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Case Notes

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ADMINISTRATIVE LAW—Practice and Procedure—Due Process Clause Does Not Require Tenants of Federal Housing Administration Financed Rental Project to be Given Trial Type Hearing on Proposed Rent Increase. Langevin v. Chenango Court, Inc., 447 F.2d 296 (2d Cir. 1971).

Plaintiffs are tenants in a housing project owned by defendant Chenango Court, Inc., and constructed under a low and moderate income housing program authorized by Section 221(d)(3) of the National Housing Act.[1] Pursuant to regulations promulgated under the Act,[2] the

1. 12 U.S.C. § 1715 *l*(d)(3) (1970). Congressional recognition of low income families' need for housing is enunciated in the Housing Act of 1949 which established as the national housing policy "the realization as soon as feasible of the goal of a decent home and suitable living environment for every American family. . . ." Housing Act of 1949, § 2, 42 U.S.C. § 1441 (1970). The rental housing program established by § 221(d)(3) is one of several stratagems created by Congress to help achieve that goal. The statute itself indicates that the program "is designed to assist private industry in providing housing for low and moderate income families and displaced families." National Housing Act, § 221(a), 12 U.S.C. § 1715*l* (a) (1970). In its report on the bill which established the § 221(d)(3) program, the Senate Committee on Banking and Currency noted that: "[f]or families with incomes that do not permit home ownership at current construction costs and at market interest rates, but who have incomes too high for public low-rent housing, this section of the bill would also establish a new program of FHA-insured, long-term low-interest-rate mortgage loans for moderate rental housing." S. Rep. No. 281, 87th Cong., 1st Sess. at 3, 4 (1961). Included in this report was the conclusion reached by the Subcommittee on Housing: "Existing institutions available to help achieve the national housing policy . . . are inadequate. It is evident that families of low and moderate income cannot be housed decently, within the foreseeable future, unless new programs for this purpose are fostered by the Federal Government, or by State and local governments, or by all levels of government.' " Id. at 4. Under § 221(d)(3), newly constructed or rehabilitated housing can be sponsored by either nonprofit or limited distribution organizations, long-term financing to cover the cost of production is provided by the federal government at a below market interest rate of three percent. The mortgage securing such financing is guaranteed by the Federal Housing Administration. The purpose of the subsidized interest rate is to enable a sponsor to keep costs low enough to offer housing at rents that low and moderate income families can afford. Nonprofit organizations are not allowed to secure any return from the sponsorship of the project, but limited distribution sponsors are allowed a return of six percent per annum on the equity they invest in the project. See Brief for Appellee Smith at 2–7; Brief of the Nat'l Housing and Economic Dev. Law project as amicus curiae at 6–9.

2. Chenango is regulated by the FHA under a regulatory agreement pursuant

landlord Chenango Court, Inc. filed an application for a rent increase with the Federal Housing Administration (FHA) and the increase was subsequently granted. Plaintiffs brought this action seeking, *inter alia*, an injunction against the FHA approved increase and a declaration that the approval of the rent increase violated the National Housing Act and the due process clause of the fifth amendment. The United States District Court for the Northern District of New York dismissed the complaint for lack of jurisdiction over the subject matter.[3] The United States Court of Appeals for the Second Circuit, proceeding to the merits, held that neither the National Housing Act, nor the due process clause of the fifth amendment required tenants to be given a trial type hearing before the FHA with regard to proposed rent increases and that the decision of the FHA was not subject to judicial review.[4]

Generally, the test for due process requirements depends upon the particular fact situation.

> Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law. The minimum procedural requirements necessary to satisfy due process depend upon the circumstances and the interests of the parties involved.[5]

to 12 U.S.C. § 1715 *l*(d)(3) (1970) and 24 C.F.R. § 221.529 (1972). The standard agreement provides with respect to rents: "No increase will be made . . . unless such increase is approved by the Commissioner, who will at any time entertain a written request for an increase properly supported by the substantiating evidence and within a reasonable time shall: (1) Approve a rental schedule that is necessary to compensate for any net increase, occurring since the last approved rental schedule, in taxes (other than income taxes) and operating and maintenance expenses over which owners have no effective control, or (2) Deny the increase stating the reasons therefore." FHA Form No. 1730 (Oct. 1969). The facts considered by the FHA in processing a rent increase are: (1) whether the project is properly maintained, (2) whether the landlord's application is complete, (3) whether the operating expenses of the project justify increased rents, (4) whether economies could be made in the operation of the project, and generally whether the rents for the project are reasonable. FHA Insuring Manual § 64205.2.

3. Langevin v. Chenango Court, Inc., 447 F.2d 296 (2d Cir. 1971). The complaint was dismissed by the district court because no tenant had a claim in excess of $10,000, as required by 28 U.S.C. § 1331 (1970).

4. 447 F.2d 296, 300 (2d Cir. 1971). The Second Circuit held that the plaintiff's claim was "an 'action in the nature of Mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff,' 28 U.S.C. § 1361, which has no requirement of jurisdictional amount." Id.

5. Dixon v. Ala. Bd. of Educ., 294 F.2d 150, 155 (5th Cir.), cert. denied, 368 U.S. 930 (1961). See Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 163 (1951).

Due process requires a trial type hearing[6] when the decision making process requires factual findings based upon the particular status of an individual, rather than an evaluation of factors not related to any specific individual.[7] In short, due process requires a trial type hearing when the facts involved are adjudicative rather than legislative.[8]

The foundation of the law concerning trial type hearings was laid in two United States Supreme Court decisions in the early part of this century. In the earlier case, *Londoner v. Denver*,[9] the City Council of Denver, sitting as a board of equalization, assessed plaintiffs' land for the cost of paving a street, giving plaintiffs the opportunity to file written objections, but not granting them a hearing. The Court held that due process encompassed more than submission of written material:

> [S]omething more . . . is required by due process of law. . . . [A] hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal.[10]

Subsequently, in *Bi-Metallic Investment Co. v. Board of Equalization*,[11] the United States Supreme Court held that such a hearing was unnecessary. This case, which also involved the City of Denver, was a

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6. There are two principal kinds of hearings—trials and arguments. The key to a trial type hearing is the opportunity given to present evidence, to present written or oral argument, and to cross-examine opposing witnesses. An argument type hearing is the typical procedure before an appellate court, where issues of law, rather than issues of fact, are in dispute. While holdings that due process requires an opportunity to present oral argument are rare, holdings that due process requires a trial type hearing are common. 1 K.C. Davis, Administrative Law Treatise § 7.01 (1958). See also Hecht v. Monaghan, 307 N.Y. 461, 121 N.E.2d 421 (1954).

7. Powelton Civic Home Owners Ass'n v. Dep't of Housing and Urban Dev., 284 F. Supp. 809, 829 (E.D. Pa. 1968). For purposes of the need for a trial type hearing, facts are of two kinds—adjudicative and legislative. Facts about the parties and their activities, business, and properties—facts that go to a jury in a jury case—are adjudicative. Legislative facts are general facts which do not usually concern the immediate parties, but which assist a tribunal in deciding questions of law and policy. Davis supra note 6, at § 7.02-03 (1958). See e.g., Goldsmith v. United States Bd. of Tax Appeals, 270 U.S. 117 (1926); Bragg v. Weaver, 251 U.S. 57 (1919).

8. Davis supra note 6, at § 7.04. See also Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855).

9. 210 U.S. 373 (1908).

10. Id. at 386.

11. Bi-Metallic Inv. Co. v. Bd. of Equalization, 239 U.S. 441 (1915).

suit to prevent state officials from raising the assessed valuation of all taxable property in that city without giving the plaintiff, an owner of real property, a hearing. Justice Holmes distinguished *Londoner* by pointing out that in that case:

A relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing. But that decision is far from reaching a general determination dealing only with the principle upon which all the assessments in a county had been laid.[12]

Bi-Metallic was followed approximately thirty years later by *Bowles v. Willingham*.[13] *Bowles* was an action by a Georgia landlord challenging the constitutionality of the Emergency Price Control Act of 1942, specifically the section which gave the Administrator power to establish maximum rents for any defense area housing accommodation.[14] Mrs. Willingham claimed that the Act violated the fifth amendment because it made no provision for a hearing before the rent fixing order became effective. The Court quoted from Justice Holmes' opinion in the *Bi-Metallic* case in deciding the issue:

Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of the individuals, sometimes to the point of ruin, without giving them a chance to be heard.[15]

In addition to following the *Bi-Metallic* doctrine, *Bowles* is significant for Justice Douglas' explanation of cases where due process requires a hearing before an administrative order becomes effective:

[C]ongress was dealing here [in *Bowles*] with the exigencies of wartime conditions and the insistent demands of inflation control . . . . [T]he procedure which Congress adopted was selected with the view of eliminating the necessity for

12. Id. at 446.

13. 321 U.S. 503 (1944).

14. 56 Stat. 23 (1942). Section 2(b) of the Act provides in part that "[w]henever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area."

15. 321 U.S. at 519, quoting Bi-Metallic Inv. Co. v. Bd. of Equalization, 239 U.S. at 445.

"lengthy and costly trials with concomitant dissipation of the time and energies of all concerned in litigation rather than in the common war effort." . . . To require hearings for thousands of landlords before any rent control order could be made effective might have defeated the program of price control.[16]

When the private interest infringed is considered to be of less importance than the threatened public harm, "an official body can take summary action pending a later hearing."[17]

In *Gart v. Cole*,[18] tenants and landowners sought a hearing on the execution of a slum redevelopment project. Under section 5 of the Administrative Procedure Act, then in effect, a trial type hearing would be mandatory only in a "case of adjudication required by statute. . . ."[19] Here there was no "express requirement of an open adjudicative hearing . . . in the Housing Act."[20] The plaintiffs, however, sought to rely "upon the implication of such a requirement from the nature and effect of the determination to be made."[21] The Court of Appeals for the Second Circuit, however, ruled that since the purpose of the proceeding was to comply with "a general plan for the relocation not of individuals, but of a group within a geographically defined area," this was not a case of adjudication.[22]

The impact of the determination is upon the group, not upon individuals, and, . . . the number of residents affected by the relocation proposals and therefore within the group is quite large.[23]

Recently, the Court of Appeals for the Second Circuit, in *Escalara v.*

16. 321 U.S. at 520-21.

17. R.A. Holman & Co. v. SEC, 299 F.2d 127, 131 (D.C. Cir.), cert. denied, 370 U.S. 911 (1962) (suspension of exemption from stock registration requirement). Compare Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (seizure of mislabeled vitamin product), with Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare benefits).

18. 263 F.2d 244 (2d Cir.), cert. denied, 359 U.S. 978 (1959).

19. 5 U.S.C. § 554(a) (1970), formerly Act of June 11, 1946, ch. 324, § 5, 60 Stat. 239.

20. 263 F.2d at 251.

21. Id. One contention that plaintiffs in Langevin did not particularly emphasize was their alleged statutory right to a trial type hearing. This contention was dismissed by the court of appeals which pointed to the language of the Administrative Procedure Act with respect to such a hearing, and noted that § 221(d)(3) of the National Housing Act "contains no such requirement. . . ." 447 F.2d at 300.

