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Article 8

Eviction Procedure in Public Housing

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attending to their interests. But it is necessary only to call the executor a fiduciary to find a duty incumbent upon him to convey the title. The general characteristic of the fiduciary relationship is loyalty and most authorities seem to agree that executors and trustees owe this loyalty to their respective beneficiaries in varying degrees. It is to be hoped, however, that enough basic *differences* between executors and trustees have been pointed up to indicate that the court's language in *Burmeister* was less than exact and that it would have made the court's meaning as to the executor-legatee relationship clearer had it used the suggested term "fiduciary" rather than adding yet another nuance to the variable definitions of "trust" and "trustee."

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Eviction Procedure In Public Housing: While public housing has been a fact of American life for over thirty years and countless millions have been tenants in such projects, the case law arising out of this relationship has been minimal. The case of *Thorpe v. Housing Authority of the City of Durham,*[1] vacated and remanded in 1967[2] and decided in January, 1969, represents the Supreme Court's first consideration of a controversy founded on this relationship.

The Thorpe family moved into their home in the Durham Housing Project on November 11, 1964.[4] Residents of the project, according to a standard lease used in federally assisted housing projects, are month-to-month tenants with the lease providing for automatic renewal for one month periods. The lease may be terminated by either party with at least fifteen days notice prior to the end of the month. On August 10, 1965, Joyce Thorpe was elected president of a tenants' organization in the project. On the following day she received notice that her lease was being terminated as of August 31, 1965. No explanation was given for the termination.[5]

Through her attorneys, Joyce requested a hearing to determine the reasons for the termination of the lease. The hearing was denied and no reasons were given. The Thorpe family's holdover prompted the Housing Authority to institute a summary ejectment proceeding in the Justice of the Peace Court. In a motion to quash the action it was argued that Joyce was being deprived of her constitutional rights and

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[1] 89 S. Ct. 518 (1969).
[2] 386 U.S. 670 (1967).
[3] For a complete discussion of public housing and many of the problems alluded to in this article, *see* Rosen, *Tenants' Rights in Public Housing,* HOUSING FOR THE POOR: RIGHTS AND REMEDIES, Project on Social Welfare Law, Supplement No. 1 (1967).
[4] For a detailed statement of the facts, *see* Douglas' concurring opinion in the first Thorpe case, 386 U.S. 670, 674 (1967).
[5] "All apparently went well for eight months; the record reveals no complaint from the manager of the housing project." Thorpe v. Housing Authority of the City of Durham, 386 U.S. 670, 674 (1967).

that due process was not being afforded because she was not granted a hearing nor informed of the reasons prompting the eviction. The motion was denied and the court ordered the Thorpe family to move out. On appeal to the superior court and a trial de novo, the court affirmed the eviction, holding that Mrs. Thorpe was not evicted because of her activities in the tenant organization, and that the Housing Authority was not required to provide a hearing, nor specify the reasons for the lease termination. On appeal to the North Carolina Supreme Court, the eviction was affirmed. The court held that the tenant's rights are governed by the lease and that it was "immaterial what may have been the reason for the lessor's unwillingness to continue the relationship as landlord and tenant. . . ."[6]

The United States Supreme Court granted certiorari on December 5, 1967.[7] On February 7, 1967, while the case was pending, the Department of Housing and Urban Development (HUD) issued a circular which directed federally assisted housing projects to inform their tenants of the reasons for a lease termination prior to the termination, and to provide a method by which a tenant might reply and offer explanation.[8] On the basis of this circular, the Supreme Court vacated the judgment of the North Carolina Supreme Court and remanded the case to that court in light of the HUD circular. On re-

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[6] 267 N.C. 431, 433, 148 S.E.2d 290, 292 (1966).
[7] 385 U.S. 967 (1966).
[8] The text of the circular is as follows:

Subject: Termination of Tenancy in Low-Rent Projects

Within the past year increasing dissatisfaction has been expressed with eviction practices in public low-rent housing projects. During that period a number of suits have been filed throughout the United States generally challenging the right of a Local Authority to evict a tenant without advising him of the reasons for such eviction. Since this is a federally assisted program, we believe it is essential that no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish.

