NOTES

WHEN IS A LABOR DISPUTE NOT A "LABOR DISPUTE"?
—JUDICIAL CONSTRUCTION OF THE NEW YORK
ANTI-INJUNCTION STATUTE*

Judicial interpretation has consistently restricted the scope of state anti-injunction statutes as applied to peaceful picketing, by reading the immunizing phrase "labor dispute" as a term of art, contrary to the usual construction of its federal prototype.1 In general, labor groups picketing peacefully2 and

---


committing no independent tort must still meet two requirements before the protection of the statute will be extended to them as parties to a “labor dispute”: their objectives must be “lawful” and they must be in “unity of interest” with the party against whom the activities in question are directed. But recently, in Schivera v. Long Island Lighting Co., the New York Court of Appeals intimated in an ambiguous opinion that the finding of a labor dispute in the layman’s sense may be sufficient to bar an injunction without resort to judicial refinement.

The controversy in question arose over union recognition. The only non-union contractor in the county was able to hire a sufficient number of non-union workmen so that peaceful picketing by the local building trades council had not interfered with his operations up to the time of the action. While building a residential development, he sold the first completed home to plaintiff, a prospective occupier. Utility workers, dispatched at plaintiff’s request

282 N. Y. 331, 26 N. E.2d 279 (1940) (same); see Atchison, T. & S.F. Ry. v. Gce, 139 Fed. 582, 584 (C.C.S.D. Iowa 1905). The possibility of peaceful picketing was at first denied.


4. But “One need not be in a ‘labor dispute’ as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication, unattended by violence, coercion, or conduct otherwise unlawful or oppressive.” Jackson, J. in Bakery and Pastry Drivers’ and Helpers’ Union v. Wohl, 315 U. S. 769, 774 (1942); American Federation of Labor v. Swing, 312 U. S. 321 (1941) (state law cannot limit peaceful picketing to dispute between employer and his own employees); Anora Amusement Corp. v. Doe, 171 Misc. 279, 12 N. Y. S.2d 400 (Sup. Ct. 1939) (peaceful picketing by Negro youth organization to induce employment of Negroes in theatre cannot be enjoined despite absence of labor dispute); Friedman v. Blumberg, 342 Pa. 387, 23 A.2d 412 (1941) (absence of employer-employee relationship did not permit injunction against peaceful picketing of glazier employing only occasional help); S and W Fine Foods, Inc. v. Retail Delivery Drivers’ and Salesmen’s Union, Local No. 353, 11 Wash. 2d 262, 118 P.2d 962 (1941) (absence of employer-employee relationship between picketers and picketed employer did not permit injunction against peaceful picketing, although court found no labor dispute).

5. Florsheim Shoe Store Co. v. Retail Shoe Salesmen’s Union of Brooklyn and Queens, Local 287, 288 N. Y. 188, 42 N. E.2d 480 (1942); and see cases cited note 19 infra.

6. Goldfinger v. Feintuch, 276 N. Y. 281, 11 N. E.2d 910 (1937) (delicatessen store and sausage factory); and see cases cited notes 15-17 infra. See also Hellerstein, supra note 1.

to perform the utility company's statutory duty to connect the gas and electricity, asked the pickets whether they would be permitted to cross the picket line, since their closed shop contract with the utility specified that they would not be required to cross AFL picket lines. When the pickets replied that they "had instructions not to allow any utilities to do any work whatsoever in the community . . . "10, the workers turned back, and the utility subsequently refused to perform the work, on the ground that a utility workers' strike paralyzing service generally in the area would result.10 Plaintiff then brought suit, apparently at the instigation of the contractor, to enjoin the picketing as against himself, and to compel the utility to perform its statutory duty. The utility union was not joined as a party.11 The injunction and mandamus were granted in the trial court, and the picketing union alone appealed, securing a reversal in the Appellate Division,12 on the sole ground that the case grew out of a labor dispute within the meaning of the New York anti-injunction statute. The Court of Appeals affirmed in a four-to-three decision.

Any examination of the doctrinal background for injunctions against peaceful picketing must be preceded by noting a relevant caveat: Even at common law, derivative harm resulting to a plaintiff as a consequence of labor activities otherwise legal, and not directed against him, is no grounds for an injunction or damages, although no "unity of interest" exists between the parties to the suit.13 But if the picketers' instructions are taken to indicate that the plaintiff was an object of the picketing,14 at least to the extent that harm to him could not be considered derivative, then an injunction might well have issued, on either or both of the traditional grounds that the object was unlawful and the necessary unity of interest lacking.

Under the New York doctrine of unity of interest, picketing can "follow the product" as long as the placards plainly so indicate,15 but only when the

---

10. This circumstance was brought out in conversations with Messrs. I. Cyrus Gordon and Carl Rachlin, counsel for defendant union, who were extremely helpful in providing background material.
14. As the court stated these instructions, the pickets were "not to allow any utilities to do any work whatsoever in the community . . . ". 296 N. Y. 26, 30, 69 N. E.2d 233, 234 (1946).
15. Spanier Window Cleaning Co. v. Awerkin, 225 App. Div. 735, 232 N. Y. Supp. 886 (1st Dep't 1928) (picketing of retailer permitted with banners which did not mention name of retailer employing non-union window cleaners); Commercial House & Window
one picketed is “in the same business for profit.” 16 Thus, if plaintiff had been a real estate operator, or a commercial builder who had bought the property in order to complete construction without being hampered by a picket line, the union would probably have met the unity of interest test. 17 But since he was a private buyer and householder, plaintiff would probably be without the scope of the controversy, although in a sense the controversy had moved away from the product, rather than the product from it. 18

Cleaning Co. v. Awerkin, 138 Misc. 512, 240 N. Y. Supp. 797 (Sup. Ct. 1930) (all picketing enjoined where banners mentioned retailer's name); cf. cases cited note 3 supra.

16. Goldfinger v. Feintuch, 276 N. Y. 281, 286, 11 N. E.2d 910, 913 (1937). The constitutionality of the “follow the product” doctrine, not yet tested by the Supreme Court, has been somewhat shaken, as evidenced by the policy behind American Federation of Labor v. Swing, 312 U. S. 321 (1941) (state court reversed for granting injunction which restricted picketing by others than employees of the employer picketed) and Bakery and Pastry Drivers and Helpers Local 802 v. Wohl, 315 U. S. 769 (1942) (state court reversed for granting injunction against picketing which peddlers employing no help, on ground that there was no showing of illegality other than absence of a “labor dispute”). But cf. Carpenters and Joiners Union of America, Local 213 v. Ritter's Cafe, 315 U. S. 722 (1942) (state court upheld in granting injunction against picketing cafe owned by plaintiff who had hired non-union contractor to build structure for him in another part of town). Where the Court will draw the line between the Ritter’s Cafe and the Swing and Wohl fact situations remains to be seen.


Sufficient unity of interest was found in the following cases: Devon Knitwear v. Levenson, N. Y. L. J. Feb. 29, 1940, p. 940, col. 1 (Sup. Ct. 1940) (jobber and contractor in garment industry); Willoughby Camera Stores v. McDonough, N. Y. L. J. June 20, 1939, p. 2850, col. 5, July 11, 1939, p. 79, col. 6 (Sup. Ct. 1939) (camera store and film processor); People v. Briesblatt, 34 N. Y. S.2d 184 (Sullivan County Ct. 1942) (hotel and bakery).

Insufficient unity of interest was found in the following cases: Canepa v. Doe, 277 N. Y. 52, 12 N. E.2d 790 (1938) (retailer-vendee and manufacturer-vendor of neon sign); Elizabeth Arden Sales Corp. v. Hawley, 176 Misc. 821, 28 N. Y. S.2d 936 (Sup. Ct. 1941), aff'd, 261 App. Div. 953, 27 N. Y. S.2d 423 (1st Dep't 1941) (cosmetics manufacturer and manufacturer of ingredient not forming major portion of product); Back v. Kaufman, 175 Misc. 169, 22 N. Y. S.2d 449 (Sup. Ct. 1940) (dentist and dental laboratory); Feldman v. Weiner, 173 Misc. 461, 17 N. Y. S.2d 730 (Sup. Ct. 1940) (butcher and fat-rendering concern to whom he sells waste fat); cf. Consolidated Realty Co. v. Dyers, Finishers and Bleachers Federation, 137 N. J. Eq. 413, 45 A.2d 132 (Ch. 1946) (court will look through corporate veil to find unity of interest).

Nor could the union meet the lawfulness of objective test,\textsuperscript{10} under this interpretation of the facts of the case. Although the picketing here was aimed at securing union recognition,\textsuperscript{20} it had as an ancillary objective the prevention of any utility work in the area. The latter objective can itself be subdivided into preventing utility employees from carrying out their jobs, and preventing the utility itself from performing its statutory duty. The common law duty of employees in businesses affected with the public interest to carry on their work as long as they continue in that employment, is not entirely clear;\textsuperscript{21} but


Perfect Laundry Co. v. Marsh, 121 N. J. Eq. 588, 191 Atl. 774 (Ct. Err. & App. 1937) (picketing by laundry routemen with placards requesting public not to deal with employer is enjoinable as violation of employees' contracts); \textit{cf.} Greater City Master Plumbers v. Kahme, 6 N. Y. S.2d 589 (Sup. Ct. 1937) (strike in breach of union contract is unlawful). \textit{But cf.} Cascade Laundry, Inc. v. Volk, 129 N. J. Eq. 603, 20 A.2d 595 (Ch. 1941) (striking laundry routemen may not be enjoined from directing business away from their employer, in violation of their contracts).