22. 263 F.2d at 251.

23. Id. In such cases the determination is not such an adjudication of individual interests as may justify the implied application of section 5 of the Administrative Procedure Act.

New York City Housing Authority,[24] held that tenants in public housing projects could not be constitutionally evicted without being afforded adequate procedural safeguards. The tenants had initiated the action challenging the constitutionality of the procedure used by the Housing Authority in terminating tenancies and assessing additional rent charges.[25] In prescribing the minimum procedural safeguards necessitated by due process the court held that it was a deprivation of due process to deny tenants access to material in their folder and that it was improper to deny the tenants an opportunity to confront and cross-examine persons who supplied that information when the Housing Authority's action was based on it.[26]

> Certain aspects of the . . . HA [Housing Authority] procedures cannot stand without a convincing showing at trial that the HA has a compelling need for procedural expedition.[27]

In a recent case[28] involving a project similar to the one in *Langevin*, the due process clause was held applicable to a private landlord in a section 221(d)(3) project. The tenants challenged the landlord's threatened use of state eviction proceedings as a violation of due process inasmuch as the landlord failed to give them proper notice of good cause for evicting them and had not afforded them a hearing. The court held that the tenants were entitled to receive a notice alleging good cause, and to have a hearing in the state courts to determine whether or not such good cause has been alleged and proven.[29] With respect to the project in question:

> [T]he federal and state governments have elected to place their power, property, and privilege behind the landlords' authority over the tenants, and have insinuated themselves into a position of interdependence with the landlords [i.e. FHA insured mortgage, low interest rates, supervision by FHA]. Whatever may be the situation of the landlords . . . with respect to their labor relations or to any immunity from intergovernmental taxation, their actions in

24. 425 F.2d 853 (2d Cir.), cert. denied, 400 U.S. 853 (1970).

25. Id. at 856-57.

26. Id. at 862.

27. Id. at 861. "Upon trial, the HA may be able to show great need for expedited procedures, or the plaintiffs may fail to substantiate all of their allegations. Therefore the fashioning of a remedy or a declaratory judgment must await the full trial of these actions." Id. at 867.

28. McQueen v. Drucker, 317 F. Supp. 1122 (D. Mass. 1970), aff'd, 438 F.2d 781 (1st Cir. 1971).

29. 317 F. Supp. at 1132.

relation to their tenants cannot be considered to be so private as to fall without the scope of the First, Fifth and Fourteenth Amendments.[30]

In *Hahn v. Gottlieb*,[31] the Court of Appeals for the First Circuit was faced with an identical set of facts as existed in *Langevin*.[32] The distinction between legislative and adjudicative facts was "particularly apt" in that the tenants, rather than the landlord, sought the hearing, and in this case "the project in question contains some 500 tenants, each of whom has the same interest in low rent housing."[33] After having determined that the proceeding in which the tenants sought the right to be heard was "basically an informal rate-making process,"[34] the Court of Appeals for the First Circuit held that the procedural safeguards of the due process clause of the fifth amendment:

> [A]re characteristic of adjudicatory proceedings, where the outcome turns on accurate resolution of specific factual disputes. [citations omitted]. Such safeguards are not, however, essential in "legislative" proceedings, such as rate making, where decision depends on broad familiarity with economic conditions. [citations omitted].[35]

Equally important in the court's reasoning, denying tenants in a section 221(d)(3) housing project the right to a hearing prior to their landlord's proposed rent increase, is the possibility that, burdened with such hearings, private investors might be discouraged from initiating section 221(d)(3) projects.[36]

30. Id. at 1128. See Colon v. Tompkins Square Neighbors Inc., 294 F. Supp. 134 (S.D.N.Y. 1968) (due process clause held applicable to a 221(d)(3) project admission practice).

31. 430 F.2d 1243 (1st Cir. 1970).

32. Plaintiff tenants in the same § 221(d)(3) project involved in McQueen v. Drucker, supra note 28, sought an opportunity to be heard on a proposed rent increase of $28 per apartment.

33. 430 F.2d at 1248. The court cited Justice Holmes' opinion in Bi-Metallic Inv. Co. v. Bd. of Equalization, 239 U.S. 441 (1915).

34. Id.

35. Id. See also Davis, supra note 6, at § 7.02.

36. 430 F.2d at 1248. In McKinney v. Washington, 442 F.2d 726 (D.C. Cir. 1970) a case decided after Hahn, the Court of Appeals for the District of Columbia was faced with a similar claim by tenants of a National Capital Housing Authority project. Id. at 726. The District of Columbia Circuit followed the reasoning of Hahn and denied the tenants' request for a hearing on proposed rent increases saying: " '[T]he governmental interest in a summary procedure for approving rent increases outweighs the tenants' interest in procedural safeguards.' " 442 F.2d at 728, quoting Hahn v. Gottlieb, 430 F.2d at 1249. A related claim of tenants in both Hahn and Langevin was that the FHA's action should be subject to judicial review. In holding

By following the reasoning in *Londoner* and *Escalara*, the second circuit in *Langevin*, in contrast to the court in *Hahn*, found it impossible to deny that the facts involved in the tenants' case were adjudicative, rather than legislative.[37] The majority decision by Chief Judge Friendly based its denial of a constitutional right to a hearing on the grounds that:

> [H]ere the Government did not itself increase the rents but simply allowed the landlord to institute an increase upon the termination of existing tenancies, as the landlord would have been legally free to do but for its regulatory agreement with the FHA.[38]

The court noted that in light of the congressional objective, of promoting "the construction of housing by private enterprise,"[39] the leaving of rent control in section 221(d)(3) projects to a regulatory agreement between the Secretary and the mortgagor[40] manifests congressional belief that a requirement for a full-fledged public utility type hearing on all proposed rent increases, "with the expense and delay necessarily incident thereto, might well kill the goose in 'solicitude for the eggs.' "[41] If rent increases can be held up for months, pending the outcome of a trial-type hearing, with all the concomitant discovery of records, taking of testimony, and written findings by an examiner, construction on the basis of distributions limited to six percent of equity investment[42] might be "decidedly unattractive" in an inflationary era.[43] In the absence of a governmental scheme of rent control, the due process clause does not

the FHA's decision to allow the rental increase unreviewable, the court in Hahn reasoned that courts are "ill-equipped to superintend economic and managerial decisions of the kind involved here." 430 F.2d at 1249. In Langevin, the Court of Appeals for the Second Circuit came to the same conclusion, but for different reasons: "[I]t would be most unusual for Congress to subject to judicial review discretionary action by an agency in administering a contract which Congress authorized it to make. Other factors tending in the direction of nonreviewability are the managerial nature of the responsibilities confided to the FHA, [citations omitted], the need for expedition to achieve the Congressional objective . . . and the quantity of appeals that would result if FHA authorizations to increase rents were held reviewable. . . ." 447 F.2d at 303. For a discussion of the question of reviewability of agency action, cited in both opinions, see Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion," 82 Harv. L. Rev. 367 (1968).

37. 447 F.2d at 300.
38. Id. at 301.
39. See supra note 1.
40. See supra note 2.
41. 447 F.2d at 301, quoting Hahn v. Gottlieb, 430 F.2d at 1246.
42. See supra note 1.
43. 447 F.2d at 301. See Mr. Justice Douglas' opinion in Bowles v. Willingham, 321 U.S. at 520–21.

prohibit Congress from determining that federal assistance to private industry to promote the construction of low and moderate income housing is best accomplished by leaving the determination of rent increase applications to the "experienced staff at the FHA."[44]

The complementary objectives of Congress, admittedly constitutional and laudable, were to encourage private enterprise to undertake the construction of housing for low and moderate income and displaced families, thereby dispensing with the use of governmental funds for equity investment, and to see that an appropriate share of the benefits of the federal assistance went to the tenants. Within this framework Congress has the power to decide—or to authorize the FHA to decide—what procedural mix will best accomplish its aims.[45]

Judge Oakes, who wrote the dissenting opinion in *Langevin*, was not persuaded by the majority's argument that the government did not itself increase the rents, but allowed the landlord to implement the increase:

To my mind, a tenant in a project financed with the use of public funds at subsidized interest rates should stand in no worse shoes than the tenants in, say, city housing authority projects. [citations omitted]. The distinction advanced by the majority, that here the Government did not itself increase the rents but simply allowed the landlord to institute an increase, is to me a distinction without a difference. [citations omitted].[46]

Judge Oakes further contended that this should not be different from a case where a private park, with a municipal purpose, was held subject to the equal protection clause.[47] Likewise, the dissent continued, if a tenant is forced to move from Chenango because of his inability to pay the higher rent, what would make his eviction different from a tenant in *Escalara*, who is evicted for violating the project rules?[48] To the extent that due process is required, decent housing is "just as basic and integral a part of life and liberties as opportunities for employment . . . for education . . . or for welfare benefits. . . ."[49] Judge Oakes concluded that the tenants at Chenango should at least be afforded a proper notice of

44. 447 F.2d at 301.

45. Id.

46. Id. at 304.

47. Id. See also Evans v. Newton, 382 U.S. 296 (1966); Pub. Util. Comm'n v. Pollak, 343 U.S. 451 (1952) (Congressional agency regulation of District of Columbia bus company subjects company's radio broadcasting service to fifth amendment).

48. 447 F.2d 305.

49. Id. at 306. [citations omitted] See also Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare); Greene v. McElroy, 360 U.S. 474 (1959) (employment); Slochower v. Bd. of Higher Educ., 350 U.S. 551 (1956) (education).

the proposed rent increase with an opportunity to confront and cross-examine persons substantiating the landlord's application.[50] What is the difference to the tenants whether the government itself increases the rents, or simply permits the landlord to increase them?

Arguments as to landlord financial problems and agency administrative inconvenience seem to me beside the point. "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when the minimal requirement [of the right to a hearing as a rudiment of 'fair play'] has been neglected or ignored."[51]

The Second Circuit's holding in *Langevin* that the essence of the plaintiffs' dispute was of an adjudicative nature[52] *and* the court's subsequent denial of the right to a hearing based upon the distinction that the government did not itself increase the rents but merely allowed the landlord to do the same,[53] represents a departure from the use of the adjudicative-legislative test as a factor in determining whether there is a constitutional right to a trial type hearing.[54] Although the court's reasoning does appear to involve " a distinction without a difference,"[55] the Second Circuit's opinion should be viewed in light of the stated objectives of the section 221(d)(3) housing program "to assist private industry in providing housing for low and moderate income families and displaced families."[56]

The significance of *Langevin* rests in the answer to the question of whether "a mandatory provision for subjecting all rent increases in such projects to what would amount to a full-fledged public utility rate proceeding," would actually "kill the goose in 'solicitude for the eggs.' "[57]

50. 447 F.2d at 306. See similar requirements of due process in Escalara v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970).

51. 447 F.2d at 306, quoting Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292, 305 (1937).

52. 447 F.2d at 300; contra, Hahn v. Gottlieb, 430 F.2d at 1248.

53. 447 F.2d at 301.