In addition to informing the tenant of the reason(s) for any proposed eviction action, from this date each Local Authority shall maintain a written record of every eviction from its federally assisted public housing. Such records are to be available for review from time to time by HUD representatives and shall contain the following information:

1. Name of tenant and identification of unit occupied.
2. Date of notice to vacate.
3. Specific reason(s) for notice to vacate. For example, if a tenant is being evicted because of undesirable actions, the record should detail the actions which resulted in the determination that eviction should be instituted.
4. Date and method of notifying tenant with summary of any conference with tenant, including names of conference participants.
5. Date and description of final action taken.

The Circular on the above subject from the PHA Commissioner, dated May 31, 1966, is superseded by this Circular.

s/ Don Hummel
Assistant Secretary for Renewal and Housing Assistance

mand, the North Carolina Court held the HUD circular did not apply to the facts of the *Thorpe* case because "all critical events took place months before"[9] the date of the circular.

The United States Supreme Court again granted certiorari,[10] and in the second *Thorpe* case reversed the North Carolina Court, holding that federally assisted housing projects must apply the HUD circular "before evicting any tenant still residing in such project on the date of this decision."[11] The Court held the circular to be mandatory on all federally assisted housing projects, and a valid exercise of HUD's rule making power.[12] The Court stated that the circular did not usurp the responsibility of local authorities in the administration of projects, and because it was "reasonably related to the enabling legislation under which it was promulgated,"[13] the circular was not an unconstitutional violation of the annual contract existing between the Durham Housing Authority and HUD.

The basic approach to evictions in public housing projects prior to the *Thorpe* decision was based on the premise that there was no distinction between public and private landlords. This philosophy was formulated in *Brand v. Chicago Housing Authority*[14] where a federal court of appeals upheld the right of the Housing Authority to terminate the lease of several tenants. The court reasoned that the tenants' right of possession was limited by the terms of the lease, and that the lease is binding on the tenants "in the same manner as though the lessor had been a private person rather than a governmental agency."[15]

This has been the standard tack of state courts when confronted with the issue.[16] Courts have repeatedly stated that the only relevant

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[9] 271 N.C. 468, 471, 157 S.E.2d 147, 149 (1967).
[10] 390 U.S. 942 (1968).
[11] Thorpe v. Housing Authority of the City of Durham, 89 S. Ct. at 522. Execution was stayed by the Supreme Court of North Carolina so the Thorpe family was still residing in the project when this case was decided.
[12] United States Housing Act of 1937, § 8, 42 U.S.C. § 1408 (Supp. III, 1967).
[13] 89 S. Ct. at 525. *See* United States Housing Act of 1937 § 1, as amended by Housing Act of 1948, 42 U.S.C. § 1401 (1964).
[14] 120 F.2d 786 (7th Cir. 1941).
[15] *Id.* at 788. The court relied on Lynch v. United States, 292 U.S. 571, 579 (1934), for the proposition that "When the United States enters into contract relations its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *See also* United States v. Blumenthal, 315 F.2d 351 (3d Cir. 1963) for support of the Brand doctrine although Vinson v. Greenburgh Housing Authority, 29 App. Div. 2d 338, 288 N.Y.S.2d 159 (1968), distinguished Blumenthal from the cases dealing with public housing. Blumenthal dealt with a lease termination by the government of surplus land which the lessor was using commercially. "Low rent housing is not the leasing of government-owned property originally acquired for a different purpose, but now surplus or not required for that purpose, on a sporadic or temporary basis . . . where the traditional notions of private property might well be applied; . . ." Vinson v. Greenburgh Housing Authority, *supra,* 29 App. Div. 2d at 341, 288 N.Y.S.2d at 163.
[16] *See, e.g.,* Columbus Metropolitan Housing Authority v. Simpson, 85 Ohio App. 73, 83 N.E.2d 560 (1949), noted in 6 J. OF HOUSING 150 (1949); San

consideration is whether the housing authority has terminated the occupancy in compliance with the lease. Since reasons for termination are not necessary in the private sphere,[17] state courts, true to the *Brand* philosophy, have not required them of public landlords.[18]

