli. Thus, it is argued, a judicial determination, based on unclear standards, would replace the statutorily mandated Board procedures. Conversely, it has been noted that an employer determined to resist his bargaining obligations will find ways to continue to evade these responsibilities despite a bargaining order. Detailed studies by Philip Ross of section 8(a)(5) violations and their aftermath vividly illustrate the correlation between the passage of time pending a final decision and the survival of preexisting relationships: statistically, the "longer the litigation the less likely was the prospect of the signing of a first contract." Yet Ross doubts that forced bargaining under an injunctive order would result in a fundamental change in an employer's behavior; he calls instead for a change in the Board's procedures and compliance standards.

When the case involves a union that has not had a previous bargaining relationship with the employer, these traditional objections to mandatory injunctive relief are magnified. In fact, the validity of issuing a bargaining order in such situations was in doubt until the Supreme Court's decision in NLRB v. Gissel Packing Co. Gissel held that a bargaining order could be part of the Board's final remedy when a union had only a card majority and had not been certified following a secret election if traditional remedies would be unlikely to overcome the effects of the employer's past practices. The Court reasoned that the Board may employ a bargaining order to protect the employees' sentiment as previously ascertained through authorization cards but distorted as a consequence of the employer's illegal actions. Although the Court stressed that certification by an NLRB election is the preferred route to establish the status of bargaining representative, it noted that Congress specifically did not withdraw from the Board the authority to order an employer to bargain on the basis of a card majority. The Court's

43. See Boire v. International Bhd. of Teamsters, 479 F.2d 778, 788 (5th Cir. 1973); Boire v. Pilot Freight Carriers, Inc., 86 L.R.R.M. 2976, 2980-81 (M.D. Fla. 1974). Significantly, at the time when the district court must decide whether or not to grant the injunction, the findings of the administrative law judge are rarely available.

44. P. Ross, The Labor Law In Action: An Analysis of the Administrative Process Under the Taft-Hartley Act 6 (Report to NLRB, Sept. 1966). About two-thirds of the cases closed before issuance of complaints resulted in execution of first contracts, but less than 36 percent of the cases closed after circuit court enforcement ended with agreements. Id.

45. Id. at 31-32. Ross hypothesized from records which show that unions receiving consent decrees did not sign more contracts than were obtained by other unions after prolonged litigation. See also P. Ross, supra note 32, at 200-03.


47. Id. at 595-600. The employers had argued that the 1947 Taft-Hartley Amendments had eliminated the use of cards to determine a majority for representation
concern in *Gissel* was to avoid "rewarding the employer and allowing him to profit from [his] own wrongful refusal to bargain."48

II. **Unanswered Questions and Some Policy Changes**

Since *Gissel* was decided, the courts have been wrestling with its impact and limits. The Supreme Court, in *Linden Lumber Division, Summer & Co. v. NLRB*,49 further refined *Gissel* by stating that when a union has a card majority, but the employer has not engaged in unfair labor practices substantial enough to impair the electoral process, the employer need not recognize the union until it is duly certified in an election. If an employer unilaterally undertakes to conduct a poll to determine whether a union has majority status, however, the Board has found a duty to bargain when that poll indicates majority support, although *Linden* may ultimately affect this policy.50 The lower courts have liberally issued interim bargaining orders when preestablished bargaining positions were being eroded by unfair labor practices,51 but when the union's representative status is not established, there has been no clear-cut policy. In two recent cases, district courts based their refusal to issue interim bargaining orders on the necessity of proceeding through nor-

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48. Id. at 610. The Court feared that the employer's ability to delay bargaining during litigation would, in the end, destroy the ability to hold a fair election. In support of this, the Court cited Board records which show that in the period between January and June 1968, the median time between the filing of an unfair labor practice charge and Board disposition of a contested case was 388 days. Id. at 611.

49. 419 U.S. 301 (1974). *Linden* involved two cases in which employers, who were not charged with unfair labor practices independent of a refusal to bargain, refused to recognize the unions' claimed majority status which was expressed through signed authorization cards.

50. See Sullivan Elec. Co., 199 N.L.R.B. 809 (1972), *enforced*, 479 F.2d 1270 (6th Cir. 1973), in which the employer's voluntary polling was held to imply an agreement to abide by the results. See also Green Briar Nursing Home, Inc., 201 N.L.R.B. 503 (1973). The future of this policy is in doubt after *Linden*, which specifically reserved decision on the effect of its holding on the situation presented in Snow & Sons, 134 N.L.R.B. 709 (1961), *enforced*, 308 F.2d 687 (9th Cir. 1962), which held that a duty to bargain arises when an employer has broken an agreement to abide by third party authentication of an apparent card majority. 419 U.S. at 310 n.10.

