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The Editors Dedicate this Issue to the Memory of Raymond Paul Hutchens, Dean of the Salmon P. Chase College of Law, 1951-1968.
A DEDICATION TO RAYMOND PAUL HUTCHENS

Holmes once said "A great man represents a great ganglion in the nerves of society, or, to vary the figure, a strategic point in the campaign of history, and part of his greatness consists in his being there." It can be assumed with some logic and reasonableness that what can be said about society at large can be applied to constituent parts of that society. In that sense a particular facet of society is a microcosm of the larger unit. Probably in every organization or institution there comes a strategic point in time when what will eventually become of the organization depends in the main on the manner in which the occurrence of critical events align themselves or are aligned by a moving force. While sometimes "things happen for the best," more often it is apparent (usually based on hindsight) that the requirement of a prime mover was necessary for any successful result. The successful result in most cases is the application of the right dosage of personal dedication and expertise in the form of a particular person to an organization ready and in need of direction and shaping.

Ray Hutchens and Chase College of Law is a story of a prime mover with pent up talent and an organization that had reached a critical point in time. The coming together of Hutchens and Chase College of Law at a critical point in time was a fortuitous event that not only fostered the presentation and shaping of the organization, but also provided a conduit through which the man could put into practice his expertise.

Ray Hutchens was born in 1914 in Ohio. After elementary schooling, he obtained his Bachelor of Science degree from Wilmington College in 1936, and his Master of Arts degree from Miami University in 1942. World War II interrupted a career as an elementary school teacher and after his return from the European war with a distinguished combat war record, Hutchens enrolled in Chase College of Law and obtained his Bachelor of Law degree in 1948. Subsequently he pursued and eventually received the Doctor of Philosophy degree from the University of Ottawa, Canada (1960). So much for the man. What about the organization?

1. 178 Mass. 625 (1901). On motion that the Court adjourn on February 4, 1901, the one hundredth anniversary of the day John Marshall took his seat as Chief Justice of the United States Supreme Court.
Chase College of Law began its life as a branch of the Cincinnati & Hamilton County YMCA in 1893. Its founder and first dean, Robert M. Ochiltree, started the first class of seventeen students and "guided this new approach to legal education over a rough and unfamiliar path, so that by the end of his tenure in 1916, part-time legal education had achieved a solid position in our legal system." 2

The avowed purpose of the part-time law school was to employ "[t]he same curriculum and study materials used in the full-time day law schools." 3 Ochiltree was successful in his endeavors from the very beginning. "In 1900 the state of Ohio approved the YMCA as a degree granting institution" 4 and on June 28, 1900, the degree of Bachelor of Law was conferred on sixty-five candidates. 5 From its inception the law school was an integral part of the YMCA educational outreach. Law school operational changes patterned after innovations adopted by "day law schools" (full-time) were difficult to implement given the fact that the YMCA Board of Directors acted as Law School officers of administration. From 1916 to 1951 the law school, while normally headed by the Dean, was as a practical matter managed and controlled by the YMCA hierarchical procedure consisting of the Education Director, Executive Secretary of the Central Branch, the General Secretary, and the Board. By 1948, at which time Raymond Hutchens was Educational Director, the law school was judged to be somewhat deficient in meeting certain accrediting standards. This situation was a result of the appearance of accrediting agencies in the legal education field. In 1934 Ohio law schools formed an association called The League of Ohio Law Schools and in 1935 the Ohio Supreme Court amended its Rule XIV, admission to the bar, (effective July 1, 1939) to require all candidates for the bar examination to be graduates of a "recognized" school. "For an Ohio institution, the definition of a 'recognized school' was that it be a member of the League." 6 On June 20, 1934 the YMCA Board of Directors authorized the College of Law to become a charter member of the League. 7

3. Id. at 2.
4. Id. at 4.
5. Id.
6. Id. at 8.
7. Id. at 9.
Concurrent with the League entry into the law school accreditation process, the American Bar Association [hereinafter cited as ABA] adopted a policy stating minimum standards for legal education and published a list of law schools that complied with these standards. The Court of Appeals in Kentucky in 1945 adopted the ABA requirement of an "approved" school for admission to the bar of the state, and an ever-expanding number of Ohio law schools with ABA approval (a majority by 1950) kept asking for equivalent League standards.

When Hutchens arrived on the law school scene in 1948 he was faced with the monumental task of reorganization and reshaping of a law school organization out of step with legal education as it was developing on both the local and national levels. Not only was it necessary to separate the law school from its YMCA training orientation, but it was also vital that the College of Law restructure its educational approach to become compatible with the developing requirements of legal educational accrediting authorities. It was apparent that Ray Hutchens recognized the deficiencies in the law school situation from the very beginning. In his doctoral thesis at the University of Ottawa (1960) Hutchens stated:

it is evident from this study that it is impossible to operate an accredited college level educational program within the conventional pattern of organizational structure of the YMCA and conform to the standards required by the recognized educational authorities. It is possible, however, for an educational institution to retain an affiliation with the YMCA and comply with the requirements of the college accrediting agencies if the YMCA grants broad powers of administrative authority to those directly responsible for the operation of the educational program.

This statement obviously reflected an opinion which must have begun long before the publication date of the thesis. Based on a report submitted to the YMCA board in 1948 by Ray Hutchens, the Board passed a resolution setting up a committee to devise a plan to carry out such autonomy as was needed to obtain national accreditation and to hold surpluses arising after January 1, 1949, for

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8. Law School Accreditation Process, A.B.A. SEC. LEG. ED. & ADMISSIONS TO THE BAR.
10. Id.
11. Id. at 7.
the law school use. This eventuated in the provision of a separate Board of Regents (with YMCA representation), which had authority over all phases of law school operation.\footnote{12}

After this noteworthy accomplishment, Hutchens set into motion the process through which the law school could obtain ABA accreditation. In February, 1950, an unofficial inspection by the ABA consultant was held and then was followed by other ABA inspections. Finally, on March 9, 1954, the Section of Legal Education of the ABA provisionally approved the Law School and in 1959 full approval was granted to the Law School by that ABA accrediting agency.\footnote{13}

In addition to critical work in the organizational structure and accreditation areas, Hutchens made extraordinary accomplishments in the law school areas of curriculum, library, admissions requirements, faculty, and fund raising.

Prior to 1952 Chase Law School faculty was completely part-time. Although these part-time instructors were outstanding in almost every respect, the absence of full-time teachers was against the national trend and in order to bring Chase Law School into agreement with national law school operation, Hutchens employed two full-time teachers in 1952. This full-time complement increased to eight by the end of Hutchens tenure at Chase in 1968. This of course meant that part-time instruction continually diminished as a percentage of the total teaching load but it also meant that Chase Law School grew closer to the national law school model.

In the area of curriculum development Hutchens was instrumental in reshaping the Chase College of Law course structure so that it closely followed that model established by day law schools. The credit hours requirement for graduation increased from sixty-four hours in the 1920's to eighty-four hours by 1954.\footnote{14} The course requirements, teaching techniques, and examination practices were patterned after the most prestigious law schools. In addition, revisions were made in the curriculum by increasing offerings of public law subjects, by expanding the numbers and categories of elective courses, thereby permitting the in-depth study of additional areas

\footnote{12. \textit{Id.} at 10.} \footnote{13. \textit{Id.} at 13.} \footnote{14. \textit{Id.} at 11 and 13.}
of interest, and by initiating and promoting an extensive continuing legal education program.

The drive for national accreditation put strong emphasis on the need for library development. In 1954 the total Chase Law School library holding was 11,000 volumes. By 1968 the total Chase Law School library holding and the quality of the collection had improved remarkably. Ray Hutchens had a well developed talent for keeping abreast of national law library trends, and in furthering his intention to make Chase College of Law compatible with national schools, he developed a pattern of acquisitions which would accomplish the purpose.

During his tenure Hutchens saw the need for law school financial security and sought ways to provide an independent Foundation for the benefit of the Law School. In 1955, through his efforts and some of the Law School Board members, Colonel Harry T. Klein, class of 1909, made a gift of Texaco stock which resulted in the creation of the Chase College Foundation. Through continued efforts, Hutchens was able to develop other sources of contributions, and by 1968 the total assets of the Foundation approximated $750,000.

When he left Chase College of Law in 1968 to continue his distinguished career at another law school, Hutchens left a law school that was immeasurably better than the one he inherited in 1948. When he assumed the leadership of the law school Hutchens found a YMCA training program in legal education unaccredited by any formal standards and facing the threat of extinction. When he left in 1968 Chase College of Law was recognized as a first rate part-time legal educational program, closely resembling national day law schools in the most important respects. A large number of practicing lawyers and members of the judiciary in the greater Cincinnati area were graduates of Chase College of Law, and the school's reputation was firmly established.

When he died in 1984, Raymond P. Hutchens left a remarkable record of accomplishment. He, more than anybody, was responsible for the salvation of an important and invaluable community asset.

15. Id. at 14.
16. Id.
17. Cumberland School of Law of Sanford University, Birmingham, Alabama.
18. Many YMCA evening Law Schools either phased out of existence or became affiliated with Colleges and Universities during the period 1930-1950.
and the promotion of it into a well respected and continually productive law school. Chase College of Law owes its character and its existence to Raymond Paul Hutchens.

W. Jack Grosse*
Kentucky Supreme Court Justice Robert O. Lukowsky died on December 5, 1981. As a memorial to his dedication to law, to legal education and to humanity, which Justice Lukowsky displayed, the Student Bar Association of Salmon P. Chase College of Law in 1982 established the Robert O. Lukowsky Award of Excellence in Teaching. The award is given by a vote of the entire student body to the full-time faculty member who has best demonstrated a commitment to teaching and an interest in the development of law students that extends beyond the classroom. This past year the Justice Lukowsky Award was given to Assistant Professor Gene Krauss. Professor Krauss has taught courses in Property; Administrative Law; Agency, Partnership & Employment Law; Antitrust Law; Comparative Law; and Race, Racism & American Law. In further recognition, the Northern Kentucky Law Review has established, beginning with this issue, a policy of extending to the recipient of the Justice Lukowsky Award an invitation to publish an article. We are pleased that Professor Krauss has accepted our invitation.
All of the most important contributions to Western social theory in modern times have paid close attention to juridical relations and legal theory.\(^1\) This is no accident. The significance of law to the study of society is twofold. First, legal materials are among the most accessible and comprehensive written records of the history of any modern society. Second, because law is the formal expression of a normative social order, one that values justice more highly than power,\(^2\) legal institutions are active historical agencies that shape social relations between the powerful and the disadvantaged social classes. Hence, the representations of society contained in legal texts more closely resemble dinosaur tracks than models constructed by Archimedean observers. In other words, they are enigmatic but real, rather than abstractly self-evident. These characteristics of law and legal texts give rise to a range of problems of interpretation.

The matter of interpreting legal texts involves developing a satisfactory answer to the question: What does the text mean? It is tempting to respond with the Professor's Gambit—that is, to answer the question by asking another: Who wants to know? To do so would not be mere frivolity, because meaning, like time and space, is a local phenomenon. Put somewhat differently, the meaning of a text is its relevance to a particular set of surrounding circumstances. To an advocate, a text's meaning is its relevance to a client's particular interests. To a legislator, the same text's meaning is its

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\(^2\) This should not be taken to mean that justice and power are ideologically opposed, or that the demands of the one cannot accommodate the exigencies of the the other. Indeed, the accommodation is thought by some to be fundamental: "General Conception All social primary goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored." J. Rawls, *A Theory of Justice* 303 (1971).
relevance to a particular set of societal concerns. To an historian, the text has relevance to a particular historical moment; and that moment is the historical circumstance of the historian rather than the moment that produced the text itself. To be sure, speculation about ancient meaning is valuable for the development of contemporary meaning because of the enigmatic character of legal texts. However, this methodological value ought not to be confused with contemporary relevance. Otherwise, the text takes on the appearance of an abstraction having no particular force.

Historical or jurisprudential interpretation of a legal text ought to develop its concrete meaning. Erroneous or sophistical interpretations can be avoided if two characteristics of law are kept in view. The first is that law is real and not imaginary. The second is that the rule of law is both hegemonic and coercive.