\textit{Cf.} Opera on Tour, Inc. v. Weber, 285 N. Y. 348, 34 N. E.2d 349 (1941) (inducing another union to strike to compel abandonment of labor-saving machinery by joint employer is unlawful); Burlington Transportation Co. v. Hathaway, 234 Iowa 135, 12 N. W.2d 167 (1943) (union can be enjoined from ordering members, employees of common carrier, not to handle goods of picketed shipper; no anti-injunction statute).

See also Frankfurter and Greene, \textit{op. cit. supra} note 1, at 25.


21. The rationale has not found direct expression in New York law since Burgess Bros. v. Stewart, 112 Misc. 347, 184 N. Y. Supp. 199 (Sup. Ct. 1920), but in a series of recent hospital cases the courts have simply denied the right to strike. Jewish Hospital of Brooklyn v. Hospital Employees Union, 252 App. Div. 581, 300 N. Y. Supp. 1111 (2d Dep't 1937); Society of New York Hospital v. Hanson, 185 Misc. 937, 59 N. Y. S.2d 91 (Sup. Ct. 1945) (peaceful picketing excepted, although strike enjoined); Beth-El Hospital v. Robbins, 186 Misc. 506, 60 N. Y. S.2d 798 (Sup. Ct. 1946) (same); \textit{Cf.} Elizabeth
the statutory duty of the utility is plain, and although impossibility may excuse specific performance, the company must still respond in damages. The picketing union was therefore attempting to and did in fact induce the breach of a legal duty, an object which prior to this decision would have placed it without the scope of the anti-injunction statute. For where a labor activity is carried on with more than one objective, the fact that any one is unlawful has been sufficient, as long as it continues, to taint the entire enterprise.  

General Hospital and Dispensary v. Elizabeth General Hospital Employees, 4 CCH Lab. Cas. 61,747 (N.J. Ch. 1941) (picketing enjoined); Western Pennsylvania Hospital v. Lichliter, 340 Pa. 382, 17 A.2d 205 (1941) (hospital not within scope of anti-injunction statute). Contra: Northwestern Hospital v. Public Service Employees Union, 208 Minn. 389, 204 N. W. 215 (1940).  

Some courts have held the Fourteenth Amendment to bar injunctions against refusal to do specific work. Alabama State Federation of Labor v. McAdory, 246 Ala. 1, 19, 18 So.2d 810, 824 (1944), cert. dismissed, 325 U. S. 450 (1944) (statute making it unlawful for any employee to refuse to handle or work on goods because non-union processed or delivered held unconstitutional); New Bedford Fish Co. v. United Sea Food Workers of Philadelphia, Local 2034, 2 Lab. Rel. Rep. Man. 791 (U.S. Dist. Ct. E.D. Pa. 1938) (no injunction will be granted to compel union members to handle fish company shipments refused because of strike against another company renting space on same wharf, since that would be involuntary servitude under the Thirteenth Amendment).  

Cf. United States v. United Mine Workers, 67 Sup. Ct. 289 (1947) (strike against government enjoined); Southern Steamship Co. v. NLRB, 316 U. S. 31 (1942) (strike by seamen on board vessel docked at safe domestic port not home port is mutiny).  


The opinion of the court is never clear whether the injunction is denied because the injury to plaintiff was merely derivative; because the court has widened the circle of labor's valid objectives and legitimate adversaries; or because, in despite of doctrine, the mere finding of a labor dispute in the layman's sense is sufficient to invoke the protection of the statute. While a possible interpretation of the facts supports the first theory, the court's statement of the facts suggests the last one, as does its initial observation that in picketing the builder, the union members were exercising a "constitutional right."27 Furthermore, if they were picketing only the builder, the ensuing discussion of the application of the anti-injunction statute would have been unnecessary.28 But the cases cited by the plaintiff29 are distinguished on the ground that "they involve either secondary boycotts [no unity of interest] or violent or otherwise intrinsically unlawful strikes or picketing."30 Although the court disclaims any intention to reverse its former holdings, the facts of its holding in the instant case may imply at least a narrower definition of what is a secondary boycott or "intrinsically unlawful" picketing.

Judge Fuld's concurrence is somewhat more clear. He terms the harm to the plaintiff "only an incidental effect, not the primary objective of the picketing",31 but he uses the case as a springboard from which to launch an attack on the restrictive interpretation of the anti-injunction statute. Construing most broadly the language of the most liberal cases,32 he concludes that neither unity of interest nor lawful objectives are prerequisites for statutory protection, going on to point out that "the statute is rendered meaningless unless it is allowed to operate in those cases where plaintiff is entitled to some relief [at common law]."33

In short, then, the harm suffered by plaintiff was not clearly derivative, and if the usual tests had been applied, he would probably have been entitled to an injunction. Since the injunction was denied, and since the Court did not spell out a rationale, either in terms of derivative harm, or unity of interest and

29. 296 N. Y. 26, 27, 69 N. E.2d 233 (1946). A selection of these cases is cited in notes 5 and 19 supra.
31. Id. at 33, 69 N. E.2d at 235. Although not the primary objective, plaintiff's deprivation might have been a secondary objective of the picketing, within this language. See note 26 supra.
lawfulness of object, there is an intimation, although not a square holding, that the two judicially developed requirements are being judicially abandoned.\textsuperscript{34}

Such a change in attitude may serve to clarify somewhat a highly confused field of law,\textsuperscript{35} and provide a salutary check on judicial impulse.\textsuperscript{36} The statute still cannot be read as an absolute prohibition against labor injunctions. It contains within itself adequate restrictions as to means employed.\textsuperscript{37} And, unless one makes the unwarranted assumption of absolute constitutional immunity for peaceful picketing,\textsuperscript{38} the lack of any limitations on the aims of or the persons towards whom the activity is directed\textsuperscript{39} may result in a policy conflict with other statutes. If, therefore, the courts are forced to make their decisions in terms of conflicting statutory policies, rather than judicially-constructed standards, judicial legislation will be properly relegated to its interstitial role, subordinate to the direct action of the legislature.

**SPECIFIC AND PERFECTED LIENS V. FEDERAL PRIORITY IN RECEIVERSHIPS\textsuperscript{*}**

The Federal Government’s right to be accorded first priority from the funds of an insolvent estate in equity receivership is exclusively statutory.\textsuperscript{1}

34. It should be noted here that other law journals have not so read the opinion, but have confined themselves largely to a discussion of the derivative harm aspects of the case. See note 7 supra.

35. See Galenson and Spector, supra note 1, at 69, and cases cited note 17 supra.

36. "... In these instances, the justification is that the defendant is privileged knowingly to inflict the damage complained of. But whether, and how far, a privilege shall be allowed is a question of policy. Questions of policy are legislative questions, and judges are shy of reasoning from such grounds." Holmes, *Privilege, Malice, and Intenti*, 8 HARv. L. Rev. 1, 3 (1894). See Fraenkel, supra note 1, at 592; 53 YALE L.J. 553, 561 ff.

37. Picketing is only protected when it is conducted by any method "not involving fraud, violence, or breach of the Peace..." NEW YORK CIVIL PRACTICE ACT § 876-a 1(f) (5).

38. "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation." Mr. Justice Douglas, concurring in Bakery and Pastry Drivers' and Helpers' Local 802 v. Wohl, 315 U. S. 769, 776 (1942).


1. REV. STAT. §3466 (1875), 31 U. S. C. §191 (1940). "Whenever any person indebted to the United States is insolvent, ... the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which
Although the applicability of the statute has long been restricted to situations in which the debtor has committed one of the prescribed acts indicative of insolvency,\(^2\) the full extent of its impact upon private claims is yet undecided. When the statute comes into play, unsecured demands are subordinated\(^3\) and consensual liens are probably preserved,\(^4\) but the status of the specific and perfected lien remains undetermined after years of discussion in dicta.\(^5\)


2. Conceivably the statute might have been applied to all cases of insolvency, but such an interpretation would have ignored the effect of the second clause which the courts have construed as limitative rather than illustrative. Mere inability to pay debts does not invoke the statute. *Prince v. Bartlett*, 8 Cranch 431 (U. S. 1814); *United States v. Canal Bank*, 25 Fed. Cas. 277, No. 14,715 (C. C. D. Me. 1844). The voluntary assignment must cover entire assets; a partial assignment is insufficient. *United States v. Hooe*, 3 Cranch 73 (U. S. 1805).

3. See note 15 infra.

4. See *Brent v. Bank of Washington*, 10 Pet. 596 (U. S. 1836) (by-laws of creditor bank gave it a right to set off debts owed by stockholder before transferring stock; this held to defeat executor's suit to have all the stock transferred with which to pay federal claim); *Conard v. Atlantic Insurance Co.*, 1 Pet. 386 (U. S. 1828) (property assigned to creditor to secure loan); *United States v. Hooe*, 3 Cranch 73 (U. S. 1805) (mortgaged property).