54. While the adjudicative-legislative test can be seen as representative of the tendency of American courts to proceed in the same way in same or similar cases, Langevin can be seen as representing the doctrine that "general rules are only generally controlling . . . . [t]hey become qualified as experience shows the need for modification and exception." W. Gellhorn & C. Byse, Administrative Law 715 (4th ed. 1960).

55. 447 F.2d at 304. The only case cited in support of the majority's distinction that the government did not itself increase the rents but merely allowed the landlord to do the same, Hahn v. Gottlieb, also based its denial of the right to a hearing on a finding that the process involved was of a rate-making nature. 430 F.2d at 1248. See cases cited in Judge Oakes' dissenting opinion, 447 F.2d at 304.

56. See supra note 1.

57. 447 F.2d at 301.

In light of the emphasis in both *Hahn* and *Langevin* on the possible effects of a mandatory trial type hearing upon prospective landlords, it is apparent that at least two courts have answered the question proposed above in terms of the section 221(d)(3) program's attractiveness to private investors.

CIVIL PROCEDURE—Parties—Class Actions For Fraud May Be Maintained By Consumers—Vasquez v. Superior Court of San Joaquin County. 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

Thirty-seven named plaintiffs, on behalf of themselves and others similarly situated, sought recision of installment sales contracts for fraudulent misrepresentation, both against the seller of freezers and frozen food products and against the finance companies to which the contracts had been subsequently assigned. Plaintiffs alleged that the defendant seller had falsely represented to each class member that the freezers were of high quality and were sold at a reasonable price, that the food orders were sold at a wholesale rate, that each order would last a minimum of seven months, and would cost less than what the plaintiffs would spend at a retail store during a comparable period. The defendants demurred to the complaint on the ground that it failed to state a cause of action. The Supreme Court of California concluded that a class action could lie against a seller where plaintiffs are able to establish the requisite community of interest with respect to the alleged representations, and against assignees of the contracts, where they have taken with notice of a buyer's defenses or have participated in the transactions from their inception.[1]

In most jurisdictions,[2] including California,[3] one or more members

1. Vasquez v. Superior Ct. of San Joaquin County, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

2. Most jurisdictions expressly authorize class actions by statute. Among these, some have modeled their statutes after the original Federal Rule 23. See, e.g., Mo. Ann. Stat. § 507.070 (1952). A growing number, however, have adopted the 1966 version of Federal Rule 23. See, e.g., Ohio R. Civ. P. 23 (Anderson 1971); Vt. R. Civ. P. 23 (1971). Some jurisdictions have Field Code Provisions which codify common law principles relating to the class suit. See, e.g., Cal. Civ. Proc. § 382 (West 1954); N.Y. C.P.L.R. § 1005 (McKinney 1963); Ore. Rev. Stat. § 13-170 (1969). In those states having no class action statute, class suits are permitted only in equity actions. See, e.g., Floreen v. Saucier, 200 Miss. 428, 27 So. 2d 557 (1946).

3. Cal. Civ. Proc. § 382 (West 1954) provides: "[W]hen the question is one of a common or general interest, of many persons, or when the parties are nu-

of an ascertainable class may sue for the benefit of all where there exists a question of common or general interest to many, or where the persons who might be made parties are so numerous that it may be impractical to bring them all before the court.[4] Actions so prosecuted are termed "representative" or "class" actions. Courts have stated that there are four pre-requisites to the maintenance of a class action:

1. parties too numerous to bring before the court by use of joinder;[5]
2. a definable class;[6]
3. plaintiffs who adequately represent the class;[7]
4. a question of common interest sufficiently pervasive to permit adjudication in a class action rather than in a multiplicity of suits.[8]

Class actions have become a favored mode of obtaining legal redress in an age when men are increasingly exposed to group injuries.[9] Nowhere is this more apparent than in the case of the consumer. State law governing the relations between consumers and merchants is generally utilized by the well informed and the highly sophisticated and thus affords little protection to those most susceptible to grievous exploitation.[10] Because

merous, and it is impracticable to bring them all before the Court, one or more may sue or defend for the benefit of all."

4. Although § 382 of the California Civil Procedure Code would appear to suggest an alternative basis for the class suit, "[I]t uniformly has been held that two requirements must be met in order to sustain any class action: (1) there must be an ascertainable class . . . and (2) there must be a well defined community of interest in the questions of law and fact involved affecting the parties to be represented." Daar v. Yellow Cab Co., 67 Cal. 2d 695, 704, 433 P.2d 732, 739, 63 Cal. Rptr. 724, 731 (1967).

5. See, e.g., Peterson v. Donelly, 33 Cal. App. 2d 133, 91 P.2d 123 (1939).

6. See, e.g., Weaver v. Pasadena Tournament of Roses Ass'n, 32 Cal. 2d 833, 198 P.2d 514 (1948). The requirement of a definable class does not mean that the identity of class members be known to the parties or be reasonably discoverable by them. See Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967). Class membership must be sufficiently defined to enable the court or some other body in a subsequent proceeding to determine who is bound by the decision. See Note, Binding Effect of Class Actions, 67 Harv. L. Rev. 1059 (1954).

7. See, e.g., Hansberry v. Lee, 311 U.S. 32 (1940).

8. See, e.g., First Congregational Church & Soc'y of Burlington v. Evangelical & Reformed Church, 305 F.2d 724 (2d Cir. 1962), cert. denied, 372 U.S. 918 (1963).

9. Kalven and Rosenfield, Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684 (1941); Note, The Cost-Internalization Case for Class Actions, 21 Stan. L. Rev. 383 (1969).

10. Report of the National Advisory Commission on Civil Disorders, 275-76

the alternative, multiple litigation, may not adequately protect the consumer's rights,[11] it has been argued that class proceedings are ideally suited to the special needs of the consumer.[12] However, fraudulent misrepresentation is one cause of action in which consumers have had difficulty in establishing the requisite community of interest.[13]

Community of interest has been interpreted to mean a common interest not only in the questions involved, but also in the remedy and subject matter of the suit itself.[14] Thus, in *Gaynor v. Rockefeller*,[15] the New York Court of Appeals held that a class suit could not be properly maintained by blacks who, on behalf of an indeterminate class of like persons, alleged discriminatory hiring practices by certain unions. The court reasoned that the wrongs asserted were individual to the different persons involved. Each aggrieved party could determine for himself the appropriate remedy, and in turn, could be subject to a defense not assertable against others.[16]

While a class action is clearly improper where the rights and interests of each member of the alleged class are separate and distinct from those of every other member, a class suit may yet lie although the claims of the parties are legally distinct and arise from separate transactions.[17] In such a case, the existence of common legal questions, a similarity in

(Bantam ed. 1968); Hester, Deceptive Sales Practices and Form Contracts—Does the Consumer Have a Private Remedy?, 1968 Duke L.J. 831.

11. The devices of joinder, intervention, consolidation and the test case almost always "presuppose 'a group of economically powerful parties who are obviously able and willing to take care of their own interests individually through individual suits or individual decisions about joinder or intervention.'" Dolgow v. Anderson, 43 F.R.D. 472, 484 (E.D.N.Y. 1968), rev'd on other grounds, 438 F.2d 825 (2d Cir. 1971).

12. Dole, Consumer Actions Under the Uniform Deceptive Trade Practices Act, 1968 Duke L.J. 1101; Eckhardt, Consumer Class Actions, 45 Notre Dame Law. 663 (1970); Goldhammer, The Consumer Class Action in California, 45 L.A. B. Bull. 235 (1970); Kirkpatrick, Consumer Class Litigation, 50 Ore. L. Rev. 21 (1970); Starrs, The Consumer Class Action (pts. 1-2), 49 Boston U.L. Rev. 211, 407 (1969); Contra, Smit, Are Class Actions For Consumer Fraud a Fraud on the Consumer?, 26 Bus. Law 1053 (1971).

13. See, e.g., Onofrio v. Playboy Club, Inc., 15 N.Y.2d 740, 205 N.E.2d 308, 257 N.Y.S.2d 171 (1965).

14. Newberry Library v. Bd. of Educ., 387 Ill. 85, 95, 55 N.E.2d 147, 153 (1944). (The terms "common interest" and "community of interest" are used interchangeably herein).

15. 15 N.Y.2d 120, 204 N.E.2d 627, 256 N.Y.S.2d 584 (1965).

16. Id. at 129, 204 N.E.2d at 631, 256 N.Y.S.2d at 590.

17. Skinner v. Mitchell, 108 Kan. 861, 197 P. 569 (1921).

the situation of the plaintiff and those for whom he sues, and a remedy applicable to all, may be a sufficient basis for a finding of common interest.[18] Such was the case in *Fiorito v. Jones*.[19] There, the Supreme Court of Illinois held that where all of the plaintiffs attacking the validity of amendments to a revenue statute were either persons dealing in the sale of services within the categories deemed taxable under the amendments or were purchasers of such services, and thus directly affected by the statutory classification, a strong common interest in the questions involved justified the maintenance of a representative action. The common legal question was the validity of the amendments, while the refund to be recovered under the decree of the trial court and the declaration of a constructive trust respectively constituted the subject matter of the suit and the remedy.

Nevertheless, the courts have generally adhered to the principle that separate frauds practiced on various persons, though committed through similar means and pursuant to a common plan, cannot constitute the basis for a representative suit.[20] Not only are such transactions legally distinct, but each is to some extent factually different. Even where false representations are exactly the same, the parties victimized may have relied upon different opinions and beliefs as to those facts. Since all may not desire the same relief, each party should be free to elect his own remedy and be subject to whatever defense may be raised against him. Furthermore, the interests of the parties may be in conflict.

This principle was recently reaffirmed by the New York Court of Appeals. In *Hall v. Coburn Corporation of America*,[21] plaintiffs signed retail installment sales contracts which defendant, a sales finance company, had supplied to the various merchants. Immediately upon consummation of the agreements, the contracts were assigned to the finance company. Because the formalities of the contract relating to the size of the printed type were in violation of a statute governing retail installment sales contracts, plaintiffs sought to bring a class suit to recover the statutory penalty on behalf of themselves and all others who had signed the form contracts. The court, denying a class action, stated that where a number of different and unrelated contracts are made between different and un-

18. See Offen v. City of Topeka, 186 Kan. 389, 350 P.2d 33 (1960).

19. 39 Ill. 2d 531, 236 N.E.2d 698 (1968), aff'd after remand, 45 Ill. 2d 15, 256 N.E.2d 833 (1968).

20. See, e.g., Garfein v. Stiglitz, 260 Ky. 430, 86 S.W.2d 155 (1935); Spear v. H.V. Greene Co., 246 Mass. 259, 140 N.E. 795 (1923); Society Milion Athena, Inc., v. National Bank of Greece, 281 N.Y. 282, 22 N.E.2d 374 (1939).