The proposition that law is real and not imaginary is a rejection of the notion that law is mere ideology. Law transcends the realm of ideas and persuasion by articulating the form of actual social relations. Abstract understandings, such as those developed by determinist or anti-conceptualist schools of thought, are unsatisfac-

3. A relatively obscure nineteenth century treatise on the principles of interpretation is an outstanding attempt to systematically address some of the questions that have been raised. Its author wrote:

[W]e are daily and hourly obliged to acknowledge authorities, but we must have good reasons not only for our acknowledgment, but also for the degree of our assent. No more is demanded, in matters of law and politics, than what every one in his individual life, experiences daily. We omit a most important duty, if we neglect collecting experience in our life, by impressing the result of important, perhaps dearly paid for, transactions or events distinctly upon our mind, so that we regulate our actions by it, even at periods, when the details of the events have vanished from our memory, and we only remember the fact that, at the time, we made up our mind after ample experience, and the result at which we arrived. This applies to cases of expediency, as well as to strictly moral cases. Far greater is the duty of society in the aggregate, of communities and states to store up experience, for, it cannot be too often repeated, politics are not a matter of invention, but of experience; not an abstract science, but the application of the eternal principles of justice and truth to ever varying circumstances.


4. For a cogent elucidation of this proposition, see E. PASUKANIS, LAW AND MARXISM: A GENERAL THEORY 73-84 (1978) (A more accurate translation of the author’s original title would be “A Contribution to the Critique of the General Theory of Law.”).


tory because they conform historical data to imaginary ideal types instead of developing their concrete meaning in contemporary context. Moreover, the idealist interpreter as well as the text takes on the appearance of an abstraction. By remembering that law is real and not imaginary, it will not be forgotten that the historian and the lawyer, like the politician and the judge, are producers as well as products of history. They are real historical actors, and not simply detached observers.

The proposition that the rule of law is both hegemonic and coercive recognizes that its embrace of justice is sealed with the ever present threat of force. This is significant for the interpretation because any given legal text carries multiple messages. For some, the law’s command is worthy of respect because it is just. Others are merely forewarned of the sanction the law implies. A satisfactory interpretation must determine the addressees of the text and the messages it carries to them. Additionally, the hegemonic character of law is significant because it invokes images of a transcendental good. Development of the concrete meaning of a text through interpretation ought to redeem the inherent truth contained in its images of an immortal good. Hence, critical interpretation of legal texts from a standpoint of redemption is a fundamentally conservative endeavor. These essays seek to focus attention on the concerns outlined above.

The first essay is a review of a revisionist historian’s use of legal texts in developing an analysis of antebellum southern slave society. The essay raises a range of concerns regarding the role of historians and of historical inquiry. It focuses on the problematic use of ideal types as interpretive devices for ferreting out the historical meaning of legal texts. The central point of criticism is that the use of ideal types results in unrealistic abstract understandings that tend to ignore the fact that legal formulations are doctrinal expressions of an actual reality, and not merely a set of disembodied ideas.

8. On the relationship of hegemony and force in politics see A. GRAMSCI, PRISON NOTEBOOKS (1971); see also Kennedy, Antonio Gramsci and the Legal System, 6 ALSA FORUM 32 (1972).
9. For example, the progenitor of all common law rights of action, the great Writ of Right, declared: “[D]o full right to the demandant . . . and if you do not, the sheriff will . . .” S. MILSON, HISTORICAL FOUNDATIONS OF THE COMMON LAW 124 (2d ed. 1981).
The second essay examines contrasting judicial applications of legal methodologies to social problems. By examining the rationales of judicial opinions in a range of cases that confront the legal and social meaning of the concepts of family and community, the differing interpretive methodologies are revealed. This exercise exposes how on the one hand judicial tunnel vision may tend to evade and obfuscate underlying social conflicts by using a particularistic legal methodology, and on the other hand illustrates the use of judicial power in contributing to the fulfillment of the historical mission of democratic ideals and institutions.

The third and final essay considers legislation concerning the constitutional ideal of religious freedom. At one level the essay raises concerns about an apparent conflict between judicial and legislative wisdom regarding the manner in which constitutional ideals are to be actualized. The essay also reaches to a metatheoretical level from which law takes on the aspect of a potential means of protecting and developing transcendental truth without itself becoming an adverse source of truth. The notion that legal texts can be interpreted from a standpoint of redemption, and an illustration of the application of this hermeneutic principle, is applied to the concrete example of cases arising under the American Indian Religious Freedom Act. 11

Taken together, the three essays that follow attempt to focus attention on a range of concerns having to do with the interrelationship of law, reality and truth. It is the author's contention that conventional legal scholarship is structured in such a way that these concerns are shielded from critical examination. The conventional order of things is perpetuated as an unstated, self-evident and unassailable truth. What follows is not inspired by a perverse skepticism, but rather by an intuition that dramatic improvements in ways of legal thinking are not only possible but necessary if law is to be a progressive historical force in these times.

I. THE FAILING OF REVISIONIST HISTORY:
THE LAW OF SLAVERY

The story of the American experience from colonial times to the present is revealed more completely by the history of race relations

than by the history of any other single issue. Specifically, the history of slavery is crucial to an understanding of the American experience for a number of reasons. Southern slave society is a unique social formation in world history. Its uniqueness inspired reflection on fundamental questions in the routine discourse of daily life. For example, it was commonplace to thoughtfully consider questions like, "What does it mean to be a person in society?" at a depth that has been approached only in the most sophisticated discourses in theology and philosophy. The legacy of slavery remains with us, not only in the perpetuation of racism, but in every aspect of American social structure, politics, culture and patterns of thought.

As the story of the American experience is revealed by the history of race relations, the intellectual history of the United States, especially in the twentieth century, is revealed by the historiography of southern slave society. Post-Reconstruction historians have typically written about slavery in contrast with their own contemporary experience. This is no less true of Southern School apologists longing for the good old days, than it is for neo-abolitionists who distance themselves from the past with moral condemnation of their predecessors.12

Recent scholarship has turned to historical materials that were previously ignored and has reconsidered traditional sources in an effort to either establish continuity between the experience of southern slave society and the contemporary American experience, or else to explain the discontinuity if that be the case. Perhaps the most accessible historical record of southern slavery is the legal doctrine written down and published in case reports and statute books. Until recently, historians have attempted to interpret this record without proceeding from a clearly articulated theory of law. Consequently, their reading of legal doctrine is highly conjectural, and meanings are derived from the record in a haphazard manner yielding dubious conclusions.

U. B. Phillips, the dean of the Southern School apologists, was sensitive to this problem of interpretation but made no effort to solve it. In the conclusion to one of his major works he stated:

On the whole, the several sorts of documents emanating from the Old South have a character of true depiction inversely proportioned to their abundance and accessibility. The statutes, copious and easily available, describe a hypothetical regime, not an actual one. The court

12. See infra notes 13-16, and accompanying text.
records are on the one hand plentiful only for the higher tribunals, with questions of human adjustments rarely penetrated, and on the other hand the decisions were themselves largely controlled by the statutes, perverse for ordinary practical purposes as these often were. It is therefore to the letters, journals and miscellaneous records of private persons dwelling in the regime and by their practices molding it more powerfully than legislatures and courts combined, that the main recourse for intimate knowledge must be had. Regrettably fugitive and fragmentary as these are, enough it may be hoped have been found and used herein to show the true nature of the living order.

The government of slaves was for the ninety and nine by men, and only for the hundredth by laws.¹³

On the basis of comparative study of United States and Latin American slave codes, Frank Tannenbaum reached the following conclusion about the path to abolition in different societies:

What the law and tradition did was to make social mobility easy and natural in one place, difficult and slow and painful in another. In Brazil and Spanish America the law, the church, and custom put few impediments in the way of vertical mobility of race and class, and in some measure favored it. In the British, French, and United States slave systems the law attempted to fix the pattern and stratify the social classes and the racial groups. But the law failed. The Haitian rebellion, the Civil War in the United States, and the abolition of slavery in the British West Indies are all part of the same process.

A stratified society, at least in terms of the experience of this hemisphere, that will not leave open a channel for growth, change, and modulation will be changed by force. So it happened....¹⁴

Kenneth Stampp was perplexed by the dual character of the slave in southern law. He projected his perplexity onto those who had conceived that duality in order to understand the status of the slave as it was revealed in actual practice:

[T]he state endowed masters with obligations as well as rights and assumed some responsibility for the welfare of the bondmen.

But the legislators and magistrates were caught in a dilemma whenever they found the slave's status as property was incompatible with his status as a person. Individual masters struggled with this dilemma in different ways, some conceding much to the dictates of humanity, others demanding the utmost return from their investment.

¹³ U. PHILLIPS, AMERICAN NEGRO SLAVERY 514 (1918).
¹⁴ F. TANNENBAUM, SLAVE AND CITIZEN 127 (1946).
After adopting Draconian codes in the early eighteenth century, the various legislatures in some respects gradually humanized them, while the courts tempered their application, but there was no way to resolve the contradiction implicit in the very term "human property." Both legislators and judges frequently appeared erratic in dealing with bondsmen as both things and persons. Alabama's code defined the property status, and throughout the antebellum South the cold language of statutes and judicial decisions made it evident that legally, the slave was less a person than a thing. 15

More recently, Judge Higginbotham has published yet another book documenting the brutality to which black slaves were subjected under the rule of law. 16 To be sure, the record of cruel treatment must be preserved for posterity so that the humanity of human beings will be a noble goal and not be taken for granted. Yet in the wake of recent scholarship, which has convincingly argued that a history of slavery limited to consideration of cruel treatment perpetuates the dehumanizing stereotype of black slaves as objects of oppression and subjects of their masters' wills, it is now reasonable to expect that new scholarship will contain deeper insights than those offered by Judge Higginbotham's book. The slave laws of six of the original colonies are catalogued and judged as if by the standards of the fourteenth amendment. Alongside are snippets of analysis reflecting the influences of legal realism and economic determinism. Judge Higginbotham relates in the preface that this work was motivated by his own painful experience of racism. But he disappoints the reader by stopping short of any conclusions about law, slavery or racism other than that which is self-evident: a lot of people suffered very badly because of the color of their skin. 17

In contrast with the foregoing examples, an outstanding attempt to come to grips with the problem of the relationship of legal theory to historiographical methodology is Eugene Genovese's chapter entitled, "The Hegemonic Function of Law." 18 The remainder of this

17. Id.; cf., e.g., G. Rawick, From Sundown to Sunup (1972); H. Gutman, The Black Family in Slavery and Freedom (1976).
essay is a critical evaluation of one aspect of Professor Genovese's argument.

Genovese gives the following account of the legal historical traditions underlying southern slave law. Ancient Roman slave society invented a rational legal order to meet the needs of increasing commercialization. Medieval Europe rejected slavery and introduced seigneurialism in its place. In early modern Europe, the rising bourgeoisie built on the ancient rational law foundation in order to break the ties of seigneurialism that constituted a restraint on the expansion of commercialization. Europeans introduced slavery into the New World as part of a program of rationalized production to meet the demands of a growing world market. The experience of the newly created slave societies was prefigured by the experience of medieval Europe. The southern slaveholders reinvented seigneurialism under the rubric of paternalism within a bourgeois legal order that had already been established. Genovese attributes the dualistic conceptions of southern slave law to a contradiction of bourgeois and pre-bourgeois elements of southern society.19

Genovese defines seigneurialism as, “the mode of production characterized by a dependent labor force that holds some claim to the means of production,” and capitalism as “the mode of production characterized by wage labor and the separation of the labor force from the means of production—that is, as the mode of production in which labor power itself has become a commodity.”20 Southern society was thus, by definition, the paradigmatic middle position between the two ideal types, having one characteristic of each but not the other—a dependent labor force separated from the means of production. The significance of these categories is Genovese's assertion that seigneurial characteristics tend to inhibit commercialization and that capitalist characteristics tend to facilitate commercialization. It is doubtful that this empirical assertion holds true in all historical circumstances.21 Nevertheless, Genovese reads these

19. E. GENOVESE, supra note 18, at 44-49. The theme that southern slave society was characterized by contradictory bourgeois and pre-bourgeois tendencies recurs throughout Genovese's work of the last twenty years. See E. GENOVESE, THE POLITICAL ECONOMY OF SLAVERY (1965); E. GENOVESE, THE WORLD THE SLAVEHOLDERS MADE (1969); E. GENOVESE, IN RED AND BLACK (1971); E. GENOVESE, FROM REBELLION TO REVOLUTION (1979).