This thinking was modified, unfortunately only temporarily, in the mid-fifties by a series of cases following the passage of the Gwinn Amendments.[19] Tenants in federally assisted housing projects were required by the Gwinn Amendment to sign oaths disclaiming membership in a list of subversive organizations. In striking down attempted evictions by housing authorities, courts repeatedly relied on *Frost and Frost Trucking Company v. Railroad Commission*[20] for the proposition that a state may not condition a privilege, which it may deny altogether, on the surrender of constitutional rights.[21] In *Peters v. New York Housing Authority*,[22] the court, in prohibiting an eviction because of a tenant's failure to sign such a disclaimer, held the Gwinn Amendment to be constitutionally defective in that it imposed "an unconstitutional requirement as a condition for occupancy in low rent housing projects."[23]

> [T]he government is under no duty to provide bounties in the form of low rent housing accommodations for its citizens. If it elects to do so, however, it cannot arbitrarily prevent any of its citizens from enjoying these statutorily created privileges. Nor can it make the privilege of their continuance dependent on conditions that would deprive any of its citizens of their constitutional rights. A government is without power to impose an

Diego State College Foundation v. Hasly, 90 Cal. App. 2d 884, 202 P.2d 868 (1949); Walton v. City of Phoenix, 69 Ariz. 26, 208 P.2d 309 (1949).

[17] Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968) stands as a limitation on a private landlord's freedom to terminate a tenancy. The court held that a private landlord may not terminate a tenancy in retaliation against a tenant who reports housing code violations. *Contra*, Hoyt v. La Chance, reported in 14 WELFARE L. BULLETIN 11 (Conn. Cir. Ct., 14th Cir at Hartford, 1968).

[18] *See, e.g.*, Chicago Housing Authority v. Ivory, 341 Ill. App. 282, 93 N.E.2d 386 (1950), noted in 7 J. OF HOUSING 432 (1950).

[19] ". . . no housing unit constructed under the United States Housing Act of 1937, as amended, shall be occupied by a person who is a member of an organization designated as subversive by the Attorney General." Act of July 5th, 1952, Ch. 578, 66 Stat. 403, re-enacted by Act of July 31, 1953, Ch. 302, 67 Stat. 307, formerly 42 U.S.C. 1411(c), repealed, Act. of Sept. 25, 1959, Pub. L. No. 86-3672, 73 Stat. 681.

[20] 271 U.S. 583 (1926).

[21] *See also* Hannegan v. Esquire Inc., 327 U.S. 146 (1946); Mr. Justice Frankfurter in his concurring opinion in American Communications Ass'n v. Douds, 339 U.S. 382, 417 (1949) stated: "This is so not because Congress in affording a facility can subject it to any conditions it pleases. It cannot. Congress may withhold all sorts of facilities for a better life but if it affords them it cannot make them available in an obviously arbitrary way or exact surrender of freedoms unrelated to the purposes of the facilities." *See* Comment, 73 HARV. L. REV. 1595 (1960).

[22] 9 Misc. 2d 942, 128 N.Y.S.2d 224 (Sup. Ct. 1953), *modified*, 283 App. Div. 801, 128 N.Y.S.2d 712 (2d Dept. 1954), *rev'd on other grounds*, 307 N.Y. 519, 121 N.E.2d 529 (1954), *appeal dismissed on remand*, 1 App. Div. 2d 694, 147 N.Y.S.2d 859 (2d Dept. 1955).

[23] 9 Misc. 2d at 957, 128 N.Y.S.2d at 241.