21. 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970).

related sellers, no common questions arise out of the similarity in the allegedly illegal instruments, nor will a common question arise because the same finance company that was the assignee of the contracts had prepared them for use.[22]

In refusing to enlarge the scope of the class action permitted under New York law,[23] the court, although not unsympathetic to the plight of the consumer, was strongly influenced by policy considerations. The court noted that it is the function of the legislature, and not the duty of the courts, to effect reform of consumer credit practices and stated:

> The public value of judicial sanction to this kind of class action which would harass a finance company . . . without addressing itself to the real evil of retail credit buying is open to substantial doubt.
>
> . . . .
>
> [W]ithout adequate public control they may become instruments of harassment benefiting largely persons who activate the litigation. No significant public benefit is discernible from the acceptance of these present class actions which do not, on the merits asserted, justify present departure from the existing New York rule.[24]

The thrust of *Hall* appears to be that the occurrence of a common wrong is insufficient to create a question of common interest unless, perhaps, plaintiffs are already united in interest.[25] There have been exceptions to this rule. *Kruse v. Streamwood Utilities Corp.*[26] and *Kimbrough v. Parker*,[27] though not true consumer suits, represent a modest erosion of the prohibition of class suits based on fraud. In *Kruse*, a representative suit brought on behalf of all the homeowners in a village to have the franchise of a sewer and water company declared void because of the interest of the village board of trustees in the franchise was deemed maintainable. Plaintiffs sought damages representing the payments made by them under an allegedly fraudulent scheme. Each of the plaintiffs was both a homeowner and a subscriber to the sewer and water service and all were united in interest. While not precluding the possibility of a class

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22. Id. at 400, 259 N.E.2d at 721, 311 N.Y.S.2d at 282-83. For a discussion and criticism of the Hall decision, see 39 Fordham L. Rev. 765 (1971).

23. N.Y. C.P.L.R. § 1005 (McKinney 1963).

24. 26 N.Y.2d at 403-04, 259 N.E.2d at 723, 311 N.Y.S.2d at 285-86.

25. See, e.g., Lichtyger v. Franchard Corp., 18 N.Y.2d 528, 223 N.E.2d 869, 277 N.Y.S.2d 377 (1966).

26. 34 Ill. App. 2d 100, 180 N.E.2d 731 (1962).

27. 344 Ill. App. 483, 101 N.E.2d 617 (1951).

suit based on fraud, the Illinois appellate court chose to avoid the issue of fraud, insisting that every class suit ought to be decided on its own merits, and further noted that the alleged misrepresentations ". . . could be considered as an essential part of the contract, and consequently the cause of action could be considered as one lying in contract rather than as one based upon fraudulent misrepresentations."[28]

The same court in its earlier *Kimbrough v. Parker* decision considered an attempt by participants in an allegedly fraudulent puzzle contest to restrain a religious corporation from further proceeding with the contest which had been publicized in a newspaper and was ostensibly conducted for the purpose of raising funds for a meeting house. Plaintiffs additionally requested the imposition of a constructive trust on the proceeds. A master's report supported plaintiffs' allegations that the contest was inherently fraudulent and the court upheld the maintenance of the action as a class suit.[29] The facts in *Kimbrough* reveal that the inducements were substantially the same for all the contestants as there were no personal solicitations and that a common fund existed out of which contributions could be returned. Thus, a complete determination of all issues bearing on the fraud could have been accomplished without a thorough investigation into the relations of the parties.

Neither *Kruse* nor *Kimbrough* represent compelling precedents in support of the consumer class suit, but *Robnet v. Miller*[30] is more directly related. An action was brought by buyers of freezers and food plans against the sellers and the assignee of buyers' notes to rescind the allegedly fraudulent contracts and to compel return of the notes and money paid. The court below issued an order restraining defendants from further impairing plaintiffs' rights while litigation was pending. The plaintiffs appealed when the order was dissolved. The Ohio Court of Appeals reversed the dissolution of the order. While the court failed to define the manner in which a common fraud could be the basis of a class suit, it did indicate that at least one of the objections to such a suit, alleged conflict of interests among class members, was under the circumstances unrealistic.[31]

28. 34 Ill. App. 2d at 108, 180 N.E.2d at 735.

29. 344 Ill. App. at 485-88, 101 N.E.2d at 618-19.

30. 105 Ohio App. 536, 152 N.E.2d 763 (1957).

31. Id. at 545, 152 N.E.2d at 766-67. "One frailty suggested namely, that some of the members of the class may want to keep their home freezers, is interesting. The class was described as including persons who were tricked, deceived and misled into believing that they were getting a freezer without charge if they would buy frozen food at one-half price and it is difficult to imagine one of this class electing to pay out his contract to the last penny."

The Federal Rules of Civil Procedure are more amenable to class suits. Rule 23(b)(3) authorizes class actions where a court finds "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that the class action is superior to other available methods for a fair and efficient adjudication of the controversy."[32] Thus, Rule 23 would appear to have made fraud the proper subject of a class action.[33] While a fraud case may be unsuited for a class action where there is material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they are addressed, a fraud perpetrated on numerous persons by similar representations is nevertheless an appealing situation for a class suit.[34] In any event, some federal courts have applied the rule liberally in situations involving considerable variation in the representations where they have been made pursuant to a common course of action.[35]

Perhaps the most expansive application of Rule 23(b)(3) is to be found in *Contract Buyers League v. F & F Investment*.[36] A class action was brought by black purchasers of realty, alleging civil rights violations, price fixing and the execution of contracts violative of Illinois common law regarding fraud, usury and unconscionable contracts. The district court held that since common questions of fact and law "predominated," a class action would be appropriate and any possible variance would not belie the finding that the action presented the required predominance since Rule 23 was intended to give district courts the necessary flexibility to assure the effectiveness of the class action as a remedial device.[37] Furthermore, the court noted that the rule made provision for a "subsequent modification of the class that appears appropriate as the actual

32. Fed. R. Civ. P. 23(b)(3).

33. Fed. R. Civ. P. 23(a) maintains as prerequisites to all class suits that: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

34. Amendments to Rules of Civil Procedure, Advisory Committee's Note to Rule 23, 39 F.R.D. 98, 103 (1966) [hereinafter referred to as Advisory Committee's Note].

35. Fidelis Corp. v. Litton Indus., Inc., 293 F. Supp. 164 (S.D.N.Y. 1968). See Fischer v. Kletz, 41 F.R.D. 377 (S.D.N.Y. 1966); Kronenberg v. Hotel Governor Clinton, Inc. 41 F.R.D. 42 (S.D.N.Y. 1966); cf. Morris v. Burchard, 51 F.R.D. 530 (S.D.N.Y. 1971).

36. 48 F.R.D. 7 (N.D. Ill. 1969).

37. Id. at 14.

contours of the litigation and problems of management are developed before the court."[38]

Because of the minute nature of individual claims and the large number of class members, the utility of Rule 23 in consumer class actions remains questionable.[39] The United States Supreme Court has interpreted Rule 23 as prohibiting the aggregation of separate and distinct claims to fulfill the $10,000 judisdictional requirement of district courts in diversity cases.[40] Thus, where separate and distinct claims are advanced, a class suit would be inappropriate unless one and possibly every member of the class were to have a claim equivalent to the jurisdictional amount.[41] Additionally, Rule 23(c)(2) requires that class actions brought under Rule 23(b)(3) provide "the best notice practicable under the circumstances, including individual notice to all members who can be identified with reasonable effort." Since notice to class members is to be accommodated to the particular purpose and need not comply with the formalities for service of process,[42] the court possesses discretion in directing the

38. Id.

39. Consumer class actions are maintainable in the federal courts only when jurisdictional requirements are satisfied. 28 U.S.C. §§ 1331, 1332 (1970). Since most actions to remedy consumer frauds are founded on state law, it is rare that a federal question arises. Thus, representatives of a class are faced with the often difficult task of obtaining complete diversity of citizenship between themselves and the defendants. Whether the action is based on diversity or the federal question provision, it is necessary that the amount in question exceed $10,000. Travers and Landers, The Consumer Class Action, 18 Kan. L. Rev. 811, 816 (1970). See also Homburger, State Class Actions and the Federal Rule, 71 Colum. L. Rev. 609, 637-47 (1971).

40. Snyder v. Harris, 394 U.S. 332 (1969); noted in 58 Ky. L.J. 403 (1969) and 21 Syracuse L. Rev. 326 (1969). Under the original rule, class actions were categorized as "true," "hybrid," and "spurious." The so-called "spurious" action involved several rights affected by a common question and related to a common relief, and judgment in such a suit extended only to parties and intervenors. Advisory Committee's Note, supra note 34, at 98. Since class members did not unite to enforce a single title or right in which they had a common and individual interest, individual claims could not be aggregated. See 3 B. J. Moore, Federal Practice ¶ 23.13, at 23-2953 (2d ed. 1969). Although the 1966 amendments dispensed with the old categories, the Supreme Court, in Snyder v. Harris, determined that claims could not be aggregated to make the jurisdictional amount in class suits that would have been deemed "spurious" under the old rule. 394 U.S. at 335-36. However, virtually all consumer class actions for damages would have been classified as spurious under the old rule. Travers and Landers, supra note 39, at 817. See generally Maraist and Sharp, After Snyder v. Harris: Wither Goes the Spurious Class Action?, 41 Miss. L.J. 379 (1970).

41. See C. Wright, Federal Courts 316 n.86 (2d ed. 1970).

42. Advisory Committee's Note, supra note 34, at 107.

kind of notice. Thus, as to those members not readily identifiable, publication would appear sufficient.[43] However, if the class members can be identified but are extremely numerous, the financial burdens of individual notice could very well prove unbearable and result in a dismissal.[44] The issue of adequate notice, however, is as yet unresolved.[45]

The Supreme Court of California began moving in the direction of the *Vasquez* case in *Daar v. Yellow Cab Co.*[46] *Daar* involved an action by a taxicab customer against a taxi company on behalf of himself and others similarly situated to recover overcharges made by the company in the use of its cabs over the four year period prior to the commencement of the suit. The court distinguished between the necessity of establishing the existence of an ascertainable class and the identification of individual class members as a prerequisite to a representative action. It was held that the mere fact that individual riders could not be identified at the time the suit was commenced was not crucial because a complete determination of all the issues affecting the class members could be made without their identification or appearance. The trial court could establish the existence of the alleged overcharge and, since all rates were uniform, an accounting would reveal the amount thereof. Each class member could then come forward to prove his separate damages. Since the issues common among class members would be the principal issues in any subsequent individual action, the substantial benefits both to the litigants and to the court were found sufficient to justify the proceeding.[47]

The court in *Daar* distinguished its holding from its earlier decision in *Weaver v. Pasadena Tournament of Roses Association.*[48] In *Weaver*, plaintiffs, on behalf of themselves and all others who had been "wrongfully" denied admission to the Rose Bowl game as a result of an allegedly fraudulent and unauthorized disposition of admission tickets, sued to recover the statutory penalty for the wrongful refusal. The court declared that a representative suit was improper since the determination of whether any one named plaintiff was wrongfully refused admission could not settle the rights of the unnamed parties. Too many factors peculiar to each individual would need to be decided to reveal whether any single refusal

43. See, e.g., Berland v. Mack, 48 F.R.D. 121, 130 (S.D.N.Y. 1969).

44. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 570 (2d. Cir. 1968) (dictum).