For a more accurate discussion of the relationship of Roman law to medieval common law, see Franklin, Bracton, Para-Bracton(s) and the Vicarage of Roman Law, 42 Tul. L. Rev. 455 (1968).

20. E. GENOVESE, supra note 19, at 16.

21. An admittedly mechanistic attempt to establish this was made in E. GENOVESE, THE
contradictory tendencies into the southern experience, and offers it as an explanation for the dualistic conceptions of social life recorded in legal texts of the period.

The analysis of southern society as a middle position between ideal types leads to the conclusion that the slaveholders were hopelessly confused by their own situation. A more prudent approach to interpreting historical records develops the meaning of the records without projecting preconceived notions onto them. To explain historical data on the basis of its failure to conform to an imaginary social formation seems quite literally to be preposterous.

A. Property and Personality

Antebellum southern courts were presented with a number of questions concerning the impact of slave status on issues of criminal responsibility. Is a slave an independent moral actor who can be held responsible for criminal acts? If a slave resists an assailant and the assailant dies, can the slave plead self-defense? Is a master who uses a whip to compel obedience guilty of a battery? Suppose the master administers a sadistic beating for no apparent reason, and the slave dies. Is he guilty of murder? When these questions were presented in legal proceedings, judges responded by articulating the meaning of slave status in southern society.

Statutes of the southern states declared slaves to be chattel property. Ownership of a chattel signifies the exclusive right to enjoy the benefit of its use. There are two aspects of this right: the owner benefits from whatever intrinsic value the chattel may have; and all other persons are obligated to refrain from interfering with the owner's enjoyment of the chattel. The notion of ownership is, thus, inseparable from the notion of obligation. However, by attaching different significance to the intrinsic value of ownership and the extrinsic obligations of non-owners, this duality is manipulated producing alternative representations of the relationship of the owner of a chattel to others. The variations are classified by the common law under headings, such as: detinue, debt, trespass, trover, conversion and theft. In each class of action the owner of a chattel complains of another's interference with its use and enjoyment. They are distinguished by alternatively characterizing the interference

PolitiCal Economy of Slavery, supra note 19; see E. Genovese, From Rebellion to Revolution, supra note 19, at xxiv.
as an intrusion, or a deprivation, or a breach of obligation of one sort or another, but the underlying difference lies in the essentially different relationships of the parties.

The duality of a chattel interest—ownership/obligation—takes on special significance when the concept is used to articulate the form of the relation of master and slave. The master owns the right of beneficial enjoyment as with any other chattel, but realization of that right requires an act of volition on the part of the slave. Thus, the master's chattel interest entails not only the obligation of third parties to refrain from interference, but also the obligation of the slave to act as an extension of the master's will. Implicit in the notion of the slave's obligation to the master is the possibility of a breach of that obligation. Thus, within the doctrinal representation of the master/slave relationship as a chattel interest, there was an implicit recognition that slaves were unlike other chattels, and that the person of the slave was more than the chattel interest of the master. Courts repeatedly pointed out that slaves were "made in the image of the Creator," that they had mental capacities, volition and feelings, "which cannot be entirely disregarded," and that the state recognized the "personal existence, and, to a qualified extent, ... [the] natural rights" of slaves.\(^2\)

Judges manipulated concepts, such as, "ownership," "obligation," "property," "will," "volition," and "personal existence" to express the form of the master/slave relationship. Criminal responsibility of slaves was explained by reference to their independent volition. Self-defense to ward off an attack was justified by referring to the slave's personal existence above and beyond the master's chattel interest. The master's right to punish a slave was explained as a necessary corollary to the slave's obligation to obey; but if the punishment reached life or limb, or was sadistic rather than disciplinary, the master was criminally responsible.

Professor Genovese insists that these different decisions were illogical and contradictory expressions of judges who were thrown into confusion when faced with hard cases. He argues that slavery rested on the idea of total power. To justify total power, slaves had to be characterized as things. If it were admitted that the slave was a person in a specific class relationship with another, then it would follow as a matter of logical necessity that slaves had family rights and were not "morally obligated to act as extensions of the master's

\(^2\) E. GENOVESE, supra note 18, at 28-30 and cases cited therein.
In other words, declaring slaves to be persons would undermine the economic and moral foundations of the slave system. Genovese interprets legal fictions as instances of self-delusion:

Judge Bunning of Georgia plainly said, "it is not true that slaves are only chattels . . . and therefore, it is not true that it is not possible for them to be prisoners . . . " He did not tell us how a chattel (a thing) could also be non-chattel in any sense other than an agreed-upon fiction, nor did he wish to explore the question why a fiction should have become necessary. Since much of the law concerns agreed-upon fictions, the judges, as judges, did not have to become nervous about their diverse legal opinions, but as slaveholders, they could not avoid the prospect of disarray being introduced into their social philosophy. 25

Judges are here depicted as thick-skinned pragmatists accustomed to facing contradiction in the practice of their craft. As slaveholders, though, it is imagined that they are nervous idealists striving to live in accordance with their ideals. The inverse of this speculation is more probably correct. Judges most likely manipulated their legal fictions with the utmost conviction that they were engaged in a rational and coherent doctrinal practice. As slaveholders they must have grown accustomed to the endless contradiction of their ideals by the actuality of their existence.

"The South had discovered," Genovese writes, "that it could not deny the slave's humanity, however many preposterous legal fictions it invented." 26 It is precisely through those legal fictions that the southern form of slavery was developed. The notion of property itself is nothing other than the legal form of a constellation of social relations oriented to some objectified value. By the nineteenth century it was clear that such objectified values were no longer conceptually limited by physicalistic images of property. 27 The legal concept of property is a formal expression of the dominance of an owner over others with respect to property relations. The domination of the slave by a master is not so dissimilar that a formal expression of the master/slave relation in the language of property relations seems odd, let alone, "preposterous." In elaborating the concept of chattel slavery, the practitioners made it clear that property in a slave was different than property in a horse, which, for

24. E. Genovese, supra note 18, at 29.
25. Id. (footnote omitted).
26. Id. at 30.
that matter, was different than property in land, or banknotes, or gold. Different social relations give different meanings to these different things, and the various rules regarding each do not reduce them to uniformity simply because they are all forms of property. To the contrary, the formal attributes of each class of property with its special rules correspond to the special characteristics of the various social relations they represent.

A composite picture of the master/slave relation emerges from the representations made in criminal cases. The master's chattel interest was never conceived as extending to the body and soul of the slave. Rather, the master was entitled to services and obedience, and the use of violence to extract these was condoned. Power over the body was only incidental to and justified by ownership of the service, and not ownership of the slave as a person. Acts of the slave in the course of rendering service were imputed to the master, but the slave was held responsible for individual acts of will. These doctrines do not embody contradictory bourgeois and pre-bourgeois tendencies. To the contrary, analogous doctrinal constructions were well known to the common law of the northern states and of England. The master's property interest in the slave was technically a chattel incorporeal, and the rules attributing responsibility for the acts of the slave accord with the law of agency.

A remarkable feature of the doctrinal representation of the master/slave relation as chattel property is the frequent and expansive elaboration of conceptions of obligation within the property conception. The slave is obligated to serve and obey; the master is obligated to care for the body that produces those services. Viewed in this light the master/slave relation resembles contract, though it is clearly not bargained for. What is so striking about the shuffling of property and contract conceptions in constructing doctrinal representations of the relationship is that precisely the same sort of manipulations occurred in the doctrinal elaboration of the master/servant relation.28 The interest acquired by a master in the early nineteenth century, whether by indenture or contract of hiring, was closely akin, if not identical, to a chattel incorporeal. Running with the interest were a variety of obligations between master and servant that were analogous to those between master and slave.

Genovese's paternalism thesis suggests distance and discontinuity between the southern slave society and the mainstream of American legal and historical development. The isomorphism of southern slave law and northern labor law powerfully suggests quite the reverse.

B. Plantation and State

State laws extended only minimal legal rights to slaves. The barest necessities of life were technically guaranteed by the law, but even these rights were difficult, if not impossible, to enforce. Slaves could not legally marry, make contracts, own property, travel the highways without a written pass, learn to read, congregate, or testify in court cases involving whites. Different rules from state to state governed manumission, hiring out of slaves, and almost every aspect of daily life. These rules were typically not enforced by official action. Rather, the administration of public order was left to the discretion of individual masters guided by public opinion. As Genovese points out, "The law existed as a resource to provide means for meeting any emergency and to curb permissive masters. But the heart of the slave law lay with the master's prerogatives and depended upon his discretion."30

The generally lax and sporadic enforcement of these laws presents a special problem of interpretation. Who were the addressees of this rather elaborate body of doctrine? Content analysis is not responsive to this question. The fact of routine non-compliance indicates that these laws were probably not directed to the attention of the slaves. The harshest provisions of the slave codes were enforced during periods when rumors of insurrection circulated; but episodic enforcement of Draconian laws in vivid contrast with normal routines can hardly have been understood by the victims as having the character of law as opposed to brute force.

It is more likely that the slave codes, as well as the standards of minimally humane treatment, were directed to the slaveholders themselves. The public authority of the southern states was constituted in accordance with republican principles. The purpose of government was to secure liberty, viz., property. The "liberty" of the slaves, of course, was included in the liberty of the master.31 The

29. See supra notes 13-16 and accompanying text.
30. E. Genovese, supra note 18, at 41.
31. This conceptualization is formally expressed in the "three-fifths" compromise of the U.S. Const. art. I, § 2; cf. P. Finkelman, An Imperfect Union: Slavery, Federalism, and
master class supplied the models of virtue in civil society and the helmsmen of political society. Their position of prominence rested on the security of property in slaves. The slave codes represented political authorization to call for a mass mobilization to extinguish any threat to the base of their power. More than any other aspect of master class domination an ability to respond quickly and decisively to the vaguest possibility of an impending slave uprising determined the arenas and tactics of social struggle within the master/slave relation. The slaveholders enjoyed a free hand in managing their plantations as long as they maintained order and discipline. Irresponsible management would result in a divestiture of sacred property rights and the direct intervention of the state.

The distribution of political power in the slave states allowed the individual slaveholders maximum autonomy in managing local affairs while reserving to the general government the force to back up their local authority. Within this array of power a space was left for struggle against domination at the level of the plantation and the neighborhood. The plantation was a regime of law. The central authority of the master was delegated to drivers and overseers. Rules were articulated, and punishments were meted out. The master was not an arbitrary ruler. He confronted the slaves in an antagonistic relation and enforced a code of conduct that represented the balance of domination and resistance. The custom of the plantation articulated that balance.

Genovese argues that the dual system of law impelled the slaves to accept paternalism:

The slaves understood that the law offered them little or no protection, and in self-defense they turned to two alternatives: to their master, if he was decent, or his neighbors, if he was not; and to their own resources. Their commitment to a paternalistic system deepened accordingly, but in such a way as to allow them to define rights for

Comity (1981) (arguing that the Constitution was an essentially pro-slavery compromise). Underlying the pragmatic political accommodation that resulted in the three-fifths compromise, the fact that southern delegates were persuaded to accept only partial recognition of the slaveholders' representation of slaves, is, perhaps, indicative of a fundamental awareness of the essentially partial character of the relation of domination between master and slave.

32. It is likely that in most places community life among the slaves extended beyond the slave quarters of a single plantation and included the surrounding neighborhood. See generally H. Gutman, supra note 17.