Moreover, lower federal courts have uniformly held that the expenses of administration are deductible from the fund before distribution to any preferred creditor, including the United States. *Kennebec Box Co. v. O. S. Richards Corp.*, 5 F.2d 951 (C. A. 2nd 1925); *United States v. Welsburn*, 48 F. Supp. 393 (E. D. Pa. 1943); *United States v. Eggleston*, 25 Fed. Cas. 979, No. 15,027 (C. C. D. Ore. 1877).


rel. Gordon v. Campbell.\(^6\) There, after a private creditor had obtained judgment against an insolvent corporation, upon which execution had issued, the State of Illinois sued to enforce a prior statutory lien for unemployment compensation contributions and succeeded in having a receiver appointed. Subsequently, the Collector of Internal Revenue intervened and filed claims for federal taxes, alleging that the claims of the United States were entitled to priority under Section 3466 of the Revised Statutes, a contention denied by Illinois on the ground, among others, that the state's statutory lien on the debtor's property gave it precedence over the federal claims. A majority of the Court, finding that a general equity receivership had been effected, ruled that the statutory lien was not sufficiently specific and perfected, for Illinois had not specified exactly what property was subject to the lien nor had it completed the procedural steps of enforcing the lien by obtaining execution on the property.\(^7\) It was therefore unnecessary to decide whether a fully perfected lien overcame the federal priority; but the Court warned that its previous statement in Knott v. United States that "(s)uch an interest (an inchoate general lien created by the laws of Florida) lacks the characteristics of a specific perfected lien which alone bars the priority of the United States"\(^8\) had been merely dictum and not intended to decide the issue.\(^9\) However, since this dictum has been repeated so frequently by the Court that it has virtually been accepted by lower federal and state courts as a rule of property law,\(^10\) the caveat that it is still an open question makes appropriate a reexamination of principles and precedents.

In the early leading case of Thelusson v. Smith, the Court stated as dictum that "the United States are to be first satisfied; but then, it must be out of the debtor's estate"\(^11\) and added that property "divested out of the debtor . . . cannot be made liable to the United States."\(^12\) Desiring nevertheless to protect the federal priority from undue limitations at the hands of state legislatures and courts, the Court in later cases continued to utilize this concept of divestment of title or possession as a check upon the claims of competing creditors. Limits were laid down. Thus, it is well established that a mort-

---

\(^6\) 329 U.S. 362 (1946).
\(^7\) Id. at 372-6.
\(^8\) 298 U. S. 544, 551 (1936).
\(^10\) United States v. Guaranty Trust Co., 33 F. 2d 533, 537 (C. C. A. 8th 1929), aff'd, 280 U. S. 478 (1930). For examples of adherence to the proposition, see United States v. Cutts, 25 Fed. Cas. 745, No. 14,912 (C. C. D. N. H. 1832) (equitable lien created by assignment of stock to secure loan held superior to federal priority); Lerman v. Lincoln Novelty Co., 130 N. J. Eq. 144, 21 A.2d 827 (Ch. 1941) (lien termed not specific and perfected and therefore held subordinate to federal priority); State v. Wynne, 134 Tex. 455, 133 S. W.2d 951 (1939), appeal dismissed for want of substantial federal question, 310 U. S. 610 (1940) (statutory lien for taxes held specific and therefore superior to federal priority).
\(^11\) 2 Wheat. 396, 425 (U. S. 1817).
\(^12\) Ibid.
gagee's claim defeats the federal priority on the theory that title has passed, at least in those states where the title theory prevails. On the other hand inchoate general liens are subordinate to the priority, since they merely entitle a creditor to obtain execution through subsequent legal process. Into this framework the Supreme Court has attempted to fit the specific and perfected lien. Apparently recognizing the commercial use of liens as a form of security, the Court has stated that "it has never yet been decided, by this Court, that the priority of the United States will divest a specific lien, attached to a thing, whether it be accompanied by possession, or not"; but on the other hand, the Court has always managed to avoid a square holding that the priority will not divest such a lien by reasoning that the particular lien involved was not sufficiently specific and perfected to present the direct question.

As a result of this process of negative definition, the Court has gradually formulated its requirements of specificity and perfection, the absence of which defeats a lien. Underlying them is discernible the Court's suspicion of those lienholders who have neglected to assert their statutory rights until the debtor has become insolvent, whereas it views more favorably those who, prior to insolvency, have taken affirmative action to protect their interests. As to specificity, the lien must be definite in at least three respects. The lienor himself must be clearly identified: a lien on securities, deposited with a state official, for the benefit of possible future creditors of a surety company was termed inchoate for lack of an ascertained holder. The debt underlying the lien must be certain in amount: obligations accruing in the future, such as rent to become due, in the case of a landlord's lien, and state taxes either as yet unassessed or subject to future judicial determination have been held


14. Whether the same holds true for those jurisdictions where a mortgage is regarded as creating only a lien is a question about which the Court has expressly refused to speculate. See New York v. Maclay, 288 U. S. 290, 294 (1933).


17. See cases cited note 15 supra.


19. United States v. Waddill, Holland, and Flinn, 323 U. S. 353, 357-8 (1945). Although future rent was computable from the lease, the possibility of a set-off or of the termination of the lease rendered the amount uncertain.

20. New York v. Maclay, 288 U. S. 290, 292 (1933). The New York statute provided that the state acquired a lien at the beginning of the year for which the franchise tax was due, even though the amount of the tax was not then fixed.

21. United States v. Texas, 314 U. S. 480, 487 (1941). The tax statute was con-
not sufficiently specific. Finally, the property attached must be specifically designated: "property devoted to or used in (the debtor's) business" has been held to be "neither specific nor constant."22

With respect to the perfection of a statutory lien on personal property the Court has emphasized the concept of "divestment." The creditor must have perfected the lien to the extent of a seizure, levy, distraint, or other legal process upon the property charged, so that the goods are legally severed from the general assets of the debtor.23 The Court has still to rule how far this enforcement process must be carried. While any final determination of "divestment" remains a question for the Court,24 a minimal requirement would seem to be that the seizure or distraint be advanced to the point where by state law the debtor is divested of his possessory interest.25 Prior to such a step, a statutory lien, though specific as to amount and the personal property charged and, if publicly filed, sufficient to put subsequent purchasers and creditors on notice, would amount to no more than a declaration of priority in insolvency distribution, subordinate to the federal priority.26 Even though such a lien were verbally stamped by the state legislature as specific and perfected, it is extremely doubtful whether it would be considered by the Court superior to

strued as reserving to the court enforcing the lien the determination of the amount of the tax, since the statute declared the tax reports merely "prima facie evidence" of the amount.

22. United States v. Texas, 314 U. S. 480, 487 (1941). Similarly, in the instant case, the statutory lien was created "upon all the personal property . . . owned . . . by any employer and used by him in connection with his trade, occupation, profession or business," and the debtor had to file a schedule of all such property. Ill. Ann. Stat., c. 48, §§ 243 (a), (e) (Smith-Hurd, Supp. 1946). The Supreme Court held that not until the filing of this schedule, which did not occur before the priority statute was invoked, would the state know the particular property to which the lien attached. 329 U. S. at 372–4.


26. See United States v. Waddill, Holland, and Flinn, 323 U. S. 353, 359 (1945) (prior to distraint, lien merely gave landlord priority in distribution of goods on premises); cf. Stover v. Scotch Hills Coal Co., 4 F.2d 748 (W. D. Pa. 1924) and United States v. San Juan County, 280 Fed. 120 (W. D. Wash. 1922) (in both cases, the statutory lien was viewed as a competing bid for priority, with the federal priority held superior under the supremacy clause). See Rogge, supra note 5, at 269–70.
the federal priority. However, when the statutory lien is on real property for realty taxes levied *in rem*, the Court has implied that the public filing of the tax delinquency would constitute sufficient perfection of the lien.

Since equity receiverships and bankruptcy proceedings deal with similar problems in the distribution of assets, the treatment of liens in the Bankruptcy Act provides an instructive analogy. Unless the Bankruptcy Act specifically invalidates a lien or renders it voidable by the trustee, the lien remains valid after the debtor is adjudicated bankrupt and, with minor exceptions, is superior to any priority accorded by Section 64 of the Act. In addition, the Bankruptcy Act is more lenient in validating some liens which would not meet the Court's requirements of specificity and perfection for preservation in receiverships: under Section 57(b), for example, statutory liens inchoate upon the adjudication of bankruptcy may be made valid if thereafter perfected within the time permitted by the statute.

Moreover, the priority philosophy of the Bankruptcy Act undercuts the instant issue. The changes in the relative order of priorities in Section 64 of the Act, effected principally by amendments in 1898, 1926 and 1938, relegate the non-tax claims of the sovereign beneath claims for the administrative expenses of the estate, laborers' wages, certain litigation costs, and state as well as federal taxes, reflecting a change in Congressional attitude toward the equitable distribution of assets. Even the proposition that the federal pri-

---

27. Hypothetically, if a statute, in addition, were to declare the debtor immediately divested without any judicial proceedings, the Court might well consider the lien perfected; but the constitutional objections to such legislation are obvious. See Rogge, *supra* note 5, at 269–70.

28. *Spokane County v. United States*, 279 U. S. 80, 94 (1929) (drawing the distinction between liens arising from taxes levied *in personam* and those from taxes levied *in rem* and holding that the prescribed procedure for perfecting the former, including divestment, had not been completed). See *Note, 26 Minn. L. Rev. 761* (1942).