> unconstitutional requirement as a condition for granting a privilege, even though the privilege may have been the use of government property.[24]

Other courts struck down evictions because the list of organizations promulgated by the housing authorities was broader than the Attorney General's list, and therefore the housing authority had exceeded its authority and the evictions were arbitrary, and a denial of due process.[25] In *Kutcher v. Housing Authority* the New Jersey Court stated that:

> [T]he Authority cannot act arbitrarily for, unlike private landlords, it is subject to the requirements of due process. . . . Due process and equal protection of the laws means equality of treatment under like circumstances and conditions both in the privileges conferred and the burdens imposed. These constitutional principles secure the individual against the arbitrary exercise of the powers of government.[26]

Courts also invalidated evictions on the basis that the housing authority did not have the right to exact the signing of such a disclaimer because such actions did not bear a reasonable relation to the purposes of public housing.[27] In a Wisconsin case *Lawson v. Housing Authority for the City of Milwaukee*,[28] the plaintiff-tenant refused to sign a disclaimer of membership, and challenged the constitutionality of the Amendment. The Housing Authority argued that it stands in the same position as a non-governmental landlord, and that tenants have no vested right which permits them to raise the issue of unconstitutionality. To this argument, the court responded:

> The holding out of a privilege to citizens by an agency of government upon condition of non-membership in certain organizations is a . . . subtle way of encroaching upon constitutionally protected liberties. . . . If a precedent should be established, that a governmental agency whose regulation is attacked by court action can successfully defend such an action on the ground that the plaintiff is being deprived thereby only of a privilege, and not of a vested right, there is extreme danger that the liberties of any minority group in our population, large or small, might be swept away without the power of the courts to afford any protection.[29]

The court struck down the resolution adopted to implement the Gwinn Amendment as an unconstitutional deprivation of first amendment

[24] *Id.* at 942, 128 N.Y.S.2d at 236.
[25] *See, e.g.*, Rudder v. United States, 226 F.2d 51 (D.C. Cir. 1955).
[26] 20 N.J. 181, 119 A.2d 15 (1955).
[27] *See* Housing Authority v. Cordova. 130 Cal. App. 2d 883, 279 P.2d 215 (App. Dept. 1955), *cert. denied*, 350 U.S. 969 (1956); Chicago Housing Authority v. Blackman, 4 Ill. 2d 319, 122 N.E.2d 522 (1954). *See also* Note, 69 HARV. L. REV. 551 (1956).
[28] 270 Wis. 269, 70 N.W.2d 605 (1955), *cert. denied*, 350 U.S. 882 (1955).
[29] *Id.* at 275, 70 N.W.2d at 608, 609.

rights stating: "This court deems the possible harm which might result in suppressing the freedoms of the First Amendment outweigh [sic] any threatened evil. . . ."[30]

The cases decided after the Gwinn Amendment controversy indicated that courts, with some exceptions,[31] refused to apply the holdings in the Gwinn cases and limit the governmental landlord to a permissible scope of action in dealing with public housing tenants. Up to the time of the second *Thorpe* case, the termination of a tenant's lease absent reasons was considered permissible conduct on the part of the housing authority.[32] This reasoning was the basis for a recent dismissal in Circuit Court, Milwaukee County, of an action brought by tenants challenging an eviction from a moderate income housing project.[33] The court held that a failure to provide a hearing prior to the termination of the lease was not a violation of due process or Wisconsin Statutes 66.40-.404, and that the housing authority is not required by statute to terminate a lease on only reasonable grounds.

Although the first *Thorpe* case left the legal effect of the HUD circular uncertain,[34] it was nonetheless effective in altering the thinking of some courts. In *Vinson v. Greenburgh Housing Authority,* a New York court, while stating that the HUD circular did not apply to the controversy because the project was state financed, held nevertheless that:

> [A] housing project authority cannot arbitrarily deprive a tenant of his right to continued occupancy through the exercise of a contractual provision to terminate the lease. In other words, action of the Housing Authority must not rest on mere whim or caprice or an arbitrary reason.[35]

Perhaps the most significant aspect of the second *Thorpe* case was the fact that it resolved the questionable legal effect of the circular. It was the position of the Durham Housing Authority that the circular was only advisory due to the circular's precatory statement "we be-

[30] *Id.* at 287, 288, 70 N.W.2d at 615.

[31] A notable exception is Holt v. Richmond Redevelopment and Housing Authority, 266 F. Supp. 397 (E.D. Va. 1966). The court found that a tenant's lease was terminated because he was active in organizing other tenants in the project. With only cursory reference to the first *Thorpe* case, the court struck down the eviction as a deprivation of first amendment rights.