33. The plantation is analyzed as a disciplinary institution by M. Hindus, Prison and Plantation, Crime, Justice and Authority in Massachusetts and South Carolina, 1767-1878 (1980).
themselves. For reasons of their own the slaveholders relied heavily on local custom and tradition; so did the slaves, who turned this reliance into a weapon.\textsuperscript{34}

He then concludes: "For protection against every possible assault on their being they had to turn to a human protector—in effect, a lord."\textsuperscript{35}

This conclusion is dubious at best. Southern slave society lacked the social, cultural and moral continuity for the masters to even approach being accepted as a sovereign presence.\textsuperscript{36} The master's authority rested primarily on the threat and the ever present actuality of violence. It is doubtful to assert that the slaves ever understood that violence as legitimate. Genovese's work certainly does not contain any empirical support for such an unlikely proposition. The doctrinal representation of the master's authority was his property interest in slaves. Genovese's argument turns on an interpretation of the concept of property. He maintains:

The slaveholders could not simply tack the idea of property in man onto their inherited ideas of property in general, for those inherited ideas, as manifested in the bourgeois transformation of Roman law and common law, rested precisely upon a doctrine of marketplace equality within which—however various the actual practice for a protracted period of time—slavery contradicted first principles.\textsuperscript{37}

Genovese's premise about the transplantation of Roman law precepts is purely speculative and unsupported by any historical data. Moreover, in bourgeois society, especially in the common law countries, marketplace equality and, indeed, political equality, rests on a doctrine of private property.\textsuperscript{38} Nevertheless, Genovese's conception of marketplace equality is this:

The modern bourgeoisie...arose and thrived on its ability to transform labor-power into a commodity and thereby revolutionize every feature of thought and feeling in accordance with the fundamental change in social relations. It thereby created the appearance of human equality, for the laborer faced the capitalist in a relation of seller and buyer of labor-power—an ostensibly disembodied commodity. The relation-

\begin{itemize}
  \item \textsuperscript{34} E. Genovese, supra note 18, at 30.
  \item \textsuperscript{35} Id. at 48.
  \item \textsuperscript{36} See P. David, Reckoning with Slavery 94-133 (1976); G. Rawick, supra note 17; H. Gutman, supra note 17.
  \item \textsuperscript{37} E. Genovese, supra note 18, at 45 (footnote omitted).
  \item \textsuperscript{38} See C. MacPherson, The Political Theory of Possessive Individualism (1962); Krauss, supra note 27.
\end{itemize}
ship of each to the other took on the fetishistic aspect of a relationship of both to a commodity—a thing—and cloaked the reality of the domination of one man by another. 39

Genovese makes far too much of the distinction between a market in labor (slaves) and a market in labor-power. It was demonstrated above that the market in labor in the specific historical context of southern slave society was understood as a reified relation of domination—chattels incorporeal—with respect to which the master and slave made quasi-contractual arrangements. In other words, there was a "fetishistic aspect" to the master/slave relationship. Conversely, doctrinal representations of the modern employment relationship reject the notion that labor-power is a commodity. 40 Indeed, an employer cannot realize the value of labor-power without dominating the time, the body and the will of the employee. The notion of managerial prerogative flatly contradicts the analysis of employment as a purchase and sale of labor-power between equals, apparent or otherwise. 41

It would seem, then, that if "first principles" are anything other than an illusion, the contradictions Genovese observes are not attributable to the failure of southern slave society to conform to preconceived notions about ideal social formations. To the contrary, such contradictions are contained within the first principles themselves, and in the social relations they represent. Genovese's interpretation of a starkly revealing set of legal texts serves only to cover them with a cloak of abstraction. Moreover, the explanation of slavery as an anomaly insulates the observer from its contemporary relevance. Developing the meaning of the slave experience in the context of American labor generally is not an equation of the material condition of slaves with the conditions of their white contemporaries or workers today. It does, however, bring to light the legacy of slavery which is embedded in the history of the present.

II. THE HISTORICAL VISION OF SERENE AUTHORITY: LEGAL IMAGES OF FAMILY AND COMMUNITY

American jurists seem always to be praying for the serenity to accept what they cannot change, the courage to change what they

39. E. Genovese, supra note 18, at 45 (footnote omitted).
can, and the wisdom to know the difference between the two. There is an unstated reciprocity between the ethical basis of law and the notion that law is an instrument for social engineering. Legal texts recount the continuing saga of innocence lost and then tentatively restored. "If men were angels," it has been said, "no government would be necessary." 42 But in forming a government of fallen angels, "You must first enable the government to control the governed; and in the next place, oblige it to control itself." 43 Thus, the vicious tempers of individual persons are seen to go where a moral citizenry dare not tread.

This reciprocity is submerged in the particularism of a common law that "arises from the facts"—facts that are knowable through the mediation of natural science. Such scientific knowledge banishes the actual conduct of human affairs from an imagined reality of truth, justice, and the American way. Thus, the point of departure for scientific inquiry into the functioning of the real world is the perfectly competitive market. 44 Though perfect competition is introduced as an analytical model having no inherent validity, actual deviance is typically characterized as market defect rather than model deficiency. Moreover, the deviant is stripped of individuality and made an example for purposes of general deterrence. 45 All human values are degraded to the level of individual caprice and comprehended as arbitrary consumer preferences. As such they can be characterized as important or trivial, fundamental or substantial, vested or speculative, etc. The institutional arrangements of society are then evaluated on the basis of how efficiently they cater to consumer preferences. The goal of efficiency is pursued through the application of non-arbitrary rules based on scientific knowledge.

It is well recognized that the characterization of interests and rationalist claims about the efficiency of legal rules are attended by controversy. This, however, is not a fatal defect. It is only one of those realities we must have the serenity to accept in a government of fallen angels. Scientific knowledge is not an absolute; it is only the best guess that the state of the art affords. 46 All other theories, opinions and speculations are of that class of subjective individual interests that are deemed to be arbitrary preferences. Hence, the

42. The Federalist No. 51 (J. Madison).
43. Id.
46. Aldous Huxley is reputed to have said somewhere, that 'all scientific knowledge begins as heresy and ends as superstition.'
source of controversy is beyond the purview of jurisprudential circumspection.

Consider, for example, the controversy attending a legislative attempt to secure family values through a regime of land use restrictions. Belle Terre, New York, a small village near the massive state university center at Stony Brook, restricted land use to family occupancy and defined "family" as the members of a household related by blood, marriage, or adoption, and unrelated couples. The ordinance thus excluded residential occupancy by more than two unrelated persons in a single housekeeping unit. The ordinance was challenged by the lessor of premises in Belle Terre that were rented to six unrelated college students. The United States Supreme Court upheld the restriction, Mr. Justice Douglas, for the Court, stating: "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs." Mr. Justice Marshall, while agreeing that these are legitimate goals, objected to the characterization of the interests at stake as being less than fundamental and to the means employed as being inefficient. He stated: "I think it clear that the means chosen to accomplish these purposes are both overinclusive and underinclusive, and that the asserted goals could be as effectively achieved by means of an ordinance that did not discriminate on the basis of constitutionally protected choices of lifestyle."

Three years later the Court was called upon to review zoning regulations containing an even more restrictive definition of "family." The ordinance made it a criminal violation for the appellant to reside with her two grandsons. In a plurality opinion, Mr. Justice Powell distinguished Belle Terre on the ground that there the ordinance affected only unrelated individuals, but that "East Cleveland, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself." The interests at stake were thus characterized as clearly fundamental, and therefore the city was to be held to the higher standards of rationality and efficiency required under a strict scrutiny. Mr. Justice Stewart, with whom Mr. Justice Rehnquist joined dissenting, disagreed with the majority's characterization of these interests. They pointed out that the

48. Id. at 9.
49. Id. at 18.
51. Id. at 498.
aspects of family life that had previously been afforded constitutional protection all pertained to the nuclear family, and that the Constitution did not protect the extended family.\textsuperscript{52}

The controversy brought out in these cases centers around legislative definitions of "family." The various opinions in \textit{Belle Terre} and \textit{East Cleveland} propounded three different definitions of "family" having differing constitutional significance. Justice Marshall's dissent in \textit{Belle Terre} suggests that any group of persons who make a home together are a constitutional family;\textsuperscript{53} Justice Powell's plurality opinion in \textit{East Cleveland} instructs that a household of related persons are a constitutional family;\textsuperscript{54} and Justice Stewart's dissent takes the position that only the nuclear family is protected by the Constitution.\textsuperscript{55} The source of this controversy lies precisely in the comprehension of all private conduct, interests and values as arbitrary consumer preferences and the mandate that public institutions cater to those preferences efficiently according to a non-arbitrary rule. The degradation of values to the level of purely private concerns ignores the role of the community, institutions, traditions and culture in the formation of those preferences. The community, constituted as the state, is constrained to speak on behalf of private interest, and the people of the state are constituted in actual communities that are deprived of a voice with which to speak.

Justice Powell in \textit{East Cleveland} attempts to escape this regression by endeavoring to supply tradition with an authoritative voice:

Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely,

\textsuperscript{52} Without pausing to inquire how far under this argument an "extended family" might extend, I cannot agree. When the court has found that the Fourteenth Amendment places a substantive limitation on a State's power to regulate, it has been in those rare cases in which the personal interests at issue have been deemed "implicit in the concept of ordered liberty." The interest that the appellant may have in permanently sharing a single kitchen and a suite of contiguous rooms with some of her relatives simply does not rise to that level. To equate this interest with the fundamental decisions to marry and to bear children is to extend the limited substantive contours of the Due Process Clause beyond recognition.

\textit{Id.} at 537 (Stewart, J., dissenting) (footnote and citations omitted).

\textsuperscript{53} \textit{Belle Terre}, 416 U.S. at 14-18 (Marshall, J., dissenting).

\textsuperscript{54} \textit{East Cleveland}, 431 U.S. at 504-06 (Powell, J., plurality).

\textsuperscript{55} \textit{Id.} at 538-39 (Stewart, J., dissenting).
have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family. 56

This passage invokes immemorial custom to distinguish East Cleveland's efforts to limit the number of young children within the city limits from the fears of Belle Terre's elders that group homes of college students will infest the community with promiscuous indulgence in sex, drugs and rock-and-roll. The distinction is based on a suprahistorical conception of the family that must necessarily be self-evident to all. Hence, even private preferences and efficient administration are subject to external constraints imposed by what might be loosely termed "the nature of things in general." 57 The extended family is entitled to constitutional protection because it inheres in the nature of civilization. 58 Justice Powell does not pause to reflect upon why, despite changes in the conditions of modern society that have brought about a decline in extended family households, the "tradition" of grandparents rearing grandchildren continues to be universally revered as a positive social value. By positing the social value of grandparentage as a self-evident truth, the silence of actual historical communities is enforced.

If the immediate communities of Belle Terre and East Cleveland could speak, otherwise than through government representatives and officials, what would they say in support of their exclusionary policies? The moral citizenry of Belle Terre might say:

We are a small village of white middle class families. We have chosen to live a quiet suburban life, away from the congestion, dirt and crime of the city, so that we can nurture our children in an environment conducive of the values to which we attribute our success and our happiness. Group homes of unsupervised late adolescents attending the nearby university pose a grave danger to our way of life. It is likely that such students were not raised in communities like Belle Terre; they are living away from their parents for the first time; they are

56. 431 U.S. at 504-05 (footnote omitted).
57. Relying on similar grounds the Supreme Court concluded that Dred Scott was not a person within the meaning of the Constitution. Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).
58. In Belle Terre, the petitioner sought judgment on a similar ground by asserting "that the ordinance is antithetical to the Nation's experience, ideology, and self-perception as an open egalitarian, and integrated society," but lacked the persuasiveness to elevate the claim to the level of self-evident truth. 416 U.S. at 7 (footnote omitted).
at an age when impulsiveness and an urge to experiment override considerations of prudence. Their lifestyle is socially and morally incompatible with the one we have chosen for ourselves; we fear that they will not be properly respectful of our cherished values; and they may have a subversive influence on our young impressionable children.

East Cleveland's counterpart, after abstractly commenting on neighborhoods in transition and escape from the ghetto environment, might then turn to an analysis of fiscal concerns:

Children are a burden on the community. We recognize that having and raising children is part of a full and happy life, and we are pleased to provide the reasonably necessary resources so that parents of this city can be assured that their children will receive a quality education. But if we allow our people to make homes for school age children that are not their own, either the quality of public education in East Cleveland will suffer, or the burden on the East Cleveland taxpayer will be increased so much that persons of modest means will be effectively excluded from this community.

In short, Belle Terre is concerned that social incompatibility of neighbors will undermine the community, and East Cleveland is concerned that an excessive number of school age children will threaten the community's fiscal security.