mal Board channels, on the determination that interim orders should not establish bargaining rights for uncertified unions, and on the delay involved before filing for the relief.\(^{52}\) In two other cases, interim orders were granted on the basis of card strength; both courts cited potential frustration of the purposes of the Act as the reason for the orders.\(^{53}\)

The importance placed by the Board on the remedial effects of bargaining orders in *Gissel* situations is reflected in a recent policy change. In 1974 the NLRB decided in *Steel-Fab, Inc.*\(^ {54}\) that a final bargaining order should apply only as of the date of the Board’s adjudication of the employer’s unfair labor practices conduct. Despite a strong dissent that this policy “would allow the Respondent to escape with the fruits of its unlawful behavior”\(^ {55}\) if the order were not made retroactive to the date of illegal conduct, the majority spoke of “a bargaining obligation which has no discernible existence until our decision reveals that we have found it necessary to impose the obligation as a remedy . . . .”\(^ {56}\) In the first case decided under this policy, the employer shut down a plant after an administrative law judge found substantial unfair labor practice violations but before the Board’s final decision, which included a prospective bargaining order that was totally meaningless at that time.\(^ {57}\) The Board’s decision in *Trading Port, Inc.*\(^ {58}\) effectively overruled *Steel-Fab*. Noting that an employer’s unilateral acts before final adjudication were left unremedied by a prospective order, the

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53. Smith v. Old Angus, Inc., 82 L.R.R.M. 2930 (D. Md. 1973); Henderson v. Gibbons & Reid Co., 53 CCH LAB. CAS. ¶ 11,081 (D.N. Mex. 1966) (pre-*Gissel* decision). The General Counsel of the NLRB has gone even further in a *Gissel* situation by requesting a final bargaining order when, although the union had not obtained majority status, “its failure to do so was considered directly attributable to the employer’s unfair labor practices . . . .” *Report on Case-Handling Developments at NLRB*, 90 LAB. REL. REP. 1, 12 (Sept. 1, 1975).


55. 86 L.R.R.M. at 1483. (Jenkins, Member, concurring in part & dissenting in part).

56. *Id.* at 1476.

57. Elm Hill Meats, 213 N.L.R.B. No. 100, 87 L.R.R.M. 1227 (1974). The employer, knowing that he had no duty to bargain over a decision to shut down his plant if made for nondiscriminatory economic reasons, closed the operation two weeks after the complaint was issued. By moving so quickly he avoided, because of the *Steel-Fab* rule, what would have been mandatory bargaining over the effects of the shutdown on the employees. *See*, e.g., Summit Tooling Co., 195 N.L.R.B. 479 (1972). In their dissent in *Elm Hill*, Members Fanning and Jenkins observed that “the employer is left free to engage in any sort of unilateral conduct to defeat the Union prior to issuance of the Board’s decision, including the elimination of all of its employees’ jobs by transferring the work to another plant.” 213 N.L.R.B. at 1230-31.

board ruled that an obligation to bargain "should commence as of the time the employer has embarked on a clear course of unlawful conduct or has engaged in sufficient unfair labor practices to undermine the union's majority status." Only by so doing could the order, in the spirit of *Gissel*, "re-establish the conditions as they existed before the employer's unlawful campaign."

### III. 10(j) Bargaining Orders: The Next Step?

The importance of *Trading Port* and *Pilot Freight* and the necessity of reaching a consistent policy to aid both the district courts and the Board is evident. The *Pilot Freight* Court, expressing concern about legitimizing a relationship that may never have existed and about unwisely injecting the courts into labor disputes, would hold the line at *Gissel*. Recognizing that ultimately the Board might issue a *Gissel*-type bargaining order as a final remedy, the court also noted the possibility of a *Linden* situation, in which a duty to bargain would not arise until after an election had been won by the union. Weighing the possible harm to the parties under each alternative, the Fifth Circuit decided that the union would not be sufficiently harmed by a continuation of its nonbargaining status to necessitate such judicial intervention. *Trading Port*, on the other hand, would extend *Gissel*'s final relief to interim situations, continuing the steady increase of section 10(j) use to reduce an employer's ability to dissipate union strength pending final Board action. Discussing the underlying rationale in *Gissel*, the court in *Trading Port* intimated that if the courts cannot issue interim bargaining orders, a final order to bargain in a *Gissel* situation might prove meaningless. By the