[32] *See, e.g.,* Housing Authority of Pittsburgh v. Turner, 201 Pa. Super. 62, 191 A.2d 869 (1963). Housing Authority v. Venezie, 25 Beaver Co. L.J. 92 (Pa. C.P. 1963). For a very recent reliance on the *Brand* doctrine, *see* Chicago Housing Authority v. Stewart, 40 Ill. 2d 23, 237 N.E.2d 463 (1968).

[33] Peterson v. Housing Authority of Milwaukee, No. 359-141 (Cir. Ct., Milwaukee County) dismissed August 20, 1968, reported in 15 WELFARE L. BULLETIN 19 (1968).

[34] Justice Douglas, in his concurring opinion in the first *Thorpe* case, 386 U.S. at 681, expressed doubt as to the legal effect of the circular. ". . . the status of the circular, whether a regulation or only a press release, is uncertain. . . ." *See also* Chicago Housing Authority v. Stewart, 40 Ill. 2d 23, 237 N.E.2d 463 (1968).

[35] 29 App. Div. 2d 338, 341, 288 N.Y.S.2d 159, 163 (1968).

lieve it is essential."[36] The Court, through analysis of a prior circular,[37] and in view of the fact that the agency intended the circular to be an addition to the Low-Rent Management Manual,[38] held that it was the intention of HUD that the circular be mandatory on all federally assisted housing projects.[39]

In holding the circular to be mandatory, the Court has taken an important step in dissolving the public-private equation. No longer can courts hold that the duties of public landlords vis-à-vis tenants are the same as private landlords. Justice Douglas, in his concurring opinion in the first *Thorpe* case, urged the Court to be more explicit in differentiating the public landlord from his private counterpart.[40] He stated that the actions of governmental landlords are circumscribed by the Bill of Rights and the fourteenth amendment. Douglas quoted from *Rudder v. United States* to underscore his point. "The government as landlord is still the government. It must not act arbitrarily, for unlike private landlords, it is subject to the requirements of due process."[41] While the Housing Authority in *Thorpe* conceded "that its power to evict is limited at least to the extent that it may not evict a tenant for engaging in constitutionally protected activity,"[42] the value of the second *Thorpe* case would have been enhanced if the Court had followed Douglas' suggestion in the first *Thorpe* case and been more explicit as to the "permissible range of state action against the individual."[43]

If the Court had been more detailed as to the scope of non-action by a public landlard, would this have unreasonably tied the hands of housing authorities in dealing with tenants? Douglas, in the first *Thorpe* case, felt that such an approach would not leave the public landlord powerless. Douglas suggested that evictions would be proper if a

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[36] *See* note 8 *supra.*

[37] The previous circular stated: "We strongly urge, as a matter of good social policy. . . ." This circular was not incorporated into the Management Manual.

[38] Pursuant to HUD rule making power under United States Housing Act of 1937, § 8, as amended, 42 U.S.C. § 1408 (Supp. III, 1967).

[39] Following the decision in the first *Thorpe* case, when the effect of the circular was uncertain, the Project on Social Welfare Law, as reported in 8 WELFARE L. BULLETIN 4, 5 (1967), queried the Chief Counsel of HUD, Joseph Burnstein, as to how HUD would enforce the circular assuming it to be mandatory on the local housing authorities. He stated: "In light of the experiences we have had in dealing with local authorities during the past 30 years, we expect that they will comply with the provisions of this Circular or endeavor to do so in good faith. In general, where instances of noncompliance with provisions of the Annual Contributions Contract have occurred, our established policy has been to seek a full exchange of views in order to remove any misunderstandings and to achieve voluntary compliance if at all possible. In very rare instances have we found it necessary to exercise our rights under Sections 501-502 to take title to or possession of the project or under Section 508 to exercise other available remedies."

[40] Thorpe v. Housing Authority of the City of Durham, 386 U.S. at 678 and 679.

[41] 226 F.2d 51, 53 (D.C. Cir. 1955).

[42] Thorpe v. Housing Authority of the City of Durham, 89 S. Ct. at 526.