In our system of jurisprudence the community, however defined, has no legally cognizable voice apart from the authoritative pronouncements of officials. The democratic imperatives of public opinion are diffused in a constitutional doctrine of abstract free speech. Once the inscrutable calculus of "clear and present danger" or "fighting words" has yielded the conclusion that an expression is "speech" within the meaning of the Constitution, the content of that expression paradoxically becomes irrelevant.\(^{59}\)

In striking down an ordinance prohibiting issuance of a parade permit for an assembly that will "portray criminality, depravity or lack of virtue in, or incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation," \(^{60}\) the United States Court of Appeals for the Seventh Circuit remarked:

Although we would have thought it unnecessary to say so, it apparently deserves emphasis . . . that our regret at the use appellees plan to make of their rights is not in any sense an apology for upholding the


\(^{60}\) Collin v. Smith, 578 F.2d 1197, 1199 (7th Cir. 1978), cert. denied, 439 U.S. 916 (1978).
First Amendment. The result we have reached is dictated by the fundamental proposition that if these civil rights are to remain vital for all, they must protect not only those society deems acceptable, but also those whose ideas it quite justifiably rejects and despises.61

Evidently, public opinion will emerge from a free marketplace of ideas regulated by the other hand of the ambidextrous phantom that garners public welfare from a free marketplace of material goods.

The juxtaposition of a mute community with a cacophony of free speech becomes highly problematic when the question of whether an expression is constitutionally protected free speech or unprotected obscenity turns upon the contemporary standards of the community.62 The determination of what the community standards are has been held to be a question of fact to be decided by the jury.63 Each juror may base his or her decision on previously acquired knowledge of prevalent attitudes in the community from which he or she has been selected. This basis of decision has been analogized to the evidentiary presumption that the jury knows what a "reasonable person" would do under the circumstances recalled by the testimony.64 By drawing this analogy the Supreme Court very nearly brings the doctrinal barrier between arbitrary consumer preference and rational administration to the point of collapse.

Within the confines of the "reasonable person" standard it remains arguable that the jury's decision is based on a self-interested toleration of idiosyncrasy in a pluralistic society. But when the individual juror's subjective experience openly supplies the content to an "objective" standard of liability, it becomes clear that not only are community standards based on the jury's understanding of reasonableness, but also that the reasonable person standard is based on the jury's understanding of the community. It is at least as plausible to say that the jury's notion of the reasonable person is based on what each juror knows to be generally acceptable behavior, as it is to say that the jurors find conduct to be reasonable because they expect toleration of their own peculiarities in return for their toleration of the defendant's.

The jury's penetration of the barrier between individual and community in obscenity adjudication did not go unnoticed. Mr. Justice Stevens dissented in Smith, stating:

61. Id. at 1210.
64. Id. at 302.
The question of offensiveness to community standards, whether national or local, is not one that the average juror can be expected to answer with evenhanded consistency. The average juror may well have one reaction to sexually oriented materials in a completely private setting and an entirely different reaction in a social context. Studies have shown that an opinion held by a large majority of a group concerning a neutral and objective subject has a significant impact in distorting the perceptions of group members who would normally take a different position. Since obscenity is by no means a neutral subject, and since the ascertainment of a community standard is such a subjective task, the expression of individual jurors’ sentiments will inevitably influence the perceptions of other jurors, particularly those who would normally be in the minority. Moreover, because the record never discloses the obscenity standards which the jurors actually apply, their decisions in these cases are effectively unreviewable by an appellate court. In the final analysis, the guilt or innocence of a criminal defendant in an obscenity trial is determined primarily by individual jurors’ subjective reactions to the materials in question rather than by the predictable application of rules of law.65

The objections cited have been raised by those seeking to limit the jury’s role in adjudication for over a century and a half.66 Indeed, it takes no great stretch of imagination to extend these objections into a broadside against all forms of group deliberation including the legislative process. Without extrapolating, however, it is notable that the crucial distinction between the jury’s role in obscenity cases and in other litigation is that the jury is instructed to formulate the rule of decision in their secret deliberations without the supervision of the court. The jury’s discretion is not rationalized with legal niceties like the old saw, that juries have the “power” but not the “right” to give a verdict contrary to the law.67

At any rate, the jury’s rule-making authority in obscenity cases is tempered by a peculiarity in the law of evidence. The analogy to the individual juror’s knowledge of what a reasonable person would do fails in one important respect. In a case to be decided on a reasonable person standard expert testimony as to what a reasonable person might do under the circumstances is not admissible because

65. Id. at 315-16 (Stevens, J., dissenting) (footnote omitted).
66. Before the 1830’s it was generally understood that juries in the United States decided questions of both fact and law in criminal cases. See Howe, Juries as Judges of Criminal Law, 52 HARV. L. REV. 582 (1939).
it is presumed that the average reasonable juror has knowledge superior to any special expertise that might be offered on the subject. However, expert testimony, though not required to establish the prosecution's case, is admissible as evidence of what contemporary community standards are. Thus, the community constituted as the jury is given the authority to decide, but its authoritative voice is limited to a general verdict lacking any specific content. To the extent that the community can speak its mind, it speaks through the medium of "value-free" social science in the form of a non-authoritative, controversial, expert opinion.

While the community is understood to be a mute entity, it is nevertheless deemed to be actually present in the jury room. Hence, the functioning of the jury seems ever to be veiled in mystery, and to assure it is functioning properly the courts resort to a curious mysticism. In striking down a jury selection procedure that systematically excluded blacks from the venire, Mr. Justice Marshall wrote in a plurality opinion: "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." Similarly, in a case challenging the exclusion of women from jury service, the Supreme Court said, "the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded." In a subsequent case challenging jury composition in which women were underrepresented, Mr. Justice Rehnquist, dissenting, chided the Court for its reliance on "unknowable" qualities of human nature, 'flavor[s]', and 'indefinable something[s]' in formulating rules of law. He thusly supplies the

69. Expert opinions in obscenity cases are typically based on community surveys using scientific sampling and statistical techniques. The conjunction of a rigorous methodology, a learned voice, and the mystique of numbers transmogrifies that which would otherwise be perceived as arbitrary.
70. The magical element of adjudication has often been the object of rationalist criticism. See, e.g., J. Frank, Courts on Trial 37-79, 108-56 (1950).
emphasis to a point he entirely misses. The focus of criticism ought not to be the Court's reliance on unknowable, indefinable imponderables, but rather should be on the substance of that which appears to be beyond the ken of legal rationality. The turn to mysticism is a left-handed recognition of the phenomenological impossibility of a voiceless community of arbitrary atoms.

If the unofficial voice of the community has either authority without content or content without authority, its official voice either exhausts its content at first utterance, or is diffused in random particularity. The previously mentioned Skokie ordinance was struck down as an impermissible burden on the operation of a free marketplace of ideas, without benefit of content analysis. The display of swastikas having been found to be symbolic "speech," the meaning of the swastika and of the ordinance were deemed irrelevant. The bizarre conclusion is that in order to realize the constitutional ideal that the state exists to secure civil liberty, the positive enactments of the state designed to restrain those who "incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation" 74 must be stricken. The cause of government, the bellum omnium contra omnes in the state of nature, has become the end of government as it is realized in civil society.

The method used to interpret the positive texts of the Skokie ordinance and the first amendment is blind to the political and social ideals expressed in those texts. Indeed, they are understood not as universal expressions, but as generalizations from an imagined particular case. The "core" meaning 75 of the text is that particular case to which it applies if it has any application at all. With this as the analytical point of departure, the meaning of the text is developed by factual analogy of any given particular case to the core case. Hence, the "core" meaning of the first amendment must certainly include the case of an individual who voices disagreement with government policy. Wearing an armband to communicate that sentiment is enough like the core case to come within the protection of the amendment. 76 Wearing an armband with a swastika is factually similar to wearing any other armband. The first amendment, therefore, protects that which the ordinance condemns. Since the

74. See supra note 60.
Constitution is the supreme law of the land, the ordinance must fail.

An alternative method of interpretation might easily have been applied without being arbitrary, oppressive or unjust.\textsuperscript{77} The Skokie ordinance bears a striking resemblance to the Civil Rights Act of 1866\textsuperscript{78} insofar as its legislative design is concerned. Both enactments protect civil rights by restraining civil conduct that is deemed to be injurious to others.\textsuperscript{79} In \textit{Jones v. Alfred H. Mayer Co.},\textsuperscript{80} the Supreme Court applied an interpretive procedure that might have been used to save the Skokie ordinance from constitutional infirmity. In that case § 1982 survived a fifth amendment due process challenge to its application to "purely private" real estate transactions.

The rationale of the Court's opinion is as follows. The thirteenth amendment declares that slavery shall not exist anywhere in the United States and gives Congress the power to enforce it by appropriate legislation. This congressional power is directed to eradicating the "badges and incidents of slavery."\textsuperscript{81} A maxim at the very core of the Anglo-American legal tradition is, "slavery is unknown to the common law."\textsuperscript{82} The historical origins of this maxim can be traced to the invention of the common law in the reign of Henry II, whose reforms included the regularization of a body of law to be commonly applied to all freeholders in the realm.\textsuperscript{83} This new common law gave crucial significance to the distinction between free and unfree peasants, and reciprocally identified recourse to the common law as the essence of freedom. The ideologies of both the English and American revolutions expanded this notion strengthening the identification of freedom with the common law as birthright. The thirteenth amendment is recognition of this birthright for black as well as white Americans. The right of acquiring, protecting, using and exchanging property is the cornerstone of common law birthright.\textsuperscript{84} The perpetuation of a custom of racial prejudice in

\textsuperscript{77} The following discussion is an application of a methodology previously described by Professor Mitchell Franklin. See Franklin, \textit{The Ninth Amendment as Civil Law Method and Its Implications for Republican Form of Government: Griswold v. Connecticut; South Carolina v. Katzenbach}, 40 \textit{TUL. L. REV.} 487 (1966).

\textsuperscript{78} Civil Rights Act of Apr. 9, 1866, c.31, 14 Stat. 27 (cf. 42 U.S.C. §§ 1981, 1982 (1982)).

\textsuperscript{79} More generally, these codifications positively reiterate the common law maxim, \textit{sic utere tuo ut alienum non laedas}.

\textsuperscript{80} 392 U.S. 409 (1968).

\textsuperscript{81} The Civil Rights Cases, 109 U.S. 3 (1883).

\textsuperscript{82} See Sommersett v. Stuart, 20 How. St. Tr. 1 [1771].

\textsuperscript{83} See Franklin, \textit{supra} note 19.

\textsuperscript{84} Many state constitutions make this quite explicit. For example, the original text of the Ohio Bill of Rights declared:
private real estate transactions has the effect of inhibiting enjoyment of a fundamental common law right. It is therefore rational for Congress to identify such conduct as perpetuating the badges and incidents of slavery, and it is not a deprivation of property without due process of law to prohibit racial discrimination in the exercise of property rights. In *Jones v. Alfred H. Mayer Co.*, the Court inserted a spurious historicist argument that § 1982 was originally intended to apply to private discrimination, but this is no more than a gloss of conventional legalism. In essence the statute’s content is developed by analogy to its expression of the ideal of freedom rather than by factual similarity to some core case that Congress presumably had in mind.

*Jones v. Alfred H. Mayer Co.* recognizes that race prejudice is not an arbitrary individual preference, but is rather a pernicious social practice that is antithetical to a free and democratic society. The evil lies in the perpetuation of the custom of prejudice, and not in the particular preference of the individual actor. For that reason an isolated act of discrimination against a white male is by comparison quite trivial. By contrast, it would seem that the National Socialist Party sought to accomplish, among other things, precisely that which the federal civil rights statutes are intended to eradicate. The Skokie ordinance develops the content of federal civil rights legislation by articulating the rights of all groups, and by providing a local remedy (denial of a parade permit). Application of the methodology of interpretation exemplified by *Jones v. Alfred H. Mayer Co.* is a non-arbitrary approach to finding the Skokie ordinance.

§ 1 Right of freedom and to establish and alter government.

That all men are born equally free and independent, and have certain natural, inherent and unalienable rights; amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety; and every free republican government, being founded on their sole authority, and organized for the great purpose of protecting their rights and liberties, and securing their independence: to effect these ends they have at all times a complete power to alter, reform or abolish their government, whenever they may deem it necessary. Ohio Const. art. VIII § 1 (1802) (see Ohio Rev. Code Ann. Appendix (Page 1979)).