45. The federal courts are sharply divided on the question of notice. See, e.g., Clark v. American Marine Corp., 297 F. Supp. 1305, 1306 (E.D. La. 1969); Johnson v. City of Baton Rouge, 50 F.R.D. 295, 301 (E.D. La. 1970); Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619, 636 (D. Kan. 1968).

46. 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

47. Id. at 715-16, 433 P.2d at 747, 63 Cal. Rptr. at 739.

48. 32 Cal. 2d 833, 198 P.2d 514 (1948).

was wrongful.[49] In *Weaver*, no ascertainable class existed since the rights of each party were dependent on facts peculiar to him only. While the class in *Daar* was not identifiable, the rights of all hinged on identical issues. *Weaver* and *Daar*, taken together, establish the necessary foundation upon which a class action will rest: a clearly ascertainable class of injured persons and a common question, the determination of which will be applicable to all.

Unlike the situation in *Daar*, ascertainability of a class presented no serious impediment to the adjudication of *Vasquez v. Superior Court of San Joaquin County*.[50] The principal issue was that of common interest. The court made it clear from the outset that a finding of a community of interest would be predicated upon the existence of common questions of sufficient pervasiveness to permit their disposition in a single suit.[51] The existence of separate transactions and the fact that each class member would have to prove his separate claim to a portion of any recovery were not strictly determinative of the propriety of a class action. So long as each member would not be compelled to litigate numerous and substantial questions peculiar to himself to establish his individual right to recover subsequent to a favorable determination of those questions common to the class, substantial benefits to the litigants and to the courts would accrue, justifying the imposition of a judgment binding on the absent parties.[52]

The community of interest requirement in *Vasquez* could be satisfied only upon a showing of a common fraud. In order to prevail plaintiffs would be required to demonstrate that the seller "made false representations with knowledge of their falsity, that these representations were made with the intent to and did induce reasonable reliance by plaintiffs, and that plaintiffs suffered damages as a result."[53]

The court scrutinized the allegations set forth in the complaint in light

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49. The Hall and Weaver decisions are distinguishable. In Hall, only two questions required determination: had the defendant supplied the identical contracts which plaintiffs signed and, if so, were the formalities of the contracts violative of the statute. Such a determination, had it been made, would have applied equally to all class members.

50. 4 Cal. 3d at 810-11, 484 P.2d at 970, 94 Cal. Rptr. at 802.

51. Id. at 809-10, 484 P.2d at 969-70, 94 Cal. Rptr. at 801-02.

52. Id.

53. Id. at 811, 484 P.2d at 970, 94 Cal. Rptr. at 802. See Cal. Civ. Code § 1572 (West 1954); Ach v. Finkelstein, 264 Cal. App. 2d 667, 70 Cal. Rptr. 472 (1968); 12 Williston on Contracts § 1487 Fraud and Misrepresentation, (3d ed. 1970).

of the elements necessary to establish fraud and found that the alleged representations fell into two categories: those relating to the contract for the purchase of the freezer and those concerning the frozen food contract.[54] The court concluded that if the salesmen in securing the contracts memorized certain representations from a printed narrative and sales manual, and recited these by rote to each member of the class, then an inference would arise that the representations were made to each class member and thus obviate the necessity of eliciting individual testimony.[55]

Furthermore, it held erroneous any assumption at the pleadings stage of the proceedings that plaintiffs could not establish the falsity of the representations on a common basis especially in light of the uniform nature of defendant seller's operating practices and policies.[56] The falsity of the representations concerning the various freezers could be shown on a common basis since it was likely that all brands and models were represented among the named plaintiffs, and proof of the allegations regarding the quality and price of the freezers purchased by named plaintiffs would provide proof for all.[57]

A more difficult situation existed with regard to the representations concerning the food contracts. Defendants argued that proof of the falsity of representations that the food orders would last a minimum of seven months would vary in each individual case. However, the court noted that the use of standard orders raised a rebuttable presumption that a defined formula was utilized to determine the customers' requirements. If a formula had been used, then the falsity of the representations could be demonstrated by proof of such factors as the average monthly consumption of food for a family of a given size.[58] Similarly, the court felt that the allegations that the food was not sold at wholesale prices and at a considerable savings were also amenable to proof on a common basis.[59]

The court next addressed itself to the element of reliance. Whether one "infers" reliance from the circumstances attending a transaction[60] or "presumes" that representations have been relied on when made in regard to a material matter and action has been taken,[61] reliance may be estab-

54. 4 Cal. 3d at 811, 484 P.2d at 971, 94 Cal. Rptr. at 803.
55. Id. at 811-12, 484 P.2d at 971, 94 Cal. Rptr. at 803.
56. Id. at 812-13, 484 P.2d at 971-72, 94 Cal. Rptr. at 803-04.
57. Id. at 813, 484 P.2d at 972, 94 Cal. Rptr. at 804.
58. Id.
59. Id.
60. Hunter v. McKenzie, 197 Cal. 176, 239 P. 1090 (1925).
61. 3 Williston on Contracts § 480 (3d ed. 1970); Restatement of Contracts § 479 (1932).

lished without recourse to direct evidence.[62] Finally, the fact that the amount of damages may vary as to each member who will be obliged to establish the extent of his individual injury did not preclude the maintenance of a class suit.[63] Because the complaint satisfactorily alleged the existence of an ascertainable class and plaintiffs appeared capable of demonstrating a community of interest so that proof of most of the important issues as to the named plaintiffs would supply proof as to all, the action was held triable as a representative suit.[64]

Defendants raised several arguments based on policy considerations. It was insisted that the intervention of a governmental body to protect the interests of consumers would be a far more effective and efficient remedy than the class suit.[65] It was further contended that in addition to being unsuited to situations involving parties having reciprocal rights and obligations, class actions were invitations to vexatious and protracted litigation and were more punitive than compensatory in nature.[66] The court pointed out that *Daar* clearly established the consumer class action as an appropriate remedy.[67] Furthermore, during the pendancy of *Vasquez*, the California legislature enacted the Consumers Legal Remedies

62. The court followed the lead of several federal class action cases which held that individual proof may not be required to establish reliance by stockholders alleging fraud based on printed misrepresentations in a corporation prospectus. See, e.g., Green v. Wolf Corp., 406 F.2d 291, 301 (2d Cir. 1968).

63. 4 Cal. 3d at 815, 484 P.2d at 973, 94 Cal. Rptr. at 805. Federal Rule 23 likewise holds class actions maintainable "despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class." Advisory Committee's Note, supra note 34 at 103.

64. In determining the question of liability of the finance company defendants, the court declined to accept the view that consumer installment contracts should not, as a matter of public policy, be viewed as negotiable instruments. See, e.g., Jordan and Warren, Uniform Consumer Credit Code, 68 Colum. L. Rev. 387 (1968); Murphy, Another "Assault Upon the Citadel": Limiting the Use of Negotiable Notes and Waiver-of-Defense Clauses in Consumer Sales, 29 Ohio St. L.J. 667 (1968); Note, Consumer Financing, Negotiable Instruments, and the Uniform Commercial Code: A Solution to the Judicial Dilemma, 55 Cornell L.Q. 611 (1970). Rather it was felt that current statutory provisions and existing case law were sufficient to resolve the issue of liability and the court concluded that the assignee finance companies were by virtue of the allegations proper parties to an affirmative action for recision of the contracts. 4 Cal. 3d at 821-25, 484 P.2d at 978-80, 94 Cal. Rptr. at 810-12.

65. 4 Cal. 3d at 816-17, 484 P.2d at 974-75, 94 Cal. Rptr. at 806-07.

66. Id.

67. Id at 817, 484 P.2d at 975, 94 Cal. Rptr. at 807.

Act[68] which specifically authorizes class actions by consumers damaged by a seller's unfair or deceptive practices. Because it was the clear intention of the legislature not to affect class actions maintainable under other provisions of the law,[69] the court felt justified in allowing a class action based on fraudulent misrepresentation that not only would facilitate the adjudication of cases brought prior to the enactment but would cover those situations not specifically provided for by statute.[70]

In sweeping aside the traditional view that similar frauds practiced on various persons cannot constitute the basis of a representative suit, the court did not suggest that a class action will always be the most appropriate method of handling the problems of consumer fraud, or even that such a proceeding will be maintainable in every situation.[71] Rather, it concluded that the maintenance of a class action is not necessarily precluded, provided that the issues which may be jointly tried, when compared to those demanding separate adjudication, justify its maintenance.[72] The questions which must be litigated separately may not be so numerous as to make a class action disadvantageous to the parties and the judicial system. In this respect, *Vasquesz* differs from *Hall*, which had stressed the differences separating the parties and viewed them as being insurmountable.

Overcoming the potential complexities of consumer class litigation requires the fashioning of new procedural devices that will permit a court to cope with the numerous parties, conflicting claims and seemingly myriad interests that appear to be so much a part of the typical class suit. To this end, the court commended to the lower courts of the jurisdiction the procedures of the Consumers Legal Remedies Act and Federal Rule 23 as being particularly instructive.[73]

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68. Cal. Civ. Code § 1750-1757 (West Supp. 1972).

69. Cal. Civ. Code § 1752 (West Supp. 1972). See Reed, Legislating for the Consumer: An Insider's Analysis of the Consumers Legal Remedies Act, 2 Pacific L.J. 1, 9 (1971).

70. 4 Cal. 3d at 818-19, 484 P.2d at 976, 94 Cal. Rptr. at 808.

71. Id. at 821, 484 P.2d at 977, 94 Cal. Rptr. at 809.

72. Id. at 815-16, 484 P.2d at 973-74, 94 Cal. Rptr. at 805-06.

73. Id. at 820-21, 484 P.2d at 977-78, 94 Cal. Rptr. at 809-10. Cal. Civ. Code § 1781 provides in subdivision (c) for a hearing to determine such issues as the propriety of a class action, the necessity for published notice, the merit of the action, and the existence of a defense. Subdivisions (d) and (e) specify rather liberal notice procedures while subdivision (f) forbids settlement of the suit without notice to class members and prior court approval. Subdivision (g)

By an imaginative interpretation of existing procedural law and in the absence of a specific statutory authorization, the Supreme Court of California has expanded significantly the basis of the class suit. In so doing, it has adopted a less mechanistic, more functional approach, not unlike that of the Federal Rule 23. Where issues are susceptible to proof on a common basis and the interests of fairness and economy are served, a class action may lie.

CONSTITUTIONAL LAW—Adoption—Religious Matching of Child and Adoptive Parents as Required by New York Statutes Held Constitutional. Dickens v. Ernesto, 30 N.Y.2d 61, 281 N.E.2d 153, 330 N.Y.S.2d 346, appeal dismissed, 40 U.S.L.W. 3596 (1972).

On December 22, 1969, petitioners sought to file an application as adoptive parents with the Erie County Department of Social Services (respondent). In response to the caseworker's question concerning their religious affiliation, petitioners stated that they professed no religion. After petitioners' application was denied solely on this basis, they instituted an article 78[1] proceeding for a judgment (1) declaring that the challenged constitutional and statutory provisions[2] violate the federal

sets forth the manner in which notice of the judgment is to be given and provides that the judgment state the name of class members.