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59. 89 L.R.R.M. at 1569.
60. *Id., quoting NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969). A recent decision with serious implications for the policy of applying interim relief retroactively is *Eisenberg v. Hartz Mountain Corp.*, 89 L.R.R.M. 2705 (3d Cir. 1975), in which district courts in the Third Circuit were ordered to limit section 10(j) injunctions to six months, renewable for an additional six months after the findings and recommendations of the administrative law judge are entered. Hoping to engender a sense of urgency into the Board proceedings, the court noted that "otherwise, a temporary injunction, entered without reaching the ultimate merits of a dispute may become, in effect, a final disposition of the controversy." *Id.* at 2709. How much bargaining would go on under a 6-month injunction is a matter of speculation.
61. *See note 49* *supra*.
62. 515 F.2d at 1194. The message relayed by the appeals court to district courts in the Fifth Circuit is somewhat ambiguous. While consistently talking in terms of reviewing the district court's opinion for abuse of discretion in issuing or denying section 10(j) injunctions, *id.* at 1192-93, the court appears to be holding that an interim bargaining order should *never* issue when there is a nonincumbent union, *see id.* at 1194, thus preserving little area for district court discretion in this matter.
time the Board finally issues a bargaining order, the unfair labor practices in the long period since the union initially asked for recognition may have so undercut the union's strength that "effective representation is no longer possible."\textsuperscript{63}

The standards used by the two courts to ascertain the necessity for injunctive relief are not markedly different. Both would use section 10(j) to prevent frustration of the purposes of the Act and both see the preservation of the status quo as the major consideration in effectuating that policy. But the two decisions look to different relationships for the key to that status quo. \textit{Pilot Freight} would only impose a duty to bargain when there was a preexisting bargaining relationship between the employer and the union. With a nonincumbent union, an interim bargaining order would, in the Fifth Circuit's view, create this relationship "by judicial fiat."\textsuperscript{64} \textit{Trading Port} is concerned with another relationship, that between the employees and the union. Finding this to be a fragile alliance, the Second Circuit based its view of the status quo on the support once given by a majority of employees, now endangered by employer actions deemed by the General Counsel and by the district court of sufficient probability to allow a 10(j) cease and desist order.

That a majority of the employees had signed authorization cards in each case is not in dispute. It is the significance of that majority vote that is questioned. Authorization cards have been criticized as unreliable indicators of majority sentiment due to, among other factors, the confusion caused by ambiguous cards, the possibility of misrepresentation by union organizers, and the inability of the employer to present his side of the argument before the employee signs.\textsuperscript{65} But in these cases there were no charges of misrepresentation, ambiguity or coercion. \textit{Gissel} recognized that authorization cards are less reliable than elections, yet unequivocally stated that as long as the cards adhered to the standards of the \textit{Cumberland Shoe} doctrine\textsuperscript{66} "employees should be bound by the clear language of what they sign . . . ."\textsuperscript{67}

Clearly, the Second Circuit's view of the status quo as one that would preserve the employees' expression of support for collective bargaining, however susceptible to future change, is more in keeping with the legislative

\textsuperscript{63} 517 F.2d at 38.

\textsuperscript{64} 515 F.2d at 1194.


\textsuperscript{66} See note 7 supra.

\textsuperscript{67} 395 U.S. at 606.
purpose behind section 10(j) and the Court's holding in *Gissel* than is the Fifth Circuit's reliance on previous recognition as the touchstone for a bargaining order. Since both courts found reasonable cause to believe that employer unfair labor practices existed, and since the NLRB had authorized the General Counsel to seek 10(j) relief, the probability was great that a final *Gissel* bargaining order would issue automatically, thus legitimizing the bargaining relationship. At that point, the importance of having maintained the previous union-employee relationship so as to have a meaningful union-employer relationship is obvious.

There is no question that the *Pilot Freight* approach requires far less judicial interference with Board functions, but whether this protects the Board's "powers and prerogatives" is questionable. One must remember, first, that it was the Board that requested the injunctive relief. It is ironic that, in the name of maintaining orderly Board procedures, the court found it necessary to deny the very relief requested. Secondly, if the Board ultimately decides that the employer is guilty of unfair labor practices and includes a *Gissel* bargaining order in the remedy, the absence of an interim order may prove to have impeded rather than to have preserved Board procedures. The short-lived Steel-Fab rule demonstrated that a *Gissel* final remedy is often ineffective unless applied retroactively; it seems clear that an interim bargaining order would be a valuable mechanism for assuring union stability and averting unilateral actions by the employer pending the final decision and order. The court in *Trading Port*, which agreed with *Gissel* that without a bargaining order there can be no effective remedy against an employer who has already been able to defeat a union in an election by pervasive unfair labor practices, lamented that in such a situation, "the Board's adjudicatory machinery may well be rendered totally ineffective." Thus, by action or by inaction when asked for interim relief, the courts may play a decisive role in the outcome.

IV. CONCLUSION

When there is reasonable cause to believe that an employer has committed unfair labor practices serious enough to preclude a fair election, interim bargaining orders should be issued on the basis of authorization card evidence of majority support. Taking into account the fact that a card majority is less reliable as an indicator of employee sentiment than a secret ballot, and understanding that employer recalcitrance can defeat the purpose

69. 517 F.2d at 38.
of any bargaining order, especially one of limited duration, the Trading Port remedy is nevertheless the one that best complies with Gissel and with the legislative aims of section 10(j).