29. *52 Stat. 877* (1938), 11 U.S.C. §107(c) (1940). Sec. 67(c) of the Act provides that all statutory liens on personal property not accompanied by possession of such property and all liens of distress for rent shall be postponed in payment to the administrative costs and expenses of the bankruptcy proceeding and wage claims, which are entitled to first and second priority respectively under §64(a). See 4 *Collier, Bankruptcy* §67.27 (14th ed. 1942).


33. "The act takes into consideration, we think, the whole range of indebtedness of the bankrupt, national, state and individual, and assigns the order of payment. The policy which dictated it was beneficent and well might induce a postponement of the claims, even of the sovereign in favor of those who necessarily depended upon their daily labor." *Guarantee Title and Trust Co. v. Title Guaranty and Surety Co.*, 224 U. S. 152, 160 (1912). "Public opinion as to the peculiar rights and preferences due to the sovereign has changed." *Davis v. Pringle*, 268 U. S. 315, 318 (1925).
priority should be liberally construed in regard to claims for taxes "upon mo-
tives of public policy, in order to secure an adequate revenue to sustain the
public burdens."34 is negatived by the fact that Congress' most recent expres-
sion of public policy on the disposition of debtors' estates reaffirmed the rele-
gation of tax claims to fourth priority.35

Admittedly, the Supreme Court has held that the Government's statutory
priority in non-bankruptcy proceedings was not impliedly amended by these
changes in the Bankruptcy Act.36 As a matter of statutory construction this
seems correct, but the fact remains that the Congressional attitude toward the
sovereign's priority has changed since the turn of the nineteenth century when
the statute was originally enacted to implement the collection of revenue.

In addition to these claims for revenue, however, the Court has extended
the applicability of the statute to contract rights of some of the administrative
agencies of the Federal Government.37 This priority frequently places on
competing private creditors a burden inconsistent with Congress' remedial
policy in initially creating those agencies. The anomalous result is to discour-
age to some degree the grant of private credit to those whom the Government
through such agencies as the Federal Housing Administration and Farm
Credit Administration seeks to aid financially.38

To refrain from broadening still further the scope of federal priority by
enlarging the amount of assets available for satisfaction of the sovereign's
claims, the Supreme Court should hold a specific and perfected lien superior
to the priority statute. Such a decision would be in accord not only with the
Court's precedents but also with more recent Congressional attitude as ex-
pressed in the Bankruptcy Act.

re-affirmation of liberal construction, see United States v. Emory, 314 U. S. 423, 426
(1941); Bramwell v. United States Fidelity and Guaranty Co., 269 U. S. 483, 487 (1926).
§64.402 (14th ed. 1941).
37. United States Dept of Agriculture v. Remund, 67 Sup. Ct. 891 (1947) (Farm
Credit Administration); United States v. Emory, 314 U. S. 423 (1941) (Federal Hous-
ing Administration); United States v. Summerlin, 310 U. S. 414 (1940) (Federal Hous-
ing Administration). However, a government corporation, being viewed as a separate
entity, has been denied the benefits of this priority. Sloan Shipyards Corp. v. United
States Shipping Board Emergency Fleet Corp., 258 U. S. 549, 570 (1922). See Note, 47
Col. L. Rev. 485 (1947).
38. The Court is reluctant to read an exception into the statute even under these
circumstances. However, priority was denied to the government for loans made to rail-
roads after World War I, as in conflict with Congressional purpose to reestablish the
credit of the private railroads. United States v. Guaranty Trust Co., 53 F.2d 533
(C. C. A. 9th 1929), aff'd, 280 U. S. 478 (1930). See Mr. Justice Reed, dissenting in
United States v. Emory, 314 U. S. 423, 433-40 (1941); Blair, supra note 1, at 6. A
possible solution of this anomaly, albeit of limited application, is the bill currently in-
troduced in Congress to amend Rev. Stat. §3466 so as to place laborers' claims for wages
ADMINISTRATION OF FEDERAL LAWS MARKS AREA OPEN TO CONCURRENT STATE REGULATION*

In its role as umpire to the federal system the Supreme Court has, at least in recent years, ruled that states may legislate concurrently with the federal government unless there be a direct conflict with, or a preemption by, federal law. To determine conflict or preemption, not only have the terms and history of federal statutes been considered, but increasing weight has been given to the practice and opinions of the appropriate federal administrative agencies.

In the recent companion cases of Rice v. Santa Fe Elevator Corp. and Rice v. Chicago Board of Trade, the Court held the State of Illinois to be precluded from enforcing a major portion of its laws regulating the practices of grain warehousemen because of parallel federal regulation. The cases arose from an attempt by D. F. Rice & Co., independent Chicago grain dealers, to get relief from allegedly monopolistic practices of the large Chicago warehouses. Having unsuccessfully petitioned the Chicago Board of Trade to alter its rules so as to prevent the practices, Rice filed a complaint with the Illinois

---

1. See generally, Braden, Umpire to the Federal System, 10 U. of Chi. L. Rev. 27 (1942).
4. From shortly after the Fourteenth Amendment was adopted in 1868 until 1937 that Amendment was the chief weapon used by the Supreme Court to curb state legislation. Yick Wo v. Hopkins, 118 U. S. 356 (1886) (San Francisco ordinance discriminating against Chinese laundries); Chicago, M. & St. P. Ry. v. Minnesota, 134 U. S. 418 (1890) (railroad rate-fixing statute); Lochner v. United States, 198 U. S. 45 (1905) (hours of work of bakery employees); New State Ice Co. v. Liebmann, 285 U. S. 262 (1932) (supervision of ice manufacturing in Oklahoma). In 1937, however, the Court upheld a Washington minimum wage statute less than a year after it had invalidated a similar New York statute for lack of “due process.” Compare West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937) with Morehead v. New York, 293 U. S. 537 (1935). No Supreme Court decision since then has, so far as noted, employed the Fourteenth Amendment to strike down a state law except in the field of “civil rights.”

That the concepts of preemption and conflict can reach far into the realm of state legislation is evidenced by such cases as Borden Co. v. Borella, 325 U. S. 679 (1945), 55 Yale Law J. 421 (1946), and United States v. Appalachian Electrical Power Co., 311 U. S. 377 (1940).
5. 67 Sup. Ct. 1146 (1947).
7. “In 1941 Rice petitioned the Board of Trade to secure revisions of some of its rules, with a view of correcting some of the major abuses. Petition was filed by 125
Commerce Commission against eleven warehousemen and the Board of Trade charging several violations of Illinois law which the Commission was empowered to enforce. 8 Seven of the warehousemen, licensed under the United States Warehouse Act, 9 and the Board of Trade, designated as a contract market under the Commodity Exchange Act, 10 commenced separate suits in a federal district court to enjoin the state commission proceedings, claiming that the United States had so preempted the field as to invalidate state regulation. 11

In holding that federal law had to a large extent superseded state regulation the Court apparently invoked a test far more realistic than that of the circuit court. Evidence of congressional intent to exclude all state legislation had

8. Complaint filed July 28, 1944, with the Illinois Commerce Commission, Civil No. 32267. Rice charged chiefly the following violations of Illinois law by the warehousemen; (1) charging excessive rates, (2) discriminating against independent grain dealers, (3) operating without a state license, (4) dealing in their own grain, and (5) failing to secure Illinois Commerce Commission approval before issuing securities or making financial transactions with other public utilities. Ibid. Violations are alleged of virtually every provision of Illinois law regarding warehouses which the Illinois Commerce Commission is empowered to enforce. Illinois Public Utility Act, ILL. REV. STAT., c. 111-2, § 1 et seq. (1945); Illinois Grain Warehouse Act, id., c. 114, § 189 et seq. The state prohibition against warehousemen dealing in their own grain has resulted from a judicial interpretation of Section Thirteen of the Illinois Constitution. Hannah v. People, 198 Ill. 77, 64 N. E. 776 (1902) (statute permitting such dealing held unconstitutional).

The alleged violation of the Board of Trade is the only provision in Illinois law which grants to the Commission authority over the Board. It requires Commission approval of all Board warehousing rules before they go into effect. ILL. REV. STAT., c. 114, § 194b (1945).

9. 39 STAT. 486 (1916), as amended, 46 STAT. 1463 (1931), 7 U. S. C. § 241 et seq. (1940). The Warehouse Act applies only to those warehousemen who take out a voluntary federal license. In Chicago, as in many of the principal markets, most large public grain elevators are federally licensed. Communication to Yale Law Journal from Department of Agriculture, Dec. 18, 1946. The Act's main purpose is to build the warehouse receipt into a dependable and easily negotiable instrument. Its chief provisions call for federal inspection of grain as to both grade and quantity and prohibit removal of grain from a warehouse until receipts issued on it are returned and canceled. See, on the importance of these two requirements, Shepherd, Marketing Farm Products 221-33 (1946). Illinois law differs from the Warehouse Act in three principal respects: (1) a warehouseman need not cancel a receipt for grain before removing the grain, (2) a warehouseman may not deal in his own grain, and (3) issuance of securities and financial transactions with other public utilities require state approval. See note 8 supra.