85. See 392 U.S. at 422-37; contra 392 U.S. at 449-80 (Harlan, J., dissenting).

86. Thus, the "reverse discrimination" thesis of *Regents of the Univ. of Cal. v. Bakke*, and subsequent cases is based on factual analogies to an abstract understanding of the Civil Rights Act of 1964, rather than a development of the content of that statute. See Regents of the Univ. of Cal. v. Bakke, 486 U.S. 265 (1988); Memphis Fire Dep’t. v. Stotts, 104 S. Ct. 2578 (1984).

to be entirely consistent with federal statutory and constitutional law.

Though other examples of the legal method underlying the Court's decision in *Jones v. Alfred H. Mayer Co.* may be cited, these are extraordinary instances in which the tribunals have grasped the historic mission of the Constitution and given practical force to its democratic ideals. Conventional renderings of positive legal texts typically oppose an imaginary sovereignty to a meaningless actuality. Hence, when the mute actual historical communities of Belle Terre and East Cleveland speak through their official voices, the basis for distinguishing their intentions is lost. All that appears are flat texts that may or may not "slice deeply into the family itself."

### III. HISTORICAL REDEMPTION: REFLECTIONS ON LAW AND IMMORTALITY

The marriage of Katherine of Aragon to Henry VIII was, in the manner of the age, a great political union. It cemented a treaty alliance of England and Spain, which figured prominently in England's preparations for war with France. The marriage was in contravention of Holy Writ, which warns that no child will be born to the marriage of a widow and her husband's brother. Katherine had been previously married to Arthur Tudor, the young king's deceased older brother. Henry is reputed to have been an ardent religionist, if not a somberly pious man. Thus, the marriage required the sanction of the Pope in Rome. No less would satisfy the faithful of the two nations who had been made parties to the transaction. In due course the scriptural impediment was removed by Pope Julius II, and the marriage took place in 1509. Notwithstanding the papal dispensation, the biblical curse exerted its force upon the marriage. Of several children conceived by Henry and Katherine, all died at birth or shortly thereafter, with the exception of Mary. Though the marriage never produced a male heir, it nevertheless resulted in the birth of a political form, the history of which trivializes the intrigues of European monarchs of the Renaissance Age. It is fair to say, that in England at least, Henry VIII sired the modern secular

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88. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965); see also Franklin, supra note 77.
89. *East Cleveland*, 431 U.S. at 498. See also supra note 51 and accompanying text.
state which issued from the barrenness of Her Majesty's womb at the precise moment when her occupancy of the throne was eclipsed.

Henry's religious fervor prompted him in 1521 to write his Assertio Septem Sacramentorum, a pamphlet condemning the heretical writings of a young German cleric named Martin Luther. This workmanlike example of theological exegesis earned for Henry and his successors to the throne of England the designation, "Defender of the Faith," conferred by Pope Leo X in the same year the pamphlet was published. Henry managed to keep hold of this distinction for only a few short years. It was already apparent that Katherine would never bear a male heir to the throne of England. Moreover, relations with Spain had become strained in recent years, and Henry had become infatuated with an English girl named Anne Boleyn. It was again necessary to petition Rome for relief so that Henry could be free to marry, but by 1529 it was clear that such relief would not be forthcoming. In the ensuing decade the Roman church was banished from England, the Crown was established as the highest authority under God, and church lands were confiscated for the benefit of the state.

Contemporaneously with the events that have been described above, a Florentine gentleman by the name of Giovanni da Verrazano was preparing an early reconnaissance mission in what was to become the European conquest of North America. Verrazano received a commission from the king of France and set sail across the Atlantic in 1524. After reaching the Carolina coast he headed north and travelled as far as New York Bay before returning to Europe. This and other voyages of discovery in the sixteenth century did not coincide with the Protestant Reformation in Europe by mere chance. The explorers were inspired by a new kind of scientific consciousness laying claim to a truth that challenged the authority of the church in Europe on rationalist grounds akin to the ones advanced by the religious reformers. In the next century the truths of new science and new religion would be joined as history launched the quest for religious freedom and the conquest of territory down a common road. In the process alternative truths, independently discovered by the indigenous civilizations of the North American continent, were tragically bulldozed to the brink of oblivion.

92. G. Elton, supra note 90 at 75-76.
A dim light of recognition of the enormity of that tragedy penetrated into the chambers of the United States Congress in 1978. It was then that that august body took a stand for the preservation of an endangered source of truth by enacting the American Indian Religious Freedom Act. The Act provides:

On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

The Act also directs the President to order an audit of the federal government in consultation with traditional religious leaders to determine changes necessary to preserve Native American religious cultural rights and practices and to report back to Congress in one year.

AIRFA has recently been given what appears to be a definitive judicial construction, which has prompted a spate of critical commentary. The judicial wisdom on this subject appears to be that: (1) the Act requires only that government officials consider Indian religious concerns as a factor when taking action regarding the management of public lands; (2) AIRFA creates no rights that were not already protected by the first amendment; and (3) access to sites, use and possession of sacred objects and freedom to worship through ceremonials and rites is, for all practical purposes, an exclusive listing of the Act’s objects, notwithstanding the prefatory language, “including but not limited to.”

96. Id.
This interpretation was most recently articulated by the United States Circuit Court for the District of Columbia in *Wilson v. Block*. In that case the Hopi Indian Tribe, the Navajo Medicinemen’s Association, and others sought to overturn a decision of the Forest Service to permit expansion of the Snow Bowl ski area on the San Francisco Peaks in the Coconino National Forest near Flagstaff, Arizona. The Indians claimed that the action of the Forest Service contravened the policy articulated by AIRFA. The factual basis of this claim was reported by the circuit court as follows:

The dominant geological formation visible from the Hopi villages and much of the western Navajo reservation is the San Francisco Peaks. The peaks, which rise to a height of 12,633 feet, have for centuries played a central role in the religions of the two tribes. The Navajos believe that the Peaks are one of the four sacred mountains which mark the boundaries of their homeland. They believe the Peaks to be the home of specific deities and consider the Peaks to be the body of a spiritual being or god, with various peaks forming the head, shoulders, and knees of a body reclining and facing to the east, while the trees, plants, rocks, and earth form the skin. The Navajos pray directly to the Peaks and regard them as a living deity. The Peaks are invoked in religious ceremonies to heal the Navajo people. The Navajos collect herbs from the Peaks for use in religious ceremonies, and perform ceremonies upon the Peaks. They believe that artificial development of the Peaks would impair the Peaks’ healing power.

The Hopis believe that the Creator uses emissaries to assist in communicating with mankind. The emissaries are spiritual beings and are generally referred to by the Hopis as “Kachinas.” The Hopis believe that for about six months each year, commencing in late July or early August and extending through mid-winter, the Kachinas reside at the Peaks. During the remaining six months of the year the Kachinas travel to the Hopi villages and participate in various religious ceremonies and practices. The Hopis believe that the Kachinas’ activities on the Peaks create the rain and snow storms that sustain the villages. The Hopis have many shrines on the Peaks and collect herbs, plants and animals from the Peaks for use in religious ceremonies. The Hopis believe that use of the Peaks for commercial purposes would constitute a direct affront to the Kachinas and to the Creator.

The court rejected the Indians’ contention that AIRFA requires strict scrutiny of federal land uses that conflict or interfere with

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99. 708 F.2d 735 (D.C. Cir. 1983).
100. Id. at 738.
traditional Indian religious beliefs or practices. Following a selective review of the legislative history, the court concluded that, "AIRFA requires federal agencies to consider, but not necessarily to defer to, Indian religious values." The weight to be accorded such considerations is committed solely to the discretion of the government official charged with managing public lands. Presumably, a reviewing court has power to overturn the administrative determination if it is arbitrary and capricious, but it is difficult to imagine such a case except where the administrator has failed to consider Indian religious values at all. In view of the legislative history, which expressly grounded the need for a clear policy statement on administrative ignorance, insensitivity and inflexibility, it is at least doubtful that Congress intended to give such broad discretion to the very same administrators whose past conduct necessitated the legislation in question. Moreover, in view of the expressed purpose of the statute, "to insure that the policies and procedures of a variety of Federal agencies are brought into compliance with the constitutional injunction that Congress shall make no laws abridging the free exercise of religion," it is difficult to imagine that Congress contemplated a lower level of scrutiny for infringements of Indian religious practices than the Constitution requires when Judeo-Christian religious beliefs are at stake.

The court rejected the Hopi and Navajo claims that the proposed further development of the Snow Bowl ski area would impose an impermissible burden on the practice of their religions. The court narrowly held, "that plaintiffs seeking to restrict government land use in the name of religious freedom must, at a minimum, demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site." Since the Forest Service had not denied plaintiffs access to the Peaks, nor had they been prevented from performing ceremonies or collecting objects, no burden on religion was proved. Consequently, no

101. Id. at 745-46.
102. Id. at 747.
103. Thus, the judicial construction of AIRFA renders it analogous to the requirements of the Administrative Procedure Act for "notice and comment" rule-making. See 5 U.S.C. § 553 (1982).
105. Id. at 8366.
107. 708 F.2d at 744.
108. Id.
further inquiry was required to determine whether the government’s interest in expanding the ski area was compelling, or whether a less restrictive alternative was available.\textsuperscript{109}

The court's analysis is significant in two respects. First, by ending the inquiry after finding that plaintiffs had failed to establish a burden under the \textit{Wisconsin v. Yoder} two-step balancing test,\textsuperscript{110} the legislative intention that the free exercise clause be considered in federal land use decisions is limited by the Supreme Court’s interpretation of that constitutional provision in unrelated particular cases. In other words, the court obstructed a legislative attempt to develop the content of the first amendment.\textsuperscript{111} Second, by defining an impermissible burden as an actual denial of access or prevention of holding ceremonies or collecting objects, the court effectively expunged the words, “including but not limited to” from the statute. That language is a methodological instruction to further develop the statute by analogy to the items specifically enumerated.\textsuperscript{112}

The reasoning of the courts in AIRFA cases has undermined the congressional purpose underlying that statute. The courts found:
(1) AIRFA only reiterates rights protected by the first amendment;
(2) it creates no new rights;
(3) \textit{Yoder} exhausts the content of the first amendment;
(4) since no \textit{Yoder}-type burden on religion was shown, there has been no violation of AIRFA. An interpretation of the statute from a standpoint of redemption\textsuperscript{113} results in a construction that allows all of the statute’s terms to be meaningful, and compels a stricter scrutiny of federal land use decisions than the courts that have interpreted AIRFA have applied.

The redeemable truth content of AIRFA is implicit in Congress' perception of a need to reaffirm the constitutional guarantee contained in the free exercise clause of the first amendment. In the House debates, Representative Udall remarked:

Mr. Speaker, this country is primarily a Christian country with a large Jewish population and substantial numbers of people practicing various other European and Asian religions. Were we to consider

\textsuperscript{109} Id. at 745.
\textsuperscript{110} See supra note 106.
\textsuperscript{111} Cf. L. Tribe, \textsc{American Constitutional Law} §§ 5-14, at 261-72 (1978) (concerning Congressional power to enforce the fourteenth and fifteenth amendments).
\textsuperscript{112} Cf. Franklin, supra note 77 (arguing that the ninth amendment is a methodological text that is to be applied to developing the content of the first eight articles of the Bill of Rights).
\textsuperscript{113} See supra note 10.
legislation which adversely impacted upon these religions and infringed upon the first amendment right to the free exercise of religion, we would, from our own knowledge and background be aware of that impact and would modify the legislation to eliminate the offensive language.

But the traditional religions of the native American people are not our religions and we are unaware of practices, rites, and ceremonials of these religions. We have in the past, enacted legislation where we have unknowingly brought about the infringement of the religious rights of Indians."

This concern is important because, "the United States has traditionally rejected the concept of a government denying individuals the right to practice their religion, and, as a result, has benefited from a rich variety of religious heritages in this country."\textsuperscript{115}

This legislative history facilitates a proper construction of the statutory language. Since the variety of religious heritages is socially valuable, religions should be protected from government intrusions. Since government officials are unfamiliar with the tenets of native American religions, aspects of religious practices are enumerated in order to guide officials through terrain where government action is likely to be intrusive. It is quite clear that Congress, in enacting AIRFA, intended to develop the content of the first amendment so as to assure that its coverage would not be limited by preconceived notions about religion that are specific to the Judeo-Christian tradition. AIRFA does not refer to sites, objects and ceremonies in order to equate Indian reverence for a mountain, eagle feathers, or dances to cathedrals, hymn books, or kneeling. Rather, it mentions these artifacts because they are representations of sacredness, and it is the quality of being sacred that entails some transcendental truth that is good and worthy of preservation. Thus, the enumeration of certain objectives in the statute is to be developed by analogy so that that which is considered to be sacred is brought within the protection of the first amendment.