In the event that the charges against the employer are dismissed, the interim bargaining order would cease and the parties would return to their prebargaining status. If, as is more likely, the final decision is in the union's favor, a final remedy will have little relevance unless the union's previous strength has been maintained. It would be a pyrrhic victory indeed if a union that won an unfair labor practice decision had lost its membership in the interim.

Barbara B. Franklin


Although "[t]here is no federal general common law," there is a power in the federal courts to find the implication of a private right of action when Congress has enacted legislation without authorizing specific civil remedies. This power plainly goes beyond statutory authority, since a showing of congressional intent to create a right of action is not always necessary. In


4. [In situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show [a congressional] intention
this sense, an implied action is the creation of a common law court, albeit a federal court. Recently, in *Cort v. Ash*, the Supreme Court considered whether a derivative action for damages could be implied from a criminal provision of the Federal Election Campaign Act prohibiting corporate expenditures in connection with federal elections. In resolving the question, the Court introduced a reformulated standard for the doctrine of implication which for the first time emphasized that the doctrine is, in part, a matter of federal common law and subject to one of its limitations—the "enclave" of traditional state concerns.

The case arose as a result of a print advertisement which appeared in national magazines just prior to the 1972 presidential election. Paid for by the Bethlehem Steel Corporation, the ad carried a headline which read: "I say let's keep the campaign honest. Mobilize 'truth squads' . . . ." The acknowledged source of the quote was Bethlehem's board chairman, Stewart Cort. The body copy of the ad mentioned the name of no political party or candidate, but it did attack a statement made by an unnamed candidate critical of large corporations. Richard A. Ash, a stockholder, on his own behalf and derivatively sought an injunction and damages, alleging that

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7. 18 U.S.C. § 610 (1970), as amended, 18 U.S.C.A. § 610 (Supp. Feb. 1975). The pertinent portion of this provision states that it "is unlawful . . . for any corporation whatever . . . to make a contribution or expenditure in connection with any election at which Presidential and Vice-Presidential electors . . . are to be voted for . . . ."

For a discussion of the legislative purpose of this provision, see 2 U.S. CODE CONG. & Ad. News 1773 (1972); United States v. UAW, 352 U.S. 567 (1957).

8. The Court poke of intruding "into an area traditionally relegated to state law." 422 U.S. at 78. The concept of an enclave of state concerns is one manner of phrasing the extent of federal common law authority. Compare Clearfield Trust Co. v. United States, 318 U.S. 363 (1943), with Bank of America Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29 (1956). For a discussion of the concept of the state enclave as a restriction on federal court common law power in diversity cases, see Ely, *supra* note 2, at 700-06.


10. Ash sought a preliminary injunction about a month before the election; the Court denied the request. Ash v. Cort, 350 F. Supp. 227, 232 (1972). The appeals court affirmed the denial of the preliminary injunction, Ash v. Cort, 471 F.2d 811, 812 (3d Cir. 1973), and the case returned to the lower court for a final hearing on the permanent relief which the plaintiff sought in the status of citizen, voter and corporate shareholder.
the corporation through the actions of its directors had violated section 610 of the Federal Election Campaign Act. The district judge granted summary judgment for the defendants on the initial ground that the plaintiff had no private right of action under the statute. On appeal, the United States Court of Appeals for the Third Circuit reversed, taking the position that unless Congress clearly indicates an intent to deny a cause of action, the possible effectuation of legislative policies underlying the statute is sufficient reason to imply one. Judge Aldisert dissented, arguing that a right of action was dependent for its existence on certain ascertainable showings of congressional intent. The Supreme Court granted certiorari and unanimously reversed the decision of the appeals court, holding that as a stockholder Ash had no federal cause of action for derivative damages under section 610.

The outcome of Cort depended upon the Court's resolution of two preliminary questions: first, whether the implication of a private remedy would aid the main purpose of section 610, and second, whether the implication of a federal right of action would intrude into an area traditionally committed to state law.

I. AN EXERCISE OF FEDERAL JUDICIAL POWER

The doctrine of implication of private actions was first announced in 1916 in Texas & Pacific Railroad v. Rigsby. The standard established was one which closely paralleled the common law tort rule that violation of a criminal statute raises some degree of presumption of negligence. Justice Pitney stated that "[a] disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in

Of these, only the claim for derivative damages was treated by the Supreme Court on the question of implication. 422 U.S. at 77.