10. 42 STAT. 998 (1922), as amended, 49 STAT. 1491 (1936), 7 U.S.C. § 1 et seq. (1940). The House Committee on Agriculture, in reporting out the bill which became the Commodity Exchange Act, said: "The fundamental purpose of the measure is to insure fair practice and honest dealing on the commodity exchanges. . . ." H. R. REP. No. 421, 74th Cong., 1st Sess. 1 (1933). The Act is comprehensive, but grants no specific authority over rules made by the contract markets, as does Illinois law. See note 8 supra.

11. Board of Trade of City of Chicago v. Illinois Commerce Commission, 156 F.2d 33 (C. C. A. 7th 1946). The district court held that state law had not been superseded and denied injunctions.
been found by the circuit court in the equivocal legislative history\textsuperscript{12} and seemingly broad coverage\textsuperscript{13} of the Warehouse and Commodity Exchange Acts. The Supreme Court, however, looked beyond the inconclusive statutory language to the actual practice of the federal regulatory agency, here the Department of Agriculture. In addition the Court appears to have relied heavily on the view of state activities taken by the Secretary of Agriculture.

Such a dual test is not new in Supreme Court decisions. It was particularly brought out by a pair of agricultural cases considering the Plant Quarantine Act\textsuperscript{14} and the Cattle Contagious Disease Act,\textsuperscript{15} which give the Secretary of Agriculture substantially identical authority in their respective fields. With no evidence of the Secretary's opinion at hand, but stressing that the Department of Agriculture was handling such problems,\textsuperscript{10} the Court held that the Plant Quarantine Act had superseded similar state legislation. In contrast, a New York ban against the importation of diseased cattle was upheld where a letter from the Secretary was produced which sanctioned the restriction imposed by the state.\textsuperscript{17} Deference to the views of federal agencies has also been marked in cases concerning labor relations,\textsuperscript{18} development of water...
power, licenses to do business, alien registration, and crop prorating programs.

The Court has underlined the issue of duplication vel non in other situations where there has been no expression by the executive—in the Cloverleaf Butter case, and in cases considering state jurisdiction over telephone companies, interstate railroads, and motor carriers.

That the Supreme Court probably prefers to obtain an opinion by the executive was demonstrated in Parker v. Brown, where a California crop control plan was upheld despite provision in the Agricultural Marketing Agreement Act for identical federal control. At the request of the Court the United States there filed a brief amicus curiae stating that the Secretary of Agriculture had helped to draw up and had approved the state plan. The Secretary's approval was stated to be a key factor in the decision.

The United States filed a brief amicus curiae in the Supreme Court in the two present cases, arguing for preemption by the Warehouse Act, and specifically refraining from making the same argument for the Commodity Exchange Act. In addition, the Administrator of the Warehouse Act has pointed out, though not to the Court, the failure of past attempts to cooperate with state warehousing officials, while the Commodity Exchange Authority has apparently had no such problem.

19. First Iowa Hydro-Electric Coop. v. FPC, 328 U.S. 152, 161 (1946) (state license to construct power project held unnecessary).
27. 317 U.S. 341 (1943).
28. Id. at 356-7.
29. "We have no occasion to decide whether the same conclusion would follow if the state program had not been adopted with the collaboration of officials of the Department of Agriculture and aided by loans from the Commodity Credit Corporation recommended by the Secretary of Agriculture." Id. at 358-9.
30. Brief for United States as Amicus Curiae, p. 18 et seq.
31. Id. at 14.
33. "The question of cooperation between the Commodity Exchange Authority and
Both for the warehousemen and the Board of Trade the *amicus* brief, presumably representing the opinion of the Secretary of Agriculture,\(^{34}\) foreshadowed the final result. The Government divided the questions in the *Elevator* case into the regulation of grain storage, *e.g.*, rates, grain standards, warehouse receipts, and the regulation of warehousing finance, *e.g.*, issuance of securities, contracts with affiliates and other public utilities.\(^{35}\) As to grain storage the Government argued strongly that state regulation should be precluded,\(^{36}\) pointing to an inevitable duplication in practice, as well as to Section 29 of the federal Warehouse Act, which, in an unusual provision, states that the jurisdiction of the Secretary of Agriculture is exclusive.\(^{37}\) In regard to warehousing finance the Government's brief confessed doubt, although it did argue against state supervision.\(^{38}\)

The Court made a similar division of warehouse activities and upheld the arguments of the Government on grain storage.\(^{39}\) Emphasizing that the Secretary of Agriculture had never attempted financial regulation of warehouses, the Court allowed the Illinois Commerce Commission to take jurisdiction over this phase of warehouse activities.\(^{40}\)

In the *Board of Trade* case, where the state sought only to review the Board's rules as to warehousing practices in the face of federal regulation designed principally to prevent fraudulent activities on the exchange itself,\(^{41}\) the Court, with the Government,\(^{42}\) could see no necessary incompatibility between state and federal action. The Court, in fact, perceived separate functions being served by the dual regulation and unanimously upheld the trial court's refusal of injunctive relief.\(^{43}\)

Effective solution of national problems under a dual form of government, where legislative adjustment frequently lags behind administrative actuality, demands that settlement of the boundaries between state and federal authority be based more on administrative practice and feasibility than on the niceties of statutory interpretation. Application of a criterion so vague as the all-inclusive language of a statute to strike down state legislation which in practice supple-
ments federal regulation can scarcely serve the best interests of either government. On the other hand, to give weight to the recommendations of the federal executive as to whether state laws can stand without impairing or duplicating federal action should both increase administrative efficiency and minimize the area of federal-state conflict.

"ADULTS ONLY" PROVISIONS IN LEASES*

The contractual obligations embodied in the residential lease,¹ which governs the living arrangements of more than half the population of the United States,² are theoretically the product of lessor-lessee negotiation on a basis of relative equality. But the real inequality of bargaining position of tenants leasing low-cost apartments and multiple dwelling houses is demonstrated by the increasing prevalence of "standardized" leases,³ in many cases virtual "contracts of adhesion."⁴ Although the current housing shortage has sharply accentuated existing inequalities, few legislative⁵ or judicial⁶ limitations on

---

* Lamont Building Co. v. Court, 147 Ohio St. 183, 70 N. E.2d 447 (1946).
1. For the usual terms and conditions of leases, see PEREGO, APARTMENT OWNERSHIP AND MANAGEMENT 63-7 (1934) and ROSAHN AND GOLDFELD, HOUSING MANAGEMENT 44-54 (1937).
2. U. S. BUREAU OF CENSUS, 16TH CENSUS OF THE U. S.: 2 HOUSING PT. I, 7-8 (1940). The 1940 census indicated a percentage of 58.9 of the population living in non-farm rental housing, as compared with 54.0 in 1930. See COLEAN, AMERICAN HOUSING 227 (1944). The Census Bureau study of June 1946 revealed that 47% of all veterans seeking housing desired rental housing, while real estate specialists have recently suggested a figure as high as 85%. In view of the high cost of sales housing and the effects of rising living costs on the buyer's ability to finance long term investment, a prevailing upward trend in rental housing percentages is highly probable. See Wheildon, National Housing Emergency, 1946-1947, 2 EDITORIAL RESEARCH REPORTS 873 (1946).
3. "The provisions embodied in [such] leases ... constitute a comprehensive scheme of landlord immunity, together with an extensive enumeration of the tenant's duties ... [which] even the informed tenant [is forced] to accept ... in order to obtain accommodations." Note, Landlord and Tenant After OPA, 14 U. CHI. L. REV. 249 (1947).
4. See Kessler, Contracts of Adhesion, 43 Col. L. Rev. 629 (1943).
5. Emergency Price Control Act of 1942, 56 Stat. 25 (1942), as amended, 50 U.S.C. App. §902(b) (Supp. 1945). Maximum Rent Regulations issued by the Administrator also sharply limit the power of landlords to terminate leases. OPA Rent Regulation for Housing §1388.1181(b), 10 Fed. Reg. 3441 (1945). However, the federal regulations do not abrogate local laws, but merely place certain legal remedies generally available to landlords in abeyance for the duration of such controls unless otherwise authorized by the administrator.
landlord power have thus far been imposed. Lamont Building Co. v. Court, in which the Ohio Supreme Court upheld a lease provision limiting occupancy to adults only, indicates that freedom of contract on a “take it or leave it” basis is still the prevailing rule.

In the Lamont case, plaintiff’s agent rented an apartment to the defendant, stating that occupancy in the building was restricted to adults, although, unknown to the agent, the defendant’s wife was pregnant at the time. When a child was born six months later, the landlord notified defendant to arrange for occupancy by adults only or to vacate. Upon defendant’s failure to comply, an eviction action was brought for the alleged violation of a substantial obligation of the tenancy. Defendant’s verdict in the trial court was affirmed by the intermediate appellate court, which held the “adults only” provision void as against public policy when applied to children born during the tenancy. With apparent reluctance, the Supreme Court of Ohio reversed. Emphasizing the importance of protecting property rights and freedom of contract as against a “vague and uncertain” public policy, the court held the “adults only” provision to be a proper subject of “voluntary” agreement and not violative of any established interest of society.

The holding seems to ignore the inevitable present consequences of “adults only” provisions. Their immediate effect is to deny many tenants with children access to the only adequate housing within reach of a limited income, thereby inducing a further overcrowding of sub-standard facilities and a construal against the landlord, with the suggestion that such a provision might be invalid on grounds of public policy as too easy to obtain during the housing shortage; Walker & Dunlop, Inc. v. Gladden, 47 A.2d 510 (Munic. Ct. App. D.C. 1946) (adopting a similar view).