The court in Vasquez felt that a hearing procedure would be appropriate for ascertaining the existence of a common interest and determining whether or not those questions requiring separate litigation are numerous and substantial. Furthermore, in the event of a "hiatus," Federal Rule 23 might prove useful. For example, Subdivision (c) (1) of Rule 23 provides that the trial court's initial determination may be conditional and thus subject to alteration or amendment prior to a decision on the merits. Additionally, subdivision (4) (B) would appear to contemplate division of class members into subclasses when such would promote efficiency.

1. Dickens v. Ernesto, 30 N.Y.2d 61, 281 N.E.2d 153, 330 N.Y.S.2d 346 (1972). Petitioners first brought an article 78 proceeding (N.Y. C.P.L.R. Art. 78 (McKinney 1963)) for a judgment declaring certain statutory provisions unconstitutional in 1970.

2. N.Y. Family Ct. Act § 116 (McKinney 1963), as amended (McKinney Supp. 1971), places religious restrictions on judicial commitment of children to private institutions, placements made by such institutions with persons other than natural parents, judicial appointments of guardians, except guardians ad litem, and the granting of petitions of adoption. N.Y. Soc. Services Law § 373 (McKinney 1966), as amended (McKinney Supp. 1971), places religious restrictions on place-

constitution,[3] and (2) directing the respondent to immediately process their application for adoptive parenthood. Special term and the appellate division found no violation of petitioners' constitutional rights,[4] but directed the respondent to accept their application.[5] The New York Court of Appeals, in affirming this decision, held that statutory religious matching provisions which require the placement of a child with persons of the same religion "so far as consistent with the best interests of the child" and "where practicable" do not violate the constitutional rights of either the child or the adoptive parents.

The court in *Dickens* was faced with the issue of whether the religious matching provisions of three New York statutes[6] dealing with custodial placement of children and enacted in conformity with the state constitution,[7] were valid under the first and fourteenth amendments of the United States Constitution. The court construed the legislative enactments in

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ments of children with private institutions, placements of children by private institutions, appointment of guardians and granting orders of adoption. N.Y. Dom. Rel. Law § 113 (McKinney 1964), as amended (McKinney Supp. 1971), provides for special provisions relating to adoption from authorized agencies, to be carried out in accordance with article VI of the Social Services Law.

N.Y. Const. art. VI, § 32 states, "When any court having jurisdiction over a child shall commit it or remand it to an institution or agency or place it in the custody of any person by parole, placing out, adoption or guardianship, the child shall be committed or remanded or placed, when practicable, in an institution or agency governed by persons, or in the custody of a person, of the same religious persuasion as the child."

3. U.S. Const. amend. I; U.S. Const. amend. XIV, § 1. Petitioners contend that New York statutes, supra, create an establishment of religion, deny them freedom of religion under the first amendment and deny them equal protection of the laws under the fourteenth amendment.

4. A 1971 study by the Cornell Law Review of the religious matching statutes and judicial interpretation thereof indicates that although the United States Supreme Court has yet to confront the issues presented by the statutes, there are aspects of questionable constitutionality involving first amendment imputation of religion, all of which might be interwoven to deny equal protection of the laws. Comment, A Reconsideration of the Religious Element in Adoption, 56 Cornell L. Rev. 780, 809–829 (1971).

5. Dickens v. Ernesto, 37 App. Div. 2d 102, 322 N.Y.S.2d 581 (4th Dept. 1971). From this determination, petitioners appealed as a matter of right to the New York Court of Appeals.

6. N.Y. Family Ct. Act § 116 (McKinney Supp. 1971); N.Y. Soc. Services § 373 (McKinney Supp. 1971); N.Y. Dom. Rel. Law § 113 (McKinney Supp. 1971).

7. N.Y. Const. art. VI, § 32.

light of prior judicial application and the recent amendments to the statutes.[8] Determining the statutes to be discretionary in their application, the court addressed itself to the constitutional challenge of the petitioners under the first and fourteenth amendments. In applying tests derived from recent Supreme Court decisions,[9] the court ultimately determined the statutory provisions to be constitutional.

Adoption in New York is a judicial proceeding, with original jurisdiction vested in the Family Court.[10] Basically there are two types of adoption. "Public" adoption involves placement through an authorized agency of the state,[11] whereas "private" placement incorporates all agencies other than those specifically designated as state agencies.[12] Both types are governed by statutory provisions which specify who may adopt, who must

8. N.Y. Family Ct. Act § 116(g) (McKinney Supp. 1971); N.Y. Soc. Services Law § 373(7) (McKinney Supp. 1971). These sections add identical parental preference provisions to be complied with by a judge in making orders of adoption under N.Y. Dom. Rel. Law § 113 (McKinney Supp. 1971). The New York Court of Appeals quoted § 116(g) of the Family Court Act in full. It provides: "(g) The provisions of subdivisions (a), (b), (c), (d), (e) and (f) of this section shall, so far as consistent with the best interests of the child, and where practicable, be applied so as to give effect to the religious wishes of the natural mother, if the child is born out-of-wedlock, or if born in-wedlock, the religious wishes of the parents of the child, or if only one of the parents of an in-wedlock child is then living, the religious wishes of the parent then living. Religious wishes of a parent shall include wishes that the child be placed in the same religion as the parent or in a different religion from the parent or with indifference to religion or with religion a subordinate consideration. Expressed religious wishes of a parent shall mean those which have been set forth in a writing signed by the parent, except that, in a non-agency adoption, such writing shall be an affidavit of the parent. In the absence of expressed religious wishes, as defined in this subdivision, determination of the religious wishes, if any, of the parent, shall be made upon the other facts of the particular case, and, if there is no evidence to the contrary, it shall be presumed that the parent wishes the child to be reared in the religion of the parent." (McKinney Supp. 1971).

9. See text accompanying notes 60-85 infra.

10. N.Y. Family Ct. Act § 641 (McKinney Supp. 1971). Effective September 1, 1972, the Family Court will have exclusive original jurisdiction over adoption proceedings. Until that time, the Surrogate's Court shall have and exercise concurrent jurisdiction.

11. N.Y. Dom. Rel. Law § 109 (McKinney 1964). " 'Authorized agency' shall mean an authorized agency as defined in the social welfare law and, for the purposes of this article, shall include such corporations incorporated or organized under the laws of this state as may be specifically authorized by their certificates of incorporation to receive children for purposes of adoption." Id.

12. Id. § 109(5). " 'Private-placement adoption' shall mean any adoption other than that of a minor who has been placed for adoption by an authorized agency."

consent and the procedures involved in applications for the court order of adoption.[13] Specific provisions, discussed *infra*, provide for the consideration of the child's religion in placement proceedings.[14]

Much attention is given in New York to the issue of religion as a factor in adoption proceedings. Religious matching requirements appear in the state constitution,[15] the Family Court Act,[16] the Social Services Law,[17] and the Domestic Relations Law[18]—all of which govern state and agency placements, and ultimately, the court order of adoption.[19] Most other jurisdictions presently adhere to religious matching requirements in custody and adoption proceedings,[20] although a recent study indicates that a number of jurisdictions are currently attempting to harmonize the religious considerations with public temporal concerns.[21] The statistics indicate, however, that in both the public and private forum, there continues a strong sentiment for the recognition of the relationship between religion and society.[22]

No entirely consistent approach to the problem of reconciling the statutory requirements with constitutional guarantees of freedom of religion[23]

13. N.Y. Dom. Rel. Law §§ 109-16 (McKinney 1964), as amended (McKinney Supp. 1971).

14. N.Y. Const. art. VI, § 32; N.Y. Family Ct. Act § 116 (McKinney Supp. 1971); N.Y. Soc. Services Law § 373 (McKinney Supp. 1971); N.Y. Dom Rel. Law § 113 (McKinney Supp. 1971).

15. N.Y. Const. art. VI, § 32.

16. N.Y. Family Ct. Act § 116 (McKinney 1963), as amended (McKinney Supp. 1971).

17. N.Y. Soc. Services Law § 373 (McKinney 1966), as amended (McKinney Supp. 1971).

18. N.Y. Dom. Rel. Law § 113 (McKinney 1964), as amended (McKinney Supp. 1971).

19. N.Y. Family Ct. Act § 116(a)-(d) (McKinney 1963).

20. Note, Religion as a Factor in Adoption, Guardianship and Custody, 54 Colum. L. Rev. 376 (1954) indicated that in 1954 forty-three jurisdictions had religious matching statutory provisions, although there existed some difference in application and discretion from jurisdiction to jurisdiction.

21. Comment, A Reconsideration of the Religious Element in Adoption, 56 Cornell L. Rev. 780 (1971).

22. Id. at 783-92. The study updates the statutory policy with regard to religious considerations. It is interesting to note that of the original forty-three jurisdictions having religious preference statutes in 1954, only thirty-six presently have statutes in force. The trend indicated by the study is toward statutory reform and agency responses to "evolving standards of child care," although differences continue to be present.

23. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I.

and equal protection of the laws[24] has permeated the decisions of the New York courts. Initially, the courts were strict in interpreting and applying the statutory religious matching requirements.[25] A number of early cases expressly denied the placement of a child with a person of a religious persuasion other than that of the natural parent.[26] Even where permission to adopt was denied on other grounds, the court has taken judicial notice of the fact that the petitioners and the natural parent espoused different religions.[27] In 1951, one of the more significant cases in the development of the New York position arose in connection with what is now the "when practicable" provision of the Family Court Act.[28] It provides:

> In appointing guardians of children, except guardians ad litem, and in granting orders of adoption, the court must, when practicable, appoint only as such guardians, and only give custody through adoption to, persons of the same religious faith or persuasion as that of the child.[29]

In *In re Santos*,[30] two children had been committed to a Jewish social agency, as a result of misrepresentations of the proprietor's religion. When this misrepresentation was subsequently discovered, the children's mother brought suit, claiming that the agency was an improper guardian. The court agreed and adopted a mandatory interpretation of the statute, stating, "the legislative mandate leaves no area for judicial discretion."[31]

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24. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, section 1.

25. See Comment, The Religious Factor in New York Adoption Proceedings, 18 Syracuse L. Rev. 825 (1967).

26. In re Guardianship of Newman, 142 Misc. 617, 255 N.Y.S. 777 (Sur. Ct. 1932); In re Hauser, 189 N.Y.S. 51 (Sur. Ct. 1921); In re McConnon, 60 Misc. 22, 112 N.Y.S. 590 (Sur. Ct. 1908); In re Guardianship of Jaquet, 40 Misc. 575, 82 N.Y.S. 986 (Sur. Ct. 1903).

27. In re Anonymous, 195 Misc. 6, 11, 88 N.Y.S.2d 829, 834 (Sur. Ct. 1949).

28. N.Y. Family Ct. Act § 116 (McKinney 1963), formerly N.Y.C. Dom. Rel. Ct. Act § 88 (McKinney 1933).

29. Id. § 116(c). Similar provisions are found in N.Y. Soc. Services Law § 373(c) (McKinney 1966) and N.Y. Dom. Rel. Law § 113 (McKinney 1964).