13. Id. at 426 (Aldisert, J., dissenting).
14. 422 U.S. at 84-85. The Court expressly reserved the question of whether there exists a private right of action for injunctive relief, since it determined that a 1974 amendment to the Federal Election Campaign Act, 18 U.S.C.A. § 610 (Supp. Feb. 1975), had intervened to relegate Ash's request for prospective relief to newly created administrative procedures, at least in the first instance. 422 U.S. at 76-78 & nn.9 & 10.
16. See James, Statutory Standards and Negligence in Accident Cases, 11 LA. L. REV. 95 (1951); Lowndes, Civil Liability Created by Criminal Legislation, 16 MINN. L. REV. 361 (1932); Morris, The Relation of Criminal Statutes to Tort Liability, 46 HARV. L. REV. 453 (1933).
default is implied . . . ."¹⁷ The broadest reading of this language, however, would "suggest that for every written volume of Title 18 of the United States Code there is an unwritten volume of Title 28,"¹⁸ that is, that each federal criminal statute is accompanied by an implied authorization for a civil remedy. The necessity of narrowing the test forced the courts to seek out qualifications that would restrict the spread of implication.¹⁹ This trend was reflected in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*²⁰ and *T.I.M.E. Inc. v. United States,*²¹ cases in which the Supreme Court declared rules of statutory construction permitting courts to deny implied actions when other evidence of congressional intent to withhold such actions may otherwise have been insufficient.²²

This presumption of congressional intent to withhold private actions, however, was expanded by some judicial opinions which restricted the doctrine of implication to situations in which there was manifest an "intent to create a private right of action by implication,"²³ placing upon the prospective plaintiff the burden of showing that Congress had intended to do what it did not do.²⁴ This approach makes congressional intent the central concern of the implication doctrine, relying upon principles which go to the heart of federal judicial power.²⁵

17. 241 U.S. at 39. The *Rigsby* standard emerged from an area of common law that would seem to be a most obvious instance of a "general" common law. See 241 U.S. at 39. The emphasis is not upon the statute, but upon the wrong committed despite the statutory prohibition, so that one federal court could say, even after *Erie*, that the "disregard of the command of a statute is a wrongful act and a tort." *Kardon v. National Gypsum Co.*, 69 F. Supp. 512, 513 (E.D. Pa. 1946).

18. 496 F.2d at 429 (Aldisert, J., dissenting).

19. See Comment, supra note 3, at 1394-95.

20. 341 U.S. 246 (1951). The Court held that initial entrustment to an administrative agency of prospective enforcement of a statute removes from the courts an ability to imply an action for retroactive relief.

21. 359 U.S. 464 (1959). The Court held that implication is not available when a statute is divided in parts, each governing the same basic conduct, and express private remedies are available in the parts other than the one in question.

22. In *Cort*, however, the Supreme Court qualified the holding of *T.I.M.E.*, emphasizing that the legislative history supported the Court's finding that Congress had intended to deny a right of action in that case. 422 U.S. at 82 & n.14.

23. See, e.g., 496 F.2d at 427-48 (Aldisert, J., dissenting); cases cited note 25 infra.

24. See Comment, supra note 3, at 1407, 1413.

25. Critics of a liberal judicial policy towards implied rights of action have emphasized the important boundaries of a federal court's power: "[I]t is the Congress, and not the federal judiciary, which creates subject matter jurisdiction for the federal courts." *Ash v. Cort*, 496 F.2d at 429 (Aldisert, J., dissenting);

In effect, appellants urge this court . . . to legislate. When Congress was dealing with . . . the statutes here involved, it was capable of clearly and directly providing the rights and remedies urged by the appellants.
A different concept of implied actions was resurrected in *J.I. Case v. Borak*. Under the facts in that case, the Court held that such actions were available in that they provided “a necessary supplement” to regulatory agency action, and because “it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.” The language suggests that implication provides those actions which Congress could not foresee as necessary for its purposes, rather than merely for those which Congress intended but for which it did not expressly provide. *Borak* thus came to represent a liberal application of the implication doctrine, one in which the judiciary’s role was active and independent of legislative authority, though justified by general legislative policy. The *Borak* standard simply required that the plaintiff and the injury be those Congress intended to affect, and that, absent a private right of action, the means legislated by Congress be inadequate to effectuate the statute’s purposes.

The precise status of the *Borak* approach, however, was placed in doubt by the Court’s 1974 decision in *National Railroad Passenger Corp. v. National Association of Railroad Passengers (Amtrak)*, which presented what appeared to be a new position on implication. Although the Court emphasized statutory construction and legislative history, it did not ignore the question of the adequacy of the statute’s means of enforcement in light of its

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Chavez v. Freshpict Foods, Inc., 456 F.2d 890, 895 (10th Cir.), cert. denied, 409 U.S. 1042 (1972);

As respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. Co. v. Tompkins* . . .


27. 377 U.S. at 432.

28. *Id.* at 433.