7. 147 Ohio St. 183, 70 N. E.2d 447 (1946).
8. While it does not appear whether a written lease was employed, the stipulations against occupancy by children were apparently entirely oral. The first month’s rental receipt was over-stamped “Specific rental rule: No pets—adults only.”
9. OPA regulations provide that a landlord may evict a lessee who “... has violated a substantial obligation of his tenancy, other than an obligation to pay rent...” OPA Rent Regulation for Housing §1388.1181(b) (3), 10 Fed. Reg. 3441 (1945). However, in order for the landlord to obtain an eviction for such violation, the obligation must be of a contractual nature, “inherent in the nature of the tenancy.” Kirschbaum v. Mobley, 26 Ohio Ops. 333, 336 (1943).
11. Of the total number of families living in rental housing, less than one fourth are able to pay more than a $40 monthly rent. Hearings before Committee on Banking and Currency on S. 1592, 79th Cong., 1st Sess., tables following 538 (1945).
12. Almost 30% of the families in urban areas, as shown by the 1940 census, are now living in housing so sub-standard as to be a threat to their health and welfare. Nat’l Comm. on Social Legislature of the National Lawyers’ Guild, A Post-War Low Rent Housing Program 3 (1945). In 1940, approximately one fourth of all rental housing needed major repairs or lacked running water and plumbing. Hearings before Committee on Banking and Currency on S. 1592, 79th Cong., 1st Sess., tables following 538 (1945). See also Wood, Introduction to Housing Facts and Principles 10, 36, 146-9 (1939).
further doubling up of families. As recognized by the press, such lease restrictions only serve to aggravate an already malignant housing situation, to which much of the increase in juvenile delinquency and disease, and degeneration of the family institution has been attributed. Nor can the caveat of the intermediate Ohio court be ignored: not only will many tenants of procreative age living under “adults only” agreements refrain, if possible, from having children, but others, faced with the prospect of eviction, might also resort to abortion of an unplanned child. Thus, a realistic analysis of the impact of these provisions during the housing shortage indicates a tendency to thwart the desire for children and to impede the normal development of family life. Far from being “vague and uncertain,” a policy of protecting and encouraging the family institution has been affirmatively expressed by legislatures, and in other contexts scrupulously adhered to by courts.

While only a few state statutes specifically prohibit “adults only” restrictions there is inherent in the state and federal housing acts passed in recent

13. See 91 Cong. Rec. 9638 (1945); 91 Cong. Rec. A5540 (1945); Hearings before Subcommittee on Banking and Currency on H.R. 4761, 79th Cong., 2d Sess. 9, 160 (1946). As of December 31, 1946, over three million families were reported living “doubled up” with their relatives or other families. Hearings before Committee on Banking and Currency on S. 1592, 79th Cong., 1st Sess. 320, tables following 538 (1945). Instances of two or three families living in one apartment are common throughout the country, while extreme cases of from nine to seventeen persons living in a two or three room apartment have been reported. See Davies, Fundamentals of Housing Study 55 (1939); Wood, Introduction to Housing Facts and Principles 38 (1939).

14. See Are Children People?, N. Y. Times, March 6, 1947, p. 24, col. 3; Roosevelt, My Day (Syndicated column) Dec. 5, 1946 (severely criticizing the Ohio court's decision in the Lamont case as a failure to recognize the urgency of the current housing situation).


16. Hearings before Subcommittee on Banking and Currency on H.R. 4761, 79th Cong., 2d Sess. 248 (1946); Davies, op. cit. supra note 13, at 106. “Marital stresses and family problems have arisen through emotional disturbances and maladjustments which can be traced directly to inadequate and crowded housing . . . (and) the need of moving in with in-laws.” N. Y. Herald Tribune, May 7, 1947, p. 28, col. 1 (citing crowded housing as the chief cause of the present high divorce rate in the United States).


18. Ariz. Code Ann. §43-1006 (1940); Rev. Code of Delaware §5067 (Star, 1936); Ill. Stat. Ann., c. 80, §37 (Smith-Hurd, 1935); N. J. Stat. Ann. tit. 2, §144-2 (1939); N. Y. Penal Law §2041. Such statutes declare the refusal to rent or the termination of existing tenancies because of children in the lessee's family to be unlawful as against public policy. Violation of the statute is a misdemeanor, resulting in fine or imprisonment.

years a legislative recognition of the relation of adequate housing to the growth and development of the family. In hearings preceding federal legislation, repeated emphasis was placed upon the necessity of protecting the security of the home by eliminating the social and economic pressures, attributable to inadequate housing, which encourage divorce and postponement of propagation. The desirability of providing opportunity for the normal development of children was also stressed, with the result that most Federal Housing Authorities have pursued a policy of extending preferential treatment in the selection of tenants to families with children. The declarations of policy found in the National Housing Acts have, in general, been adopted by the states in statutes coordinated with the federal legislation.

Judicial recognition of the importance of preserving the family institution is found in cases involving acts and agreements in derogation of marriage and the marital functions. Property and contract rights have frequently been "impaired" in voiding conditions and covenants in deeds and contracts which tend to restrain or discourage marriage or to encourage the future separation of husband and wife. Similar considerations have prompted courts to strike down agreements between husband and wife to refrain from sex rela-


23. By 1940, thirty-nine states had enacted housing legislation, integrated with the National Housing Acts, creating state housing authorities. The National Housing Act of 1937 sets forth a general policy of remedying "the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income... injurious to the health, safety, and morals of the citizens of the Nation." 50 Stat. 888 (1937), 42 U.S.C. §1401 (1940).


26. Pereira v. Pereira, 159 Cal. 1, 103 Pac. 488 (1909); Barngrover v. Pettigrew, 128 Iowa 533, 104 N. W. 904 (1905); Cartwright v. Cartwright, 3 De G. M. and G. 982 (Ch. 1853); Halsbury, Laws of England 157 (Hailsham Ed. 1932). See Fender v. Mildmay, 3 All Eng. 402, 415 (H. L. 1837), in which Lord Thackerton expressed the idea that "such agreements negative the consortium vitæ, which is intended... to conserve and further the interests of the children..." But cf. Farnum v. Bartlett 52 Me. 570 (1864).
tions, and to recognize the refusal of sex relations or the continued use of contraceptives as a ground for divorce or annulment. While it may be argued, as did the Ohio court, that “adults only” provisions do not in themselves constitute a direct contractual restraint on propagation or marriage, their practical effect would seem to place them in the same disfavored category.

By placing these lease terms in their social and economic perspective, therefore, ample basis can be found upon which to declare them void as contrary to public policy. While a forthright decision to this effect would perhaps be the most facile solution to the problem, many courts are reluctant to pre-commit themselves on a recurring issue, preferring instead to deal with each fact situation as it arises. Were this position to be adopted in viewing “adults only” provisions, effective means of minimizing their undesirable consequences would still be available. As suggested by the dissent in the Lamont case, it may often be a question of fact for determination by the jury whether the “adults only” restriction is merely a rental policy of favoring childless tenants or whether it is actually a part of the rental agreement; and in the latter case, whether the birth of a child constitutes a “violation of a substantial obligation of the tenancy” within the meaning of OPA regulations. Moreover, in those cases where an agreement against occupancy by children has


30. Lamont Building Co. v. Court, 147 Ohio St. 183, 184, 70 N. E.2d 447, 448 (1946). The court argued that the landlord was not compelling the tenant to covenant against having children, but was only requiring that the tenant should not bring any children he might have in the future on to the leased premises. Such a construction would, of course, tend to separate children from their parents until adequate accommodations could be secured.

31. For an English view of “Adults Only” provisions, see Note, 87 Sol. J. 368 (1943).


33. In actual practice, “adults only” restrictions are seldom included in the specific terms and conditions of the lease, whether the lease be oral or written. As indicated in the Lamont case, any agreement relating to occupancy by children is usually arrived at informally during the pre-lease negotiations between the landlord and the prospective lessee. Communication to the Yale Law Journal, from the New Haven Real Estate Board, April 14, 1947.

34. See note 9 supra. In the Lamont case, the unilateral action of the landlord in stamping a rental rule across the face of the rental receipt could hardly be called a “contracting” between the parties; the materiality of the obligation, therefore, in the absence of express language, seemed properly a question for the jury.
clearly been made, there may often be no forfeiture provided for the breach of this particular covenant or condition. Since doubtful cases are generally construed against the party seeking to invoke a forfeiture, the landlord might be limited to an action for nominal damages and the tenant remain in possession. The parol evidence rule may also be used to good advantage in avoiding a termination of the lease, and even in those cases where a written covenant or condition provides for forfeiture, non-performance may still be excused under the doctrines of "changed conditions" or "impossibility of performance." In the Lamont case, for example, there was evidence of other children living in the same building, which could be regarded as a ma-

35. Murphy v. Traynor, 110 Colo. 465, 135 P.2d 230 (1943); Steinberg v. Fine, 225 Mich. 281, 196 N.W. 367 (1923); Miller v. Reidy, 85 Cal. App. 757, 250 Pac. 358 (1927); see 2 TIFFANY, THE LAW OF LANDLORD AND TENANT, §365-6 (1912) and cases therein collected; see TAYLOR, LAW OF LANDLORD AND TENANT §499 (9th ed. 1934) and cases there cited.