[43] Thorpe v. Housing Authority of the City of Durham, 386 U.S. at 681.

tenant's conduct, such as failure to follow reasonable regulations, impaired the smooth operation of the project. "Evictions for such reasons will completely protect the viability of the housing project without making the tenant a serf who has a home at the pleasure of the manager of the project or the housing authority." [44]

The argument was made in both *Thorpe* cases, as it has been made in a long line of cases,[45] that housing authorities must grant the tenant a hearing that complies with due process prior to a lease termination. The Supreme Court refused to deal directly with this issue in the second *Thorpe* case,[46] but intimated that if housing authorities did not grant a hearing, a tenant's remedy would be to holdover and challenge the reason for termination in the ensuing eviction proceeding. Consonant with this approach was Douglas' question in the first *Thorpe* case. "Is there a constitutional requirement for an administrative hearing, where, as here, the tenant can have a full judicial hearing when the authority attempts to evict him through judicial process?"[47]

This position places an unwarranted amount of faith in the eviction proceeding. With the poor service of process which is prevalent in urban areas,[48] often the first notice that a tenant receives of the eviction is when the sheriff arrives to dispossess. Because most eviction proceedings are summary in nature[49] and not an ideal forum to raise the issues of arbitrariness or unconstitutionality, tenants have been required to take the initiative and attempt to prevent the eviction through injunction or declaratory judgment. Since the HUD circular requires the housing authority to provide the tenant with "an opportunity to make such reply or explanation as he may wish,"[50] and because courts have found it unnecessary to require a hearing prior to termination,[51] HUD should require, through an additional circular, an appropriate hearing in order to effectively implement the February 7 circular.

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[44] *Id.* at 680.

[45] *See, e.g.,* Chicago Housing Authority v. Stewart, 40 Ill. 2d 23, 237 N.E.2d 463 (1968); Williams v. Housing Authority of Atlanta, Civ. Action No. 10796 (N.D. Ga. 1967).

[46] The Court stated: "We do not sit, however, 'to decide abstract, hypothetical, or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision. . . .'" Thorpe v. Housing Authority of the City of Durham, 89 S. Ct. at 527, quoting from Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1965).

[47] Thorpe v. Housing Authority of the City of Durham, 386 U.S. at 678.

[48] LE BLANC, LANDLORD-TENANT PBORLEMS, IN THE EXTENSION OF LEGAL SERVICES TO THE POOR, 51-60 (U.S. Dept. of H.E.W. 1964).

[49] *See* WIS. STAT. Ch. 291 (1967); Milwaukee Elec. Tool Corp. v. River Realty Co., 248 Wis. 589, 22 N.W.2d 593 (1945).

[50] *See* note 8 *supra.*

[51] While the Court did not pass directly on the requirement of a hearing, there is authority supporting the position that the constitutional requirements of due process are satisfied if there is a judicial hearing before the governmental action becomes final. Ewing v. Mitinger and Casselberry, Inc., 339 U.S. 594 (1950); Lichter v. United States, 334 U.S. 742 (1948); Hager v. Reclamation District, 111 U.S. 701 (1884).

While both *Thorpe* cases were decided on non-constitutional grounds, the Court has nonetheless, in holding the HUD circular to be mandatory, taken an essential step in protecting the rights of public housing tenants. Specifying reasons for termination will implicitly restrict the housing authority from terminating the lease on unconstitutional or arbitrary grounds. The tenant, thus armed with the reasons for the termination, will be on firmer ground in challenging the termination than the pre-Thorpe tenant who was not entitled to the reasons for the termination. The *Thorpe* case is but a small step, but it does mirror a growing body of thought, starting with the philosophy of *Frost*[52] and the cases decided under the Gwinn Amendment, that tenants in public housing, and recipients of all forms of government largesse are not constitutional nonpersons.[53] Hopefully, in the near future, with an appropriate case before it, the Supreme Court will be more explicit in defining the rights and duties of landlords and tenants in public housing.

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[52] 291 U.S. 583 (1926)
[53] *See* Reich, *The New Property*, 73 YALE L. REV. 733 (1964); Fortas, *Equal Rights—For Whom?*, 42 N.Y.U. L. REV. 401 (1967).