30. See Wyandotte Transp. Co. v. United States, 389 U.S. 191, 202 (1967), in which the standard was first clearly enunciated. This three-part test has nevertheless been called the *Borak* test. See Comment, supra note 3, at 1396 n.24.

legislative purpose. It appeared to some observers that the Court had established a standard which was based upon a presumption against implied actions. The Supreme Court in Securities Investor Protection Corp. v. Barbour added some weight to this conclusion, using the form of analysis provided by Amtrak to deny a private remedy. In dictum, however, Barbour confirmed that congressional intent was not a prerequisite to an implied civil action when Congress had "enacted a statute incapable of achieving its purpose." The exact standard to be applied in such cases, however, remained unclear.

Neither Amtrak nor Barbour, moreover, attempted to grapple with the source of a federal court's power to imply an action, even by such a selective standard, when Congress had not shown an intent to create such a right. Nevertheless, there have been several earlier cases in which the Court addressed the question. Most notable among them are Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics and Wheeldin v. Wheeler, in which the Court made attempts to reconcile its prior holdings with the notion that an implied action may be court-created, and therefore a matter of federal common law, rather than a matter of simple statutory

32. The Court's consideration of the matter was relegated, however, to what seems to have been a search for Congress' general attitude towards private actions as manifested in the statutory framework. 414 U.S. at 461-65.
33. See Comment, supra note 3, at 1401-04. The suggestion was that rules of statutory construction were the tools the Court was using to limit the potentially broad scope of implication. Id. at 1394.
35. The Court's analysis of the claim in Amtrak began with the observation that express statutory provision for one form of proceeding ordinarily implies that no other means of enforcement was intended by the Legislature. That implication would yield, however, to "clear contrary evidence of legislative intent," for which we turned to the legislative history and overall structure of the Amtrak Act.
36. Id. at 425. The Court apparently limited the availability of private actions on this ground to situations in which the statute would be "practically unenforceable." Id. at 424.
37. In Barbour, the Court noted the oft-quoted language of Bell v. Hood, 327 U.S. 678, 684 (1946): "Where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." 421 U.S. at 424.
38. 403 U.S. 388 (1971). The Court held that a federal common law right of action was available for a violation of fourth amendment rights. The primary distinction between Bivens and other implication cases might be found in the Court's traditional concern for the preservation of the constitutional rights of the individual.
This failure to fully confront the common law aspect of the implication doctrine may have been the cause of the varied judicial approaches which commentators have pointed to in the cases. But, in Cort v. Ash, the Court seemed finally to accept that an implied right of action is partially, if not essentially, a court-created right.

II. THE COURT DEFINES A STANDARD

In reaching its decision in Cort, the Court quickly disposed of claims for injunctive relief on the ground that an amendment of the Federal Election Campaign Act had intervened to provide an administrative procedure through which requests for such relief could be made. This left only the claim for derivative damages within the purview of the Court. At the outset, Justice Brennan identified several factors considered relevant in the determination of “whether a private remedy is implicit in a statute not expressly providing one.”

Of the four factors mentioned, the first three were clearly gathered from the mainstream of implication cases. Rigsby was cited for the proposition that the plaintiff should be of the class “for whose especial benefit the statute was enacted . . . .” Amtrak was cited for the second factor, posing the question whether there is “any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one.” The third factor, also drawn from Amtrak, was phrased in terms of the consistency of the implied action with “the underlying purposes of the legislative scheme.”

40. In Wheeldin, Justice Brennan would have had the availability of a federal common law right of action turn on whether such a right was "necessary or appropriate' for dealing with 'essentially federal matters.'" 373 U.S. at 664 (Brennan, J., dissenting), quoting United States v. Standard Oil Co., 332 U.S. 301, 307 (1947). In Bivens, Justice Harlan took a similar approach, stressing that the judiciary has a responsibility to assure the workings of federal policy. 403 U.S. at 402-04 (Harlan, J., concurring).

41. See, e.g., Comment, supra note 3, at 1393-97.


43. Id. at 78. That the Court was relying upon an evaluation of flexible “factors” for its consideration, rather than definitive requirements, is consistent with the common law basis of the Court's decision. Such discretion would presumably have been inappropriate had the interpretation of a statute been involved. See, e.g., Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 378-79 (1958).

44. 422 U.S. at 78, quoting 241 U.S. at 39. An alternative reading of the language in Rigsby would suggest that the Court was distinguishing between special and general public injury. See, e.g., Frothingham v. Mellon, 262 U.S. 447 (1923).

45. 422 U.S. at 78. Some commentators had suggested that this might be the single principle for which Amtrak stood. E.g., Comment, supra note 3, at 1401-04.