Had the courts read AIRFA as has been suggested, their analysis might have proceeded as follows: (1) \textit{Yoder} requires strict scrutiny where official action burdens religion; (2) AIRFA expands the implicitly Judeo-Christian conception of religion underlying \textit{Yoder} by developing the content of the first amendment to include a

metaphysical connection between places, things, behaviors and religious belief; (3) government action has an impact on the land that tends to undermine Indian religious beliefs; therefore (4) the government’s action must be justified by a compelling interest, and, if it is, less restrictive alternatives should be pursued.

Such an approach would cultivate AIRFA’s historical mission of preserving the inherent truth content that is revealed by native American conceptions of sacredness, and that can be redeemed as a universal social good. It is more than mere coincidence that Wilson and the other AIRFA cases also involved claims based on the Wilderness Act and the National Historic Preservation Act. All three statutes seek to preserve the sources of inherent truth and immortality. Indeed, the list is comprehensive, for it includes, religion, nature, and history. What else is there?

116. See supra note 97.
HOW TO READ THE NEW IRELAND FORUM REPORT—SEARCHING BETWEEN THE LINES FOR A REALISTIC FRAMEWORK FOR ACTION†

by

Professor Kevin Boyle,*  
and Dr. Tom Hadden**

I. INTRODUCTION

The Report of the New Ireland Forum has been widely welcomed as the most positive contribution to solving the Northern Ireland problem for some years.† Yet, it is equally widely recognized that the Report's prescriptions are totally unrealistic and can only be pursued, if at all, in ways which are inconsistent with the principles it asserts. To reach what kernel of reality the Report does contain on which some positive action might be based, it is necessary to understand the political context in which this important initiative was taken.

The forum was established early in 1983 on the initiative of John Hume, leader of the Social Democratic and Labour Party [hereinafter cited as SDLP] in Northern Ireland. Though the three main parties in the Republic (as opposed to their leaders) were initially unenthusiastic, Hume managed to convince sufficient individuals that if nothing was done to bolster constitutional nationalism in the North, Provisional Sinn Fein would be likely to take over from the SDLP the right to speak for most Northern Catholics.

The express purpose of the Forum was to seek a way in which "lasting peace and stability could be achieved in a New Ireland


* Dean of the Faculty of Law and Professor of Law, University College Galway, National University of Ireland; LL.B., Queen's University, Belfast, 1965; Diploma in Criminology, Cambridge University, 1966.

** Lecturer in Law, Queen's University, Belfast; B.A., Cambridge University, 1961; LL.B., 1962; Ph.D., 1967.


A number of important research studies have also been published by the Forum: The Cost of Violence Arising from the Northern Ireland Crisis since 1969 (1983); The Economic Consequences of the Division of Ireland since 1920 (1983); A Comparative Description of the Economic Structure and Situation North and South (1983); The Macroeconomic Consequences
through the democratic process and to report on possible new structures and processes through which this objective might be achieved."

It was originally hoped that its report would be ready in a few months. But the volume of evidence presented to it and the difficulty in securing agreement between the delegates of the four constituent parties—Fianna Fail, Fine Gael and the Irish Labour Party in the Republic, and the SDLP in the North—resulted in the publication of the report being put back from month to month. The timing of its eventual publication on May 2, 1984, was influenced by the need all involved felt to produce a unanimous report in time to influence the electoral chances of the SDLP in the European elections in the following month. This pressure, and the conviction that nothing but a unanimous report would be worthwhile, gave Charles Haughey, leader of the traditionally Republican Fianna Fail, a golden opportunity to make it a condition of his agreement that the report would make a 'unitary state' the primary objective. "A unitary state would embrace the island of Ireland governed as a single unit under one government and one parliament elected by all the people of the island," though it was agreed that special protection would have to be given in any such state to the unionist community in the North. Consequently, the alternative options raised in the report of a federal/confederal state formed of the Republic and Northern Ireland, and of a system of joint authority under which both the London and Dublin governments would have equal responsibility for all aspects of government in Northern Ireland, were effectively downgraded though they appear to have been favoured by other party leaders as more realistic and attainable. The possibility of an internal settlement within Northern Ireland finds no place in the Report apart from an oblique reference where it is noted that "the Parties in the Forum remain open to discuss other views which may contribute to political


2. N.I.F.R., supra note 1, at paragraph 1.1.

3. Elections to the European Parliament held in Northern Ireland on June 14, 1984. Members elected were: Ian Paisley (Democratic Unionist Party), John Hume (Social Democratic and Labour Party) and John Taylor (Official Ulster Unionist Party). The Provisional Sinn Fein candidate, D. Morrison, failed to win a seat.


5. Garret Fitzgerald (Fine Gael), Dick Spring (Labour), and John Hume (Social Democratic and Labour Party).
development."6 Since publication of the Report, the Parties in question have clearly been split in their interpretations of its contents. Mr. Haughey claims that it endorses immediate action to bring about a unitary state and has called for a constitutional conference.7 Dr. Fitzgerald and Mr. Spring, leaders of the governing Fine Gael/Irish Labour Party coalition, and John Hume have continually stressed its open-ended nature and have laid more emphasis on the list of requirements—notably the need to accommodate both traditions—identified as essential to any lasting settlement than on any one option.8

This interpretation of the Forum Report, as an agenda for discussion rather than a blueprint for action, has been generally accepted in Ireland, Britain and the United States.9 But it appears a remarkably thin agenda. Despite the mountains of evidence presented to the Forum and long days of oral discussion, the Report runs to a mere 38 pages and contains a bare minimum of factual information or constitutional analysis. The historical background is brief and one-sided. The outline of the three options ignores the many and obvious difficulties in law and in practice which each would raise. Also, there is no mention at all of the problem of securing some form of democratic government within Northern Ireland, whether as part of a federal or confederal state or under joint authority. Positions on many of these points may have been reached and reserved for later negotiations and it is fair to note that the wish to have the Report widely read influenced its length as did the painfully slow process of securing an agreed text. But if there is to be any serious public consideration of the forum Report even as an agenda, a good deal of the basic information and analysis which practical and political considerations have prevented the Forum itself from providing must be made explicit.

II. THE BACKGROUND

A. Partition

The Forum Report reiterates the fact that partition was con-

6. N.I.F.R., supra note 1, at paragraph 5.10.
trary to the wishes of the majority of Irish people as expressed in the last all-Ireland election of 1918 and the traditional nationalist view that "the intention underlying the creation of Northern Ireland was to establish a political unit containing the largest land area that was consistent with maintaining a permanent majority of unionist." Since the British government is, in effect, blamed for creating the problem through the terms of the 1920 settlement, it is appropriate to begin by stating what actually happened and why it happened in the period from 1911 until 1921.

The truth in crude terms is that both the Republic of Ireland and Northern Ireland were created by a combination of military force and popular will. The idea of partition was first seriously raised when it became clear that very large numbers of Protestants in Ulster were prepared to fight in Carson's UVF against the imposition of home rule by Britain on all-Ireland basis. The idea that the rest of Ireland must be granted a measure of independence was similarly accepted when it became clear that the IRA could not be defeated and that the vast majority of voters in the twenty-six counties supported the objectives of Sinn Fein. It is true that the British government made no attempt to coerce the Unionists and that it did its best to suppress the IRA. It is also true that the adoption of partition as a solution, however temporary, may be attributed to other contemporary British political and defense concerns, and that the way in which the border was drawn and the promised Boundary Commission was aborted in 1925 added to nationalist suspicions of British motives. It is nonetheless essential to remember that the underlying reasons for partition were that the vast majority of the inhabitants in the North and in the South of Ireland had expressed incompatible loyalties and commitments and that very large numbers in each part had shown their willingness to fight for those commitments.

10. N.I.F.R., supra note 1, at paragraphs 3.1 and 3.2.
11. "Both Northern Ireland and the Irish Free State owe their origin not to the force of argument, on which the national movement from O'Connell to Redmond had relied, but to the argument of force, and their history bears the marks of that tragic but inescapable fact." T.W. Moody quoted in J. Darby, Conflict in Northern Ireland: The Development of a Polarised Community 1 (1976).
B. Current Realities

The Forum Report lays considerable stress on the failure of the 1920 settlement, which "locked both sections of the community in Northern Ireland into a system based on sectarian loyalties," and on the resulting alienation of Northern Catholics first from the Unionist regime in Northern Ireland and following the imposition of direct rule in 1972 from current British policies in both the political and security spheres. But it does not sufficiently emphasise the extent to which the forces which led to partition in 1929 have remained unchanged. Even the briefest analysis of the balance of population, voting patterns and military power within Northern Ireland reveals the lack of credibility of the Forum's preferred option of unity by consent, even as a long-term objective.

In the first place, it is clear from the results of the 1981 census in Northern Ireland not only that there has been very little change in the proportions of the majority and minority communities since 1920, despite the continuing higher birth rate among Catholics, but also that it would be unrealistic to predict any rapid change in the foreseeable future. The work of Dr. Paul Compton on the demography of the two communities shows that different emigration rates have continued to counter-balance higher Catholic fertility. His latest estimates indicate that Catholics represented only 37.5 percent of the total population in 1981, compared with a figure of some 33.5 percent in 1926, and that as in earlier decades the net intercensal emigration of Catholics between 1971 and 1981, at about 14 percent, was more than double that of Protestants, at about 6 percent, as shown in the accompanying table. Compton concludes that if Catholic fertility and family size continue to fall during the 1980's, as he predicts, "there can be no automatic assumption that present trends will remain unchanged and that Catholics will eventually become the majority community in the province."

<table>
<thead>
<tr>
<th>Year</th>
<th>Catholics</th>
<th>Protestants and Others</th>
</tr>
</thead>
<tbody>
<tr>
<td>1971 estimate</td>
<td>562,000</td>
<td>965,000</td>
</tr>
<tr>
<td>natural increase</td>
<td>78,000</td>
<td>30,000</td>
</tr>
<tr>
<td>net migration</td>
<td>76,500</td>
<td>53,500</td>
</tr>
<tr>
<td>1981 estimate</td>
<td>563,000</td>
<td>941,500</td>
</tr>
</tbody>
</table>

It is equally clear that the commitment of the Protestant majority to the maintenance of the union with Britain is unchanged. In the last formal vote on the matter in March 1973, 58 percent of the voting population in Northern Ireland voted to maintain the union, less than 1 percent voted for a united Ireland and 41 percent did not vote. Allowing for the deliberate abstention of most Catholics and for the usual 20 percent to 25 percent of non-voters, it can only be concluded that almost the whole of the Protestant community turned out to vote for the union. There is no evidence from recent opinion polls to suggest that a new border poll would produce a different result.

Nor can the commitment and the ability of many members of the Protestant community to use force to defend their position be seriously doubted. There are currently some 7,500 members of the Ulster Defence Regiment (hereinafter cited as UDR), some 8,000 members of the Royal Ulster Constabulary (hereinafter cited as RUC) and some 4,500 members of the RUC Reserve. Though these forces are officially non-sectarian, it is well-known that there are very few Catholics in the UDR and that the proportion of Catholics in the RUC is not much more than 5 percent. All these forces are well-armed and at least in the case of the UDR have been constituted for the express purpose of the defence of Northern Ireland. There can be little doubt that in the event of a threatened British withdrawal many more members of the majority community would be ready to join official or semi-official para-military organization as they did in the early 1920's and on the imposition of direct rule in 1972, and that if it were not possible to defend the union, the defence of an independent Northern Ireland would be adopted as an alternative.

These various considerations indicate how unrealistic is the Forum’s apparent first choice of unity by consent. Even if there were to be a substantial change in the voting power of the two communities, perhaps as a result of a change in patterns of emigration following from a more equal distribution of employment opportunities within Northern Ireland, it would be unwise to expect a peaceful resolution of the Northern Ireland problem on that ground alone. On the contrary, it seems more likely that communal tensions and the risk of civil war would increase rather than decrease as the balance of the population became more equal.