30. In re Santos, 278 App. Div. 373, 105 N.Y.S.2d 716 (1st. Dept. 1951), appeal dismissed, 304 N.Y. 483, 109 N.E.2d 71 (1952).

31. "On the facts presented herein, the legislative mandate leaves no area for judicial discretion. It was and still is practicable to give these infants to an institution under the control of persons of their religious faith in fulfillment of the statute

The mandatory approach expressed in *Santos* was reflected clearly in subsequent decisions of the New York courts in denying petitions for cross-religious adoptions.[32] In spite of the statutory language, "when practicable," the courts refused to consider the express limitation of the statutory language outside the realm of religious consideration. Material factors, such as the motives of the adoptive parents, their emotional, financial and marital stability, were not given comparable weight in the final determination of the "best interests"[33] of the child; a religious variance was an insurmountable obstacle.

Some erosion of this position occurred in 1958 when the New York Court of Appeals for the first time considered the religious matching requirement in adoption proceedings,[34] and in so doing, extended in a limited manner the application of the statute. In *In re Maxwell*,[35] the court affirmed the grant of a petition for the adoption of a presumably Roman Catholic child by Presbyterians, who agreed to raise the child as a Roman Catholic. Petitioners had instituted adoption proceedings based on the consent of the mother who had abandoned the child. But the mother reappeared and introduced evidence of her Catholicism. The court, however, accepted the natural mother's original affidavit, stating that she had no religion, at face value, and granted adoption to the petitioners, relying on the "when practicable" clause. The court stated that the established policy of the state had not changed, but that under the facts of the case,[36] where no faith existed, the clause "when practicable" was given broader interpretation since the statute was:

[N]ecessarily designed to accord the trial judge a discretion to approve as

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that their 'religious faith be preserved and protected by the Court' . . . ." Id. at 375, 105 N.Y.S.2d at 718.

32. In re Anonymous, 207 Misc. 240, 137 N.Y.S.2d 720 (Saratoga County Ct. 1955);The petition was denied even though the petitioners agreed to raise the child as a Roman Catholic, the religion of the natural parents.

33. There are a number of material factors which adoption agencies consider as criteria in the selection of able and fit parents for adoption. While the criteria vary slightly from agency to agency, the cited factors are general in nature and application, and are presented to the court for consideration in making the final court order of adoption.

34. In re Maxwell, 4 N.Y.2d 429, 151 N.E.2d 848, 176 N.Y.S.2d 281 (1958).

35. "It is, of course, the settled policy of this state to insist upon adoption by persons of the same religious faith as that of the child. But this policy does not require a court to deny custody to adoptive parents where a child has been accepted by them following a declaration or representation by the mother . . . that she does not embrace any religious faith." Id. at 434, 151 N.E.2d at 850, 176 N.Y.S.2d at 284.

36. Id.

adoptive parents persons of a faith different from the child's in exceptional situations.[37]

The court restricted its holding, however, stating that the presence of the phrase "when practicable" was intended by the legislature to enable the court to "relax the requirement in the unusual case such as the one before us."[38]

While this rationale suggests a departure from the previously strict mandatory approach,[39] the court avoided a direct consideration of the religious protection question by accepting the affidavit of the natural mother that she embraced no specific religion over her later statement of professing Catholicism. Moreover, the significance of the decision is further diluted by the weight the court gave, in reaching its decision, to the promise of the adoptive parents to raise the child in the Catholic religion in accordance with the wishes of the natural mother.[40]

The *Maxwell* holding did not adequately define the limits of judicial discretion to be exercised under the religious matching statutes; hence clarification was necessary. Rather than clarify the "discretion"[41] of the holding in *Maxwell*, the New York Court of Appeals in *Starr v. De Rocco*[42] directly confronted the requirement in the state constitution,[43] which also provides that in custody and adoption proceedings, the court shall, when practicable, place the child in the custody of a person of the same religious persuasion.[44] In this case the New York Supreme Court, Special Term, had awarded custody of two infant orphans to the petitioners, who were of a different religious persuasion than that of the children. The Appellate Division reversed, stating that:

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37. Id.

38. Id. at 434, 151 N.E.2d at 851, 176 N.Y.S.2d at 284.

39. "New York [with the decision in the *Maxwell* case] has taken its place with the majority of jurisdictions in interpreting the religious requirements of the adoption statutes liberally . . . ." Note, 10 Syracuse L. Rev. 124, 126 (1958); But see Comment, The Religious Factor in New York Adoption Proceedings, 18 Syracuse L. Rev. 825, 829 (1967).

40. 4 N.Y.2d at 433, 151 N.E.2d at 850, 176 N.Y.S.2d at 283. The 4-3 decision had no majority opinion due to fact that Judge Froessel concurred in the affirmance solely on the ground that petitioners agreed to have the child baptized and raised as a Catholic.

41. See supra note 35.

42. 24 N.Y.2d 1011, 250 N.E.2d 240, 302 N.Y.S.2d 835 (1969).

43. N.Y. Const. art. VI, 32.

44. Id.

this constitutional provision means more than a mere extension of authority to exercise discretion as to the religious aspect in custody matters.[45]

In a *per curiam* decision affirming the order of the Appellate Division which had granted custody to parents of the same religious faith, the Court of Appeals disregarded the discretionary language of *Maxwell*, stating that judicial discretion short of compelling reason was contrary to the intent of the state constitution, and therefore unavailable to the courts.[46]

Faced with a broad challenge to the religious matching statutes[47] in New York, the Court of Appeals in *Dickens* applied the criteria of the 1970 amendments to these statutes.[48] In reviewing the earlier decisions of the court dealing with religious protection statutes, the *Dickens* court apparently recognized the continuing mutual respect between government and society[49] in considering religion as relevant in the placement of children for adoption, a respect mandated by the New York State Constitution.[50] The extent to which religious matching governs in the challenged legislation was, in the opinion of the court, modified by the 1970 amendments of three legislative provisions[51] which:

45. 29 App. Div. 2d 662, 286 N.Y.S.2d 313 (2d Dept. 1968), aff'd mem., 24 N.Y.2d 1011, 250 N.E.2d 240, 302 N.Y.S.2d 835 (1969).

46. "The Appellate Division found that this provision was intended to prohibit the placement of a child with a guardian of a religious persuasion other than that of the child unless some compelling reason required otherwise; that there were available able and willing persons, blood relatives of the children, who professed the same religious faith as them . . . in the absence of a compelling reason to avoid the constitutional mandate, Special Term had exercised a judicial discretion which was not available to it." 24 N.Y.2d at 1012, 250 N.E.2d at 241, 302 N.Y.S.2d at 836.

47. In a 1955 study, Pfeffer, Religion in the Upbringing of Children, 35 B.U.L. Rev. 333, 373 (1955), the author describes the various statutes governing religion in custody and adoption as "religious protection" statutes.

48. N.Y. Family Ct. Act § 116 (McKinney 1963), as amended (McKinney Supp. 1971); N.Y. Soc. Services Law § 373 (McKinney 1966), as amended (McKinney Supp. 1971); N.Y. Dom. Rel. Law § 113 (McKinney 1964), as amended (McKinney Supp. 1971).

49. See generally List, A Study of "Religious Protection" Laws, 13 Buffalo L. Rev. 9 (1963). Zorach v. Clauson, 343 U.S. 306 (1952) characterizes the American people as a "religious people."

50. N.Y. Const. art. VI, § 32.

51. N.Y. Family Ct. Act § 116 (McKinney Supp. 1971); N.Y. Soc. Services Law § 373 (McKinney Supp. 1971); N.Y. Dom. Rel. Law § 113 (McKinney Supp. 1971).

"amended the respective statutes . . . to eliminate any requirement that the religious matching provisions be applied mandatorily." Thus, the challenged legislation places primary emphasis on the temporal best interests of the child, although the religious preference of the natural parents remains a relevant consideration.[52]

The religious preference is placed in perspective as the decision in *Dickens* recognizes that the flexibility of the statute grants broad discretion to the court in deciding what is best for the child.

The court then addressed the fundamental question of the constitutionality of religious matching statutes. It was the contention of the petitioners, that New York has, by statute[53] created an establishment of religion and inhibited the free exercise thereof, in violation of the first amendment; petitioners further alleged an arbitrary classification denying them equal protection of the laws as guaranteed by the fourteenth amendment. As to the first amendment objections, U.S. Supreme Court decisions in the development and history of the first amendment demonstrate that the establishment and free exercise clauses are prohibitions drawn in a sweeping fashion which have been applied in a case by case approach.[54] Inconsistency in these interpretations by the court is due in part to

"too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles."[55]

The U.S. Supreme Court has yet to directly confront the controversial issues generated by the religious matching requirements in adoption laws.[56] U.S. Supreme Court decisions in other church-state areas are particularly susceptible to broad and general phrasing, like the "wall of

52. 30 N.Y.2d at 66, 281 N.E.2d at 155, 330 N.Y.S.2d at 348.

53. N.Y. Family Ct. Act § 116(g) (McKinney Supp. 1971); N.Y. Soc. Services Law § 373 (McKinney Supp. 1971); N.Y. Dom. Rel. Law § 113 (McKinney Supp. 1971).

54. Walz v. Tax Commission, 397 U.S. 664, 667-72 (1970). See generally, L. Pfeffer, Church, State and Freedom (1967).

55. 397 U.S. at 668.

56. The U.S. Supreme Court has refused certiorari in one Massachusetts case, In re Goldman, 331 Mass. 647, 121 N.E.2d 843 (1954), cert. denied, 348 U.S. 942 (1955). The Massachusetts court upheld the objections of the guardian ad litem to the adoption of the twin infants by a Jewish couple, although the natural mother had consented in writing to the adoption with full knowledge of the religion of the adoptive parents. The court preserved an imputation of the mother's Catholic religion and rejected the contention of difficulties "underlying the concept that a child too young to understand any religion, even imperfectly, nevertheless may have a religion." Id. at 652, 121 N.E.2d at 846.

separation" erected in the dictum in *Everson v. Board of Education*.[57] Notwithstanding, since the 1940 decision of the Court to apply the establishment and free exercise provisions to the states through the fourteenth amendment,[58] decisions have attempted to define the manner in which "there shall be no concert or union or dependency"[59] between church and state.

From recent Supreme Court decisions, there emerge a series of criteria which can be applied as guidelines in measuring legislative enactments against the scope of first amendment provisions. The first test, formulated in *Everson*,[60] prohibits legislation enacted in terms of comparative religions:

> Neither [state or federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . In the words of Jefferson, the clause . . . was intended to erect a "wall of separation between church and state."[61]

A second test, expressed by Mr. Justice Douglas in the 1952 decision of *Zorach v. Clauson*,[62] while acknowledging the importance of religion, precludes a causal relationship: ". . . [T]here shall be no concert or union or dependency one on the other."[63] More exacting in its delineation of "neutrality" is the test established by *Abington School District v. Schempp*,[64] which requires that all legislation have "secular legislative purpose and a primary effect that neither advances nor inhibits religion."[65] Another test in attempting to articulate the scope of the first amendment establishment clause is expressed in *Walz v. Tax Commission*:[66]

57. 330 U.S. 1 (1947). The Court upheld a resolution of the board of education authorizing the reimbursement of parents for public transport of children to sectarian schools.