46. 422 U.S. at 78, 83 n.14. The cited portion of the Amtrak opinion may be read as a generalized search for congressional intent. See note 32 supra.
The Court's reliance upon these factors, however, departed from its view in prior cases. The Court apparently used the language in Rigsby to distinguish the primary and secondary beneficiaries of the statute in question,47 and then determined that the plaintiff stockholder was a secondary beneficiary.48 In reference to this distinction, the Court stated that a primary beneficiary's right of action would not be dependent upon a showing of congressional intent to create an action, although an express purpose to deny one would be controlling.49 In this context, the Court sought to explain the emphasis on statutory construction developed in Amtrak and T.I.M.E. by declaring that those rulings denying actions were grounded primarily upon specific support found in the legislative history.50

In spite of the fact that it had found that the derivative plaintiff was neither the main beneficiary of section 610 nor the subject of any legislative intention as to civil remedies, the Court inquired whether allowing a cause of action would serve the main purpose of the statute.51 This portion of the opinion leaves the distinct impression that the presence of this factor alone would have entitled Ash to an action in the district court.52 The Court found, however, that a derivative action would not be helpful in enforcing the Act.53

At that point, the Court made a significant departure from the line of

47. This hierarchy of protected persons, like the distinction the Court made between the main and secondary purposes of the Act, appears to be arbitrary and less than consistent with strict adherence to the approach of looking to congressional purpose. As the appeals court stated: "It may be improper to infer a cause of action from a statute only incidentally protecting plaintiff, [but] the Supreme Court has indicated that protection of stockholders was not merely an incidental purpose of § 610 . . . ." 496 F.2d at 423. Thus, it is more appropriate to take the distinction as the Court's own.
48. 422 U.S. at 80-82.
49. Id.
50. Id. at 82-83 n.14. Apparently, the Court wanted to lay to rest the mechanical application of the maxim "espressio unius est exclusio alterius" (the expression of one thing is the exclusion of the other) as a rule of statutory construction in the absence of additional support from legislative history. See also 496 F.2d at 427 (Alisert J., dissenting). This rule has been said to be the most prominent example of the presumption against implication. See Comment, supra note 3, at 1416-21.
51. 422 U.S. at 84.
52. The Court also considered a fourth factor, the significance of state law regulation, see notes 54-57 & accompanying text infra, but since the Court's determination of this issue hinged upon its finding that Ash's action would not further the main purpose of the Act, it seems reasonable to assume that had the action been found helpful in effectuating the main purpose of section 610, the principle of Borak would have applied and the dominion of state law regulation would not have been considered. See 377 U.S. at 434. If regarded as an independent ground for implication, the advancement of congressional purpose could logically stand alone as a ground for implication.
53. 422 U.S. at 84.
cases on implied rights of action. The fourth factor it considered was whether or not a private federal action would unnecessarily "intrude into an area traditionally committed to state law ..."54 This is the concept of the protected enclave of state law that has been offered as a general restriction on the reach of the common law power of the federal courts.55 The Court first determined that the relationship of a shareholder to a corporation was within that enclave, and relying upon Borak, determined that the intrusion of a federal action would be appropriate if it effectuated the main purpose of the statute.56 Since it had previously answered the latter question negatively, the Court concluded that a right of action should not be allowed.57

In essence, the analysis of Cort proceeds from the question of congressional intent to create a cause of action in a particular plaintiff, to the question of the main congressional purpose and whether a right of action would effectuate it. It is not altogether clear, however, that the Court's treatment of the final factor, the dominion of state law, is anything more than an obverse expression of the principle that no private federal action is available when no federal policy would be advanced.58

III. THE NEW FACTORS IN IMPLICATION

The Supreme Court in Cort made the pertinent distinction between implied rights of action founded upon congressional intent, and those which arise out of the common law power of the federal judiciary.59 The

54. Id. at 85.
55. This approach at limiting the range of federal common law, and even federal legislative power, see, e.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 97 (1937) (McReynolds, J., dissenting), has been most prominent in questions concerning the foundation of the Erie doctrine. See, e.g., Hanna v. Plumer, 380 U.S. 460, 474-75 (1965) (Harlan, J., concurring). There is a serious question as to whether the concept of a state enclave, given the relationship of the federal to the state government, is anything more than a negative expression of the extent of federal interests. See Ely, supra note 2, at 701-02.
56. The qualification that the purpose be the main or primary one intended by Congress does not appear in Borak, which contains language to the contrary. 377 U.S. at 432. It would seem that this segregation of purposes is related to the Court's original finding that a stockholder is not a primary beneficiary. The concept of purposes of varying importance had been used to dissect section 610 in an unrelated argument. See United States v. CIO, 335 U.S. 106, 135-38 (1948) (Rutledge, J., concurring).
57. 422 U.S. at 85. The loop in the Court's logic testifies to the indefiniteness of the state enclave factor. See note 55 supra.
58. The question left open is whether, in the absence of congressional intent, a right of action would be permitted to serve a subsidiary purpose of the statute if to do so would not intrude upon a state enclave.
59. See note 4 supra.
distinction permitted the Court to isolate a group of cases which had apparently expressed a presumption against implication, and to limit their scope to cases in which on the whole there is a clear legislative intent to deny a right of action.