36. See 2 TIFFANY, op. cit. supra note 35, at 1358-64.

37. Morris v. Healy Lumber Co., 46 Wash. 2d, 91 Pac. 186 (1907); see 2 TIFFANY, op. cit. supra note 35, at 1363 and cases therein cited. It may be difficult to predict whether an oral agreement will be considered collateral to a written lease or a variation of the written terms. However, it is generally held that, to be collateral, the promise or agreement must relate to a subject distinct from that to which the written lease applies, and that the reservation of an option to terminate a written lease can not rest upon an oral contemporaneous agreement.

38. Kneip v. Schroeder, 255 Ill. 621, 99 N. E. 617 (1912); Jackson v. Stevenson, 156 Mass. 496, 31 N. E. 691 (1892); see 2 TIFFANY, THE LAW OF REAL PROPERTY 1456 (1920); Goldstein, Restrictions on Use of Land, 54 Harv. L. Rev. 255 (1940). While the doctrine of changed conditions seems to be peculiarly a property concept, with reference to restrictive covenants in deeds, there seems to be little reason why the underlying principles would not be equally applicable to restrictive covenants in leases.

Much of the difficulty which the courts have encountered in construing covenants and conditions in leases has arisen out of the confusion over the conceptual nature of the lease. Under the property concept, the lease itself, as distinguished from a contract to lease, is regarded as a conveyance of an "estate in land," a view which seems wholly inappropriate as applied to apartment leases. Some courts, however, have discarded the property view for the "contract" theory, designating the lease as a bilateral contract which becomes primarily executory as to the lessee upon signing by the lessor. See Hawkinson v. Johnston, 122 F.2d 724 (C. C. A. 8th 1941), cert. denied 314 U.S. 639 (1941); see also JACOBS, CASES AND MATERIALS ON LANDLORD AND TENANT 13 (1941); Bennett, The Modern Lease-An Estate in Land or a Contract, 16 Tex. L. Rev. 47 (1937); 3 WILLISTON, CONTRACTS §§890 (1936).

39. Hanford v. Connecticut Fair Association, 92 Conn. 621, 103 Atl. 833 (1918); see 2 TIFFANY, THE LAW OF LANDLORD AND TENANT 1409-10 (1912); ANSON, CONTRACTS §376 (Corbin's ed. 1930); 6 WILLISTON, CONTRACTS §1935(3) (1938). The equity relief against forfeiture on grounds of "inevitable accident" under the property concept of leases would appear to be governed by principles similar to the doctrine of "impossibility" under contract law, resting upon "fortuitous circumstances beyond the control and contemplation of the promisor." See RESTATEMENT, CONTRACTS §454 (1932), stating as grounds for relief not only strict impossibility, but also "impracticability because of extreme and unreasonable difficulty." See also PAGE, THE DEVELOPMENT OF THE DOCTRINE OF IMPOSSIBILITY OF PERFORMANCE, 18 Mich. L. Rev. 589 (1920).
terial change in conditions. And were the wife not pregnant at the time of leasing, it might well be said that performance of the "no-children" covenant or condition had been rendered impossible by fortuitous circumstances beyond the control of the tenant.

Judicial intervention in itself, however, may not be sufficient. While courts can avoid or minimize the undesirable social effects of "no-children" restrictions as they arise in forfeiture and eviction cases, they have no means of taking action against the operation of such restrictions as conditions precedent to leasing. Although the paucity of cases arising under the few statutes designed directly to meet this latter problem would imply some means of circumvention, nevertheless, if correlated with adequate publicity and strict enforcement whenever possible, the statutes would add a moral factor persuasive on most of the law-abiding public. Furthermore, in providing a definitive legislative policy for courts to follow and enforce, a recurrence of the results of the Lamont decision would be avoided. Even in the absence of legislation, however, courts should recognize the far reaching social implications of "adults only" provisions and refuse to grant them judicial sanction.

STATE REGULATION OF PILOTAGE: CONSTITUTIONALITY OF NEPOTIC APPRENTICESHIP REQUIREMENT*

The Supreme Court, as arbiter of the conflict between individual rights guaranteed by the Constitution and state police power, has shown a salutary deference to state and municipal regulation of callings and professions. But

40. See note 18 supra.

41. Since the enactment of the Arizona statute in 1921, not one case has yet arisen. Communication to the Yale Law Journal from the Attorney General of Arizona, July 22, 1946. The oldest of the statutes, enacted in Illinois in 1909, records one case: People v. Metcalf, 392 Ill. 418, 64 N. E. 2d 867 (1946) (dismissed for incompetent proof). It would seem reasonable to conclude that the lessees are often unaware of their statutory rights, and that the statute is circumvented by the landlord's refusal to disclose the reasons for non-rental.

42. Many landlords have endeavored to obtain the results of "adults only" provisions by the use of "restricted occupancy" clauses which terminate the lease upon occupancy by more than two "persons." Where such clauses are clearly an effort to evade the statute, the courts should have little difficulty in piercing the subterfuge and refusing to enforce them.

43. "...freedom of contract must mean different things for different types of contracts . . . (our concepts) must change with the social importance of the type of contract and with the degree of monopoly enjoyed by the author of the standardized contract." Kessler, supra note 4, at 642.

*Kotch v. Board of River Port Pilot Commissioners, 67 Sup. Ct. 910 (1947).

1. Where there is a rational justification for the legislation and the means of regulation are reasonably related to the end sought, the Court has upheld such action.
its recent 5-4 decision in *Kotch v. Board of River Port Pilot Commissioners*,
upholding a Louisiana system of pilotage regulation which sanctions nepotism in
the selection of river port pilots, may represent an undesirable extension of
this policy.

Pilotage, the vocation of guiding vessels within ports and through inland
waterways, is a clannish profession which because of its great importance to
commerce has long been subject to governmental regulation. Limited federal
regulation has been supplanted by extensive state systems, some of which

State Board of Dental Examiners, 294 U.S. 608 (1935); Graves v. Minnesota, 272 U.S.
337 (1929); McNaughton v. Johnson, 242 U.S. 344 (1917). *Osteopaths:* Hayman v. Galveston,
North et al., 271 U.S. 40 (1926); Watson v. Maryland, 218 U.S. 173 (1910); Reetz v.
Michigan, 183 U.S. 505 (1902); Dent v. West Virginia, 129 U.S. 114 (1899). *Private Detectives:*

On the other hand, the Court has protected, under the Fourteenth Amendment, the
right to equal protection of the laws, Yick Wo v. Hopkins, 118 U.S. 356 (1886) and the
right to work, Truax v. Raich, 239 U.S. 33 (1915); Allgeyer v. Louisiana, 165 U.S. 578
(1897).

2. 67 Sup. Ct. 910 (1947). Mr. Justice Black wrote the majority opinion. Mr.
Justice Rutledge, with whom were Messrs. Justices Reed, Douglas, and Murphy,
dissented.

3. But it should be noted that the court was careful to limit its decision to pilotage
alone. 67 Sup. Ct. 916 (1947).

4. See, e.g., Mobile Bar Pilots Association v. Commissioner of Internal Revenue, 97
F. 2d 695, 697 (C.C.A. 5th 1938); Kane, Deep Delta Country, c. 10 (1944); Kalkhoven,

5. As early as the fourteenth century, England had pilot guilds (later royal corpora-
tions) which provided bodies of licensed pilots. *Pilotage in the U.S., Special Agents*
Series, Department of Commerce, p. 8, (1917).

6. When the United States Constitution was adopted, each state had its own system of
regulation. By the Act of August 7, 1789, Rev. Stat. § 4235, (1875) Congress indicated
its intention not to supplant these systems, although under the commerce clause (U.S.
 Const. Art. 8) it had been given that power. Anderson v. Pacific Coast S.S. Co., 225 U.S.
187 (1912). The states, however, are now excluded from regulation of pilots engaged in

7. State action in the pilotage sphere has been consistently upheld by the Supreme
U.S. 332 (1904); Wilson v. McNees, 102 U.S. 572 (1881); *Ex parte Neil*, 13 Wall.
236 (U.S. 1871); Cooley v. Bd. of Wardens of Port of Phila., 12 How. 299 (U.S. 1851).
State courts also have uniformly upheld the regulatory systems. State *ex rel.* Biscayne
require long apprenticeships and most of which do not explicitly prohibit nepotism.

The Louisiana law follows the general pattern. It establishes a State Board of Pilotage Commissioners consisting of three licensed pilots which is authorized to limit the number of pilots and select pilots according to its own rules. Applicants must have served a six months apprenticeship under a state-licensed pilot, but the Board is given no powers over the selection of apprentices. In practice, only persons selected by the statutorily-authorized Crescent River Port Pilots Association can become apprentices, and this is undoubtedly the legal situation in the other states also.

Bay Stevedoring Co. v. Turner, 143 Fla. 424, 196 So. 816 (1940); Kotch v. Board of River Port Pilot Commissioners, 209 La. 737, 25 So.2d 527 (1946); Caples v. McNaught, 147 Ore. 72, 31 P.2d 1105 (1931); State ex rel. Sater v. Board of Pilotage Commissioners, 198 Wash. 695, 90 P.2d 238 (1939).