58. Cantwell v. Connecticut, 310 U.S. 296 (1940). "The fundamental concept of liberty embodied in that [Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment." Id. at 303.

59. Zorach v. Clauson, 343 U.S. 306, 312 (1952). "We are a religious people, whose institutions presuppose a Supreme Being." Id. at 313. The Court upheld a public school release-time program, in which religion classes were held outside the schools.

60. 330 U.S. 1 (1947).

61. Id. at 15-16.

62. 343 U.S. 306 (1952).

63. Id. at 312.

64. 374 U.S. 203 (1963).

65. Id. at 222; see Bd. of Educ. v. Allen. 392 U.S. 236, 243 (1968).

66. 397 U.S. 664 (1970).

Determining that the legislative purpose . . . is not aimed at establishing, sponsoring or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive governmental entanglement with religion.[67]

Finally, in 1971 the Court examined the cumulative effect of prior tests formulated in establishment clause challenges, and in so doing, developed a three-test criteria. In *Lemon v. Kurtzman*,[68] petitioners challenged the constitutionality of Rhode Island and Pennsylvania statutes[69] which granted state aid to private schools. Here the Court summarized the two tests formulated in the *Schempp* decision—"secular purpose" and "primary effect" and the *Walz* standard of "excessive entanglement" as "cumulative criteria" to be applied in determining the validity of such legislation and establishment clause challenges.[70]

The court in *Dickens* chose to apply the *Abington* test and found the matching provisions to be within its confines,[71] in view of the fact that religion is not a controlling factor in placement proceedings.[72] In examining the statutory amendments,[73] the New York court concluded that legislation which places primary emphasis on the best interests of the child insofar as religious matching, undoubtedly obviates government entanglement[74] and meets the necessary constitutional prerequisites.[75] To

67. Id. at 674.

68. 403 U.S. 602 (1971), rehearing denied, 404 U.S. 876 (1972).

69. R.I. Gen. Laws Ann. §§ 16-51-1 to -9 (Supp. 1970); Pa. Stat. Ann. tit. 24, §§ 5601-09 (Supp. 1971).

70. Lemon v. Kurtzman, 403 U.S. 602, 612-16 (1971).

71. " '[T]o withstand the strictures of [that] [first amendment] Clause,' the Supreme Court has observed, 'there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.' " 30 N.Y.2d at 66, 281 N.E.2d at 156, 330 N.Y.S.2d at 349.

72. "Religion has never been an exclusive, or . . . a controlling, factor in adoption proceedings. The standard contained in the new amendments to the religious conformity provisions—namely, 'the best interests of the child'— is a flexible one, affording the court a broad discretion in deciding whether a proposed adoption would be best for the child." Id. at 66-67, 281 N.E.2d at 156, 330 N.Y.S.2d at 349.

73. N.Y. Family Ct. Act § 116(g) (McKinney Supp. 1971); N.Y. Soc. Services Law § 373(7) (McKinney Supp. 1971).

74. 30 N.Y.2d at 66, 281 N.E.2d at 156, 336 N.Y.S. at 349. Having at once determined the primary purpose of the legislation to be secular in nature and discretionary in application, the court successfully applied the Abington test. Id.

75. "Legislation which provides for the placement of a child with adoptive parents of the same religion 'so far as consistent with the best interests of the child, and where practicable' . . . undoubtedly fulfills a 'secular legislative purpose' and

support their claim of unconstitutionality under the establishment clause, petitioners asserted that subdivision (e) of section 116 of the Family Court Act,[76] which defined the meaning of the "when practicable" clause, effectively precluded them from consideration for adoptive parenthood. The court strongly emphasized that this provision is limited by the amendment which effects parental wishes only "so far as consistent with the best interests of the child."[77] In applying the amendment to the statute, the court reasoned that both secular and religious considerations would be taken into account in determining the child's best interests.[78] As to the contention of petitioners that "free exercise of religion" is violated by the religious matching requirements, the court affirmed the position of the lower court that adoptive parents without religious affiliations would be eligible to adopt a child of unknown religious background or a child surrendered without qualification by the natural parents.[79] While it is to be recognized that matching requirements present an additional difficulty[80] for some people to adopt a child, the court reasoned that petitioners are not limited in their search for an adoptive child to their respective community.[81] Citing the Supreme Court decision in *Sherbert v. Verner*,[82] that legislation, to avoid constitutional challenge regarding free exercise of religion, must be justified by a compelling state interest in the regulation of the subject,[83] the court here determined that the challenged legis-

certainly reflects and preserves a 'benevolent neutrality' toward religion. . . . And, just as clearly, the 'matching' provisions neither have the 'primary effect' of advancing or inhibiting religion, . . . nor foster an 'excessive government entanglement' with church interests." Id.

76. N.Y. Family Ct. Act § 116(e) (McKinney 1963) provides: "The words 'when practicable' as used in this section shall be interpreted as being without force or effect if there is a proper or suitable person of the same religious faith or persuasion as that of the child available for appointment as guardian, or to be designated as custodian, or to whom control may be given, or to whom orders of adoption may be granted; or if there is a duly authorized association, agency, society or institution under the control of persons of the same religious faith or persuasion as that of the child, at the time available and willing to assume the responsibility for the custody of or control over any such child.

77. N.Y. Family Ct. Act § 116(g) (McKinney Supp. 1971); N.Y. Soc. Services Law § 373(7) (McKinney Supp. 1971).

78. 30 N.Y.2d at 67, 281 N.E.2d at 156, 330 N.Y.S.2d at 350.

79. Id. at 67-68, 281 N.E.2d at 157, 330 N.Y.S.2d at 350.

80. Comment, A Reconsideration of the Religious Element in Adoption, 56 Cornell L. Rev. 780, 821-822 (1971).

81. 30 N.Y.2d at 68, 281 N.E.2d at 157, 330 N.Y.S.2d at 350.

82. Sherbert v. Verner, 374 U.S. 398 (1963).

83. Id. at 403.

lation served a valid secular purpose, and as such, neither discriminated against the petitioners because they had no religious persuasion, nor forced them to adopt a religion.[84] Moreover, the court directed the respondent to accept and process the application of the petitioners for adoptive parenthood.[85]

In their final contention the petitioners claimed that the legislative provisions created an arbitrary classification, which when applied to their application, denied to them equal protection of the laws, since the enactments had no relevance to the purpose of adoption laws.[86] Noting that the amendments to the adoption laws clearly allow the surrendering parent the expression of a religious preference, the court dismissed this contention, reasoning that petitioners were actually decrying "the shortages of adoptive children and surrendering parents without religious affiliation or preference."[87] The court recognized the well established right of a parent to control the religious upbringing of the child as a right guaranteed under the fourteenth amendment,[88] and in the absence of parents, it becomes a valid exercise of the state's power as *parens patriae* in regulating the order of adoption.[89] With the best interests of the child as the source, direction and limiting consideration in determining the reasonableness of the state's action, the court dismissed the constitutional challenge of the petitioners.

The decision of the New York Court of Appeals in *Dickens*, appears to advance a more enlightened and flexible criteria in adoption proceedings.[90] Although the decision does not obviate the religious matching

84. 30 N.Y.2d at 68, 281 N.E.2d at 157, 330 N.Y.S.2d at 350.

85. In affirming the decision of the Appellate Division, which directed the respondent to process the application of the petitioners for adoption, the court reasserted this directive.

86. 30 N.Y.2d at 68, 281 N.E.2d at 157, 330 N.Y.S.2d at 350.

87. Id.

88. The opinion of the Appellate Division was quite specific in recognizing this common law right. 37 App. Div. 2d 102, 105, 322 N.Y.S.2d 581, 583 (4th Dept. 1971), referring to Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

89. Id. at 105, 322 N.Y.S.2d at 583; cf. Pierce v. Society of Sisters, 268 U.S. 510, 512 (1925).

90. In a recent challenge to judicial discretion in granting cross religious child placement in New Jersey, the New Jersey Supreme Court held, that absent special circumstances, adoption cannot be denied solely on the ground that prospective adoptive parents lack belief in a Supreme Being or lack church affiliation. In re Adoption of E., 59 N.J. 36, 279 A.2d 785 (1971). The facts are similar to the Dickens case, except that the New Jersey statutes do not require religious matching in custody and adoption proceedings, nor is there legal presumption that the religion

requirement in New York child placement proceedings, its mandatory character is appreciably modified, and the flexibility now built in presents a significant improvement. In a jurisdiction which has steadfastly adhered to a strict construction of the statutory language,[91] the decision reflects a definitive policy change, although there remain important substantive issues which this distinguished court failed to address itself to. The determination of what a religion signifies in terms of the rights of the child and the ramifications of its consideration present formidable questions for judicial analysis. With the increased significance of adoption in our society, and the enormous growth in applications for adoptive parenthood,[92] the compelling importance of its prerogatives must be affirmed in both legislative enactment and judicial wisdom. If New York is to promote the enduring best interest of its citizen children, the courts must be prodigious in their vigilance over the protection of individual rights. The discretion vested in the courts to determine the important multiple interests of family life, balancing the needs of the child with the protection of both natural and adoptive parents, is indeed a compelling task. However difficult it is to define the relationship between religion and society, a definition must be had, for the protection of society in general, but most especially in the hope that the adoptive familial situation might "imitate natural sonship perfectly."[93] The problem presents no small challenge:

Pure logic and intellect may be satisfied with absolutes, but wisdom demands something more. The problem that underlies . . . "religious protection" laws—the relation between religion and the free society—is profoundly difficult, and profoundly important; there can be no easy solution. But if the analysis were

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of the child is that of the parent. N.J. Stat. Ann., tit. 9, ch. 3, § 23(a) (1960) is the only indication of religious affiliation, wherein it provides due regard for the religious background of the child in appointing an agency to initially care for the child. The New Jersey Supreme Court, in reversing the lower court decision, held that where the sole ground for denying the adoption was the religious belief of the applicants, who were otherwise fit, the court would grant the adoption as an exercise of its original jurisdiction. In re Adoption of E, supra at 57, 279 A.2d at 796.

91. See text accompaning notes 25–46 supra.

92. Comment, A Reconsideration of the Religious Element in Adoption, 56 Cornell L. Rev., 780, 781–786 (1971). In the last decade, adoptions have increased from 96,000 in 1958 to 166,000 in 1968. Id. at 781.

93. Ramsey, The Legal Imputation of Religion to an Infant in Adoption Proceedings, 34 N.Y.U.L. Rev. 649 (1969), quoting Thomas Aquinas in Summa Theologicae, III (Sup.), Q. 57, art. 1, ad. 1.

conceived of, not as a search for absolutes, but rather as an attempt to understand all the competing interests, including the interests represented by the concept of sovereignty and the manner of its disposition by the people, then wisdom may be served.[94]

And so may justice.

94. List, A Child and a Wall: A Study of "Religious Protection" Laws, 13 Buffalo L. Rev. 9, 57–58 (1963).