When the Court addressed the problem of setting the standard that should determine the availability of court-created private actions, however, it was left with the broad principle of Borak, extending to the full sphere of federal legislative concerns. The need for restriction manifested itself in both the Court's unrationaled and somewhat arbitrary division between the main and subsidiary purposes of the statute in question, and the emergence of the state enclave limitation. Whatever considerations moved the Court, two novel and restrictive elements were introduced into the law of implied actions. Given that court-created rights of action are the subject, it is not inappropriate that the Court develop new standards in a situation in which it has established the need.

Yet, it may be suggested that the more durable of judge-made principles are clearly related to the judicial policy objectives they pursue. It was never stated why, for example, a federal court should not be willing to imply an action and intrude upon the state enclave to effect a subsidiary purpose of Congress, particularly when it has been expressed as clearly as in the history of section 610. Nor did the Court express the principle underlying its finding that, in this case, derivative damages would not aid the main purpose of section 610 in deterring the influence of corporations over federal elections. It seems apparent that some sort of presumption was at work, since it is not difficult to argue that damages would necessarily enhance the enforceability of a criminal provision.

60. Cases cited notes 20 & 21 supra. See also note 50 supra.
61. A probable reason for the Court's line drawing is that the full exercise of federal common law power to create implied actions through the Borak standard would be impractical. It has been suggested that this was the rationale of Amtrak:

I am persuaded that the Amtrak court could not fail to notice the plethora of implied civil remedy cases which arose from an unrestricted application of J.I. Case Co. v. Borak . . . I am convinced that the Amtrak court consciously and deliberately applied the brakes . . .

496 F.2d at 429 (Aldisert, J., dissenting). The Amtrak restrictions were, however, based upon the issue of congressional intent, and were therefore an imperfect means to accomplish the task of making court-made law an effective tool of federal legislative purpose.
62. 422 U.S. at 84.
63. The Court suggested that derivative damages would only have the effect of permitting directors to temporarily "borrow" corporate funds in order to make campaign contributions. Id. at 84. The Court's decision would appear to give the directors in this case the privilege of not repaying the loan, assuming there were in fact violations of section 610.
Finally, the Court's emphasis on the enclave of state law as a possible measure of the availability of implied actions does not seem sufficient to place any additional restriction on implication. In other areas of the federal common law, the enclave marks the borders of substantial federal interests. In the matter of implied federal actions, however, the traditional state concern is of an ambiguous character, since the basis for an implied action is the presence of a federal policy which normally would supersede traditional state dominion.

In sum, the new restrictions that emerged in *Cort* suggest that the Court will more closely exercise authority over judicially-created rights. The precise nature of these restrictions, however, does not seem to be consistent with the objectives for which such authority might be exercised.

IV. CONCLUSION

One of the major premises underlying the decision in *Cort v. Ash* is that courts retain the power to create implied rights of action when necessary to effectuate congressional policy. It follows, therefore, that the restrictions placed upon that power are also created by the federal judiciary and involve primarily questions of court self-administration, rather than questions of statutory construction or the scope of traditional state authority. The courts would simply be unable to entertain the volume of actions that could arguably effectuate all the main purposes of congressional enactments. In light of these considerations, perhaps the courts should provide only those rights of action which would be *most effective* in enforcing congressional purposes.

64. *See* note 55 *supra.* The value of having state courts enforce federal rights, once they are found to exist, is obvious. *See generally* Note, *State Enforcement of Federally Created Rights,* 73 Harv. L. Rev. 1551 (1960).


66. *See* note 61 *supra.* A federal court may create rights of action to effectuate a congressional purpose. But because the federal courts are essential to the federal system, *see* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), that purpose cannot be fulfilled if the courts are overcrowded with causes of action which individually promote a federal interest. Inherent in the power to create rights of action, therefore, is the power to limit them for the sake of competent performance. The doctrine of primary jurisdiction of an administrative agency exemplifies judicial self-administration for the purpose of efficiency. *See* Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) (plaintiff challenging rates filed with ICC required to resort initially to Commission).

67. *See* Note, *supra* note 5: "It being a reasonable assumption that Congress in-
Absent a showing of congressional intent in regard to the vesting of a right of action, the federal judiciary, under this criterion, would be free to compare potential plaintiffs and to determine which class among them would best aid the enforcement of the provision in question. The most effective implied action might be found by balancing this factor against the extent to which a particular class of potential plaintiffs, because of its size, threatens to eventually increase congestion in the federal court system. In this way, an implied action would not be denied when, both in theory and in fact, it promotes the means and the ends of congressional policy.

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