12. The Board recommends to the Governor those it deems qualified, but his required approval appears to be a mere formality. La. Gen. Stat., tit. 59, § 9157 (Dart, 1939).

13. The law does not in terms require that the apprenticeship be served under an incumbent pilot, but the state supreme court has so construed it by the instant decision. 209 La. 737, 25 So.2d 527 (1946).

14. Id. at 758, 25 So.2d at 533.

15. Although §9159 of La. Gen. Stat., tit. 59 (Dart, 1939) authorizes the formation of the Association, it does not prescribe any duties therefor. However, since all state-licensed pilots engaged in pilotage on the Mississippi River between New Orleans and the Mississippi Delta (including the three members of the Board) belong to the Association, it is impossible to become an apprentice without Association approval. Pilots handling vessels through the Delta to the ocean have their own association and are separately regulated. La. Gen. Stat. §§9141, 9146-53 (Dart, 1939).
group has consistently limited selection to its members' relatives and friends. A 1942 amendment extended the monopoly of state-licensed pilots to include pilotage of foreign vessels within the port of New Orleans, which had been the major portion of the business of plaintiffs, federally licensed pilots. Although plaintiffs had more than fifteen years pilotage experience in that area, the Board refused to consider their applications for state licenses because they had not served the required six months apprenticeship.

The Louisiana Supreme Court, in an opinion which avoided the real issues, upheld the state statute against plaintiffs' charge of violation of the equal protection clause of the Fourteenth Amendment. The United States Supreme Court, in sustaining the Louisiana court's decision, admitted that the Louisiana system was one of nepotism, but nevertheless upheld the statutes as not "unrelated" to the concededly proper objective of ensuring a safe and efficient pilotage system.

Deference to state legislation in the area of economic regulation has not caused the Court in previous cases to slight its function as the ultimate guardian of individual freedom in the fields of civil rights and civil liberties. The right to engage in one's chosen profession, free from state-imposed unreason-

18. For the applicable federal licensing statute, see note 6 supra.
19. Kotch v. Board of River Port Pilot Commissioners, 209 La. 737, 25 So.2d 527 (1946). The court interpreted plaintiffs' complaint as an attack upon the power of the state to regulate pilotage rather than upon the method, and rested its decision on Olsen v. Smith, 195 U.S. 332 (1904). There, the United States Supreme Court upheld the constitutionality of similar Texas statutes. The Olsen case is, however, distinguishable, since in Petterson v. Board, 24 Tex. Civ. App. 33, 57 S.W. 1002 (1900), on which the Texas court relied in ruling on the Olsen case, 68 S.W. 320 (1902), the apprenticeship provision of the Texas statute had been construed as directory only. The Louisiana provision is mandatory.
20. 67 Sup. Ct. 910 (1947). The Court considered as an important factor that the case tested the power of a state to select its own officers and agents. But the decision cannot be justified on this ground. As pointed out by the dissent in the Kotch case, a state cannot legally sanction unconstitutional discriminatory practices in any profession simply by declaring its members to be state officers. Id. at 917 (1947). Furthermore, it should be noted that pilots are state officers in Louisiana only by judicial construction. Levine v. Michel, 35 La. Ann. Rep. 1121, 1124 (1883); Louisiana v. Follett, 33 La. Ann. Rep. 228, 230 (1881); Williams v. Payson, 14 La. Ann. Rep. 7, 8 (1859). But see Houston Pilots v. Goodwin, 178 S.W.2d 308, 312 (Tex. Civ. App. 1944).
able and discriminatory training requirements, would seem an essential element of such freedom. It is, therefore, surprising that the Court rejected two lines of legal argument which could have been used to invalidate the Louisiana system of pilotage regulation.

First, it can be argued that the mandatory apprenticeship requirement is itself unconstitutional. The usual rule is that state regulation of a profession is constitutional wherever the means chosen are reasonably related to the ends sought. Since there would seem to be no rational basis for requiring federally-licensed pilots of fifteen years experience in the same area to undergo a six months apprenticeship, such a requirement would appear to constitute a deprivation of the liberty and property guaranteed by the Fourteenth Amendment.

Second, it can be contended that any state-sanctioned system of selection which makes family relationship the all-important criterion constitutes a violation of the equal protection clause of that same amendment. Certainly this is so where the connection between nepotism and increased safety and efficiency is of the tenuous kind found here. And there are analogous cases which could support such a doctrine. In Yick Wo v. Hopkins, the Court invalidated a system of licensing of laundrymen, when applied so as to discriminate on the basis of nationality; discrimination based on blood relationship is not.

---

24. In Smith v. Texas, 233 U.S. 630 (1914), the Court held unconstitutional a Texas statute providing that only those who had occupied certain specified positions might become railroad conductors, saying: "... there is no authority for the proposition that conditions may be imposed by statute which will admit some who are competent and arbitrarily exclude others who are equally competent... None of the cases sustains the proposition that, under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special or favored position." Id. at 638. Cf. Williams v. Molther, 198 Fed. 460, 464 (C. C. A. 2d 1912) in which a Federal court upheld any applicant's right to an examination for a federal pilot's license, saying: "While no citizen has the inherent right to a pilot's license, every citizen has a right to be examined for it. The local inspectors are to determine the applicant's qualifications. They may hold in any case that he has not had sufficient deck experience. That, however, is quite different from refusing him an examination for this reason... One applicant might be qualified after one year's experience when another would not be qualified after five years. It seems to us purely arbitrary to say that no one is qualified to act as a pilot because he has not had any fixed period of deck experience." And see cases cited note 1 supra.

25. Factors mentioned by the Court to sustain the connection between nepotism and a safe pilotage system, such as "... the advantages of early experience under friendly supervision in the locality of the pilot's training, the benefits to morale and esprit de corps which family and neighborly tradition might contribute, the close association in which pilots must work and live in their pilot communities and on the water, and the discipline which is imposed to assure the State competent pilot service appointment..." [67 Sup. Ct. 910, 916 (1947)], are of dubious validity when applied to federally-licensed pilots with fifteen years experience.


27. And declared unconstitutional a statute which, although fair on its face, had been unequally administered. Cf. Snowden v. Hughes, 321 U.S. 1 (1943). The legalistic diffi-
entitled to any greater protection. Furthermore, the Kansas Supreme Court has held that a union certified under the Railway Labor Act to act as exclusive bargaining agent is, in effect, a governmental agency and is barred by the Fifth Amendment from establishing discriminatory membership requirements. In the instant case, Louisiana has authorized the formation of what amounts to a pilots' union, given it a closed shop, and permitted it to maintain discriminatory membership requirements. Such discrimination by a state would appear to be as much subject to the prohibitions of the Fourteenth Amendment as was the action of the Kansas union to the Fifth Amendment.  

The Court's decision may seem less surprising when it is realized that the case marks the intersection of two conflicting lines of doctrine—judicial self-restraint in the field of state control of economic affairs and judicial activism in the field of state limitations of civil rights. But the paramount position of


30. There is, moreover, some precedent which would explain the votes of individual members of the court. Mr. Justice Black's position, for example, may perhaps be more readily explicable in the light of his extreme aversion to striking down state statutes without a direct Congressional mandate. See his dissents in Southern Pacific Co. v. Arizona, 325 U.S. 761, 784 (1945); McCarrol v. Dixie Greyhound Lines, 309 U.S. 176, 183 (1940); J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 316 (1938). But cf. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 643 (1943), where he joined with Mr. Justice Douglas, a dissenter in the instant case, in repudiating his concurrence in the Gobitis decision, where he had placed states' rights above individual liberties. And in Morgan v. Virginia, 328 U.S. 373, 385 (1946), he concurred reluctantly in the invocation of the commerce power to invalidate a state statute providing for racial segregation in interstate busses.

In the field of business regulation, Mr. Justice Frankfurter has departed completely from the stand he took beside Mr. Justice Black in the Dixie Greyhound case, Freeman v. Hewitt, 67 Sup. Ct. 274 (1947), but it is not surprising to find him with the majority here, in view of his striking dissent in the Barnette case, as well as his dissents in the Jehovah's Witnesses cases, 319 U.S. 134 (1943). It should be noted that his concurrence in the Morgan case, 328 U.S. 373, 385, carefully avoids the civil rights issue.

Mr. Justice Burton, another member of the majority, should be remembered as the lone dissenter in the Morgan case—a position from which his stand here cannot be deduced, but may perhaps be implied. Although the voting record of the Chief Justice in civil liberties cases is too brief to permit of definitive comment, he appears to have shown a consistent bias towards the support of established governmental authority.
civil liberties would seem to call for a positive policy of judicial protection rather than a negative policy of self-abnegation.\textsuperscript{31}

Jackson's vote is most difficult to account for. He is less hesitant than some of his brethren to intervene in state affairs without specific Congressional authorization, Duckworth v. Arkansas 314 U.S. 390, 397 (1941), and he wrote the opinion of the court in the \textit{Barnette} case, \textit{supra}. But the temper of his opinions suggests that the Board's "efficiency" argument might have found in him a sympathetic auditor, and he, unlike Justices Murphy and Rutledge, has more often placed other values above civil liberties. See, \textit{e.g.}, Douglas v. Jeannette, 319 U.S. 157, 166 (1943) (householder's right of privacy).