C. The Alienation of the Minority

This evidence of the commitment and capacity of the majority community to maintain the separate status of Northern Ireland and to resist its absorption in an all-Ireland state does not, of course, mean that the partition settlement of 1920 or the current situation can be regarded as in any way satisfactory. The commitment of the minority community in Northern Ireland to its Irish identity and culture is at least as strong as that of the majority to its British or non-Irish identity and culture. It has been sustained over the past sixty years notwithstanding efforts, both formal and informal, to suppress it.

This continuing sense of separateness of the part of Northern Catholics and their desire to assert their Irish identity has been reinforced both by their experience as a minority within Northern Ireland and by the continuing promotion of the ideal of Irish unity within the Republic. There is no doubt that under the Unionist regime, members of the minority community suffered political discrimination, notably in the drawing of local government constituency boundaries and in the delay in implementing British reforms in voting qualification. Nor is there any doubt that they have experienced consistently higher rates of unemployment and socio-economic deprivation, attributable in part to discriminatory policies in the siting of industries. It has been estimated that in 1971, the unemployment rate among Catholics was more than double that among Protestants.\(^{20}\) In social and cultural matters, the Unionist regime lost no opportunity to assert, and on some matters such

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\(^{20}\) Fair Employment Agency for Northern Ireland, An Industrial and Occupational Profile of the Two Sections of the Population in Northern Ireland (1978) (available from the Government Bookshop, 80 Chichester Street, Belfast BT 1 4JY).
as Sunday observance and the use of Gaelic, to impose the values and attitudes of the majority and to emphasise that the manifestation by Catholics of their Irishness was unacceptable.

These various forms of discrimination, justified where not denied as the costs of disloyalty, were experienced at a communal rather than an individual level, not least because of the highly segregated educational system within Northern Ireland. The resulting identification of communal and political identities, however imprecise, further exacerbated the social and economic differentiation between the two communities. Some Catholics hoped that the problem might be resolved within a purely Northern Ireland context and gave their support to a civil rights campaign in the late 1960's in which the primary demand was for equal political and economic treatment of all citizens within Northern Ireland. The reluctance of most Unionists to accept the legitimacy of these demands and the progressive deterioration in public order and security led eventually to the imposition of direct rule in 1972.21 Since then, however, the British government has failed to achieve any major improvement in the position of the minority community. Preliminary analysis of the 1981 census indicates that even after a decade of direct British rule the unemployment rate among Catholics remains double that among Protestants.22 There has been an equal lack of success in establishing a form of regional governments in which representatives of the minority are able to play an effective role. And the worst effects of the troubles and of the abuses by both the British Army and the RUC and UDR have undoubtedly been experienced in predominantly Catholic areas. All this has contributed to a deepening sense of alienation among the minority community both from the majority community and from Britain. The resulting despair felt by many Catholics at the prospect of resolving their problems within a Northern Ireland or a British context has been the primary motivating force both behind the decision to establish the New Ireland Forum and the progressive increase in support for Provisional Sinn Fein.

D. The Mutuality of Unionism and Republicanism

The Forum Report gives a reasonably accurate account of the way in which the Unionist majority in Northern Ireland ignored

the legitimate rights and interests of the Catholic minority there. 23 The justification or excuse for the denial to Catholics of any effective power and of a fair share of official positions was the reluctance of members of the minority to become involved in the institutions of a state which they rejected. With hindsight, it is easy to see that the exclusive attitude of the Unionists was shortsighted even from their own narrow viewpoint. The continued existence of a disaffected minority of more than one-third posed a greater danger to the stability of Northern Ireland than the slow growth in the proportion of Catholics which many of the discriminatory policies and practices which flourished under the Unionist regime were designed to avoid.

The account which is given of policies and practices in the Republic is much less satisfactory. The Report asserts that “the constitutional, electoral and parliamentary arrangements in the South specifically sought to cater for the minority status of Southern Unionists and did so with considerable, if not total success.” 24 While this is fair comment on the original Free State constitution as far as it goes, the Forum’s credibility would have benefited had it acknowledged the weight of testimony submitted to it which criticized the present Republic as a Roman Catholic dominated state. The pattern of policies since the 1920’s from the imposition of censorship and the elimination of the possibility of divorce to the adoption of an explicit Catholic Constitution in 1937 as well as many laws and practices thereafter progressively created a confessional state. 25 The values of the Protestant minority both within the twenty-six counties and within the thirty-two county area over which the Republic aspired to rule were largely ignored or overridden. Though the minority of Protestants within the twenty-six counties was so small as not to pose any possible threat to the Catholic majority, no opportunity was missed to assert the Catholic, Gaelic and non-British ethos of the state and in so doing to confirm the fears and prejudices of Northern Protestants and to deter them from contemplating any form of unity or even mutual respect. 26 The exclusive nature of the Republic was expressed in cultural terms by the emphasis on Gaelic language and Catholic symbols; in social terms by the Catholic Church regulations on

24. N.I.F.R., supra note 1 at paragraph 3.2.
mixed marriages and the laws on divorce and contraception; and in political terms by the refusal to recognize the legitimacy of Northern Ireland.\textsuperscript{27} It was perhaps natural for a newly formed state like the Republic to assert its independence from Britain and its own non-British language and culture. But the effect of these policies and of the regular assertion of the ultimate objective of incorporating the whole of Ireland within the Republic, without taking any account of the views and interests of the majority community there, was simply to reinforce the determination of Unionists to have nothing to do with the Republic.

It is perhaps the major achievement of the Forum thus far that politicians in the Republic increasingly now recognize this error. But the extent to which traditional Irish Republicanism and the least attractive aspects of Ulster Unionism are mutually self-supporting has not been sufficiently recognized.

Nor has the need for the majority in the Republic to demonstrate in advance of any possible unification that it is willing to embrace the pluralist values and attitudes on which so much emphasis is placed in the Forum Report. Northern Protestants do not need the long memories which all sides in Ireland are credited with to call to mind the result of the recent referendum on abortion in the Republic.\textsuperscript{28}

III. THE FORUM MODELS

A. Consent and Legitimacy

A further major achievement of the Forum is the explicit recognition that any movement towards unification in any form must be by consent. The Report firmly rejects 'attempts from any quarter to impose a particular solution through violence' and asserts with


\[\textsuperscript{28}\text{Boyle, Ireland, in Abortion and Protection of the Human Fetus: An International Perspective (S. Frankowski ed. forthcoming).}\]

In the Eighth Amendment of the Constitution Act 1983, the electorate in the Republic by referendum voted to confirm the existing statutes prohibition on abortion in any circumstances with the adoption of a constitutional amendment recognizing the right to life of the fetus. The Catholic Church and laity supported the proposed amendment while the Protestant Churches as a whole opposed it. Ireland is thought to be the only state in the world to recognize explicitly the right to life of the fetus and to prohibit abortion in all circumstances.
equal clarity that 'the political arrangements for a new and
sovereign Ireland would have to be freely negotiated and agreed
to by the people of the North and by the people of the South.'

The implications of these principles however are not fully explored,
either in respect of the various models which are proposed or in
respect of the status quo.

The principle of consent cannot be separated from that of
legitimacy both in law and in political reality. It has long been
a fundamental tenet of Irish nationalism that Northern Ireland is
not a legitimate state. The Forum Report reiterates the view that
the achievement by Sinn Fein of a clear majority for independence
in 1918 gave an irreversible mandate for both independence and
unity for the whole island of Ireland. Though effective if not con-
stitutional independence was granted by the British in 1921, the
traditional nationalist view is that unity was frustrated both by
the British and by the Northern Unionists and that neither had
the right to do so. Had unity been denied only by the British govern-
ment, and if the island had been partitioned against the wishes
of both the nationalist majority and the Northern Unionist minority,
this view would be tenable in international law. But those were
not the facts. On the contrary, legitimacy can properly be claimed
for the current constitutional status of Northern Ireland in two
important and internationally recognized senses: first, in that a
substantial majority of its citizens have consistently expressed their
support in free and fair elections for union with Britain; and second,
in that in the event of an armed conflict or insurrection within
its boundaries, it is almost certain that the majority community
would be able to maintain an effective system of government. The
first of these may be equated with the universally accepted prin-
ciple of self-determination. The second is tacitly accepted in inter-
national law in that the victors of an internal conflict or a revolu-
tionary coup d'état are entitled to and are generally granted first
de facto and ultimately de jure recognition.

It must be conceded, on the other hand, that on a broader con-
ception of legitimacy, which requires the general acceptance of a
state by substantially all of its citizens, Northern Ireland is not
a legitimate political entity. Nor can it be claimed that those respon-
sible for its government have met the highest internationally

29. N.I.F.R., supra note 1, at paragraph 5.2.
30. Id. at paragraph 3.1.
accepted standards either in the treatment of its communal minority or in matters of internal security. But the same could be said of many other states whose legitimacy is not generally contested. The usual response to such criticisms is to demand that the treatment of the minority should be improved rather than that the legitimacy of the state be denied. The pursuit of arguments based on more demanding tests of legitimacy in an Irish context poses particular difficulties for those who wish to establish a new unitary state. For it cannot realistically be claimed that there is any immediate prospect of establishing a new all-Ireland state which would command the general acceptance of substantially all its citizens.

The natural conclusion from this analysis is that the continued legitimacy of Northern Ireland as presently constituted must be recognized, and that any immediate action must be directed towards a fuller recognition of the identity, rights and interests of the nationalist minority within Northern Ireland rather than of the unionist minority within Ireland as a whole. That is not the conclusion of the Forum. Having enunciated the principle of consent, the Report ignores the implications of that principle in its analysis of future structures, while insisting throughout that Northern Ireland constitutes an urgent crisis requiring immediate action from the British government. In adopting as its preferred policy the unitary state option, and by its call for British action, the Report could be accused of serious contradiction. For, if the principle of consent (in particular its corollary, the right of Unionists to say no to a united Ireland) is treated seriously, much of the discussion in the remainder of the Forum Report becomes a matter of academic rather than practical concern, since it is clear to all that the consent of Unionists to the options which are proposed is not forthcoming.

Another interpretation, and a more hopeful one, of the Forum Report might place emphasis on its identification of the need for discussions between the two Governments to create the framework and atmosphere necessary for reconciling the two traditions based on the section of the Report, 'realities and requirements'. On this

32. N.I.F.R., supra note 1, at paragraphs 5.1 and 5.3.
interpretation, the Forum's options are the negotiable preferences from the nationalist point of view in any such discussions. Before proceeding to a more detailed discussion of what might be achieved within a more realistic framework, a brief account must be given of the problems which would arise in implementing the three options favoured by the Forum even if the consent of Unionists could be obtained.

B. A Unitary State

The model of a unitary state with special protections for the Unionist minority which is proposed in the Forum Report would not be unreasonable in itself if the consent of Unionists could be obtained. It is suggested that provision might be made for: one, a guaranteed minimum level of representation for Unionists in a Senate with blocking powers on issues of major communal importance; two, weighted voting majorities to be required in the enactment of legislation on matters agreed to be fundamental; three, guaranteed individual and communal rights, notably in respect of the two major cultural traditions and the two major educational systems; four, the recognition of dual citizenship for those wishing to assert their British identity; and five, special institutions to acknowledge the unique relationship between Britain and Ireland and provide expression of the long-established connections which unionists have with Britain.3 (As will be seen, all these ideas may appropriately be applied in reverse to the protection of the rights and interests and identity of nationalists within Northern Ireland and the United Kingdom.) Reference is also made to the need for and practicality of a single legal and judicial system and a single police service recruited from the whole island, and to the benefit likely to be obtained from integrated economic and agricultural policies.34

The fundamental objection to this model is, of course, the deep rooted objection among Unionists to any form of unification. There is nothing in the Forum Report to indicate how the very substantial subvention which Northern Ireland currently receives as a less prosperous region within the United Kingdom is to be replaced or made unnecessary in any new arrangement. A study of the economic implications of the unitary state and the other options

33. N.I.F.R., supra note 1, at paragraphs 6.4, 6.6, 6.7.
34. Id. at paragraphs 6.3, 6.5, 6.8.
published along with the Report does, however, spell out the implications of the subvention being removed entirely. The financial imbalances if the North alone were to bear the cost, “would be so severe that the adjustment in living standards and in employment would be unconscionable.” The virtual impossibility in present circumstances of the Southern economy providing the British subvention is also demonstrated by the study. It is not impossible that Unionists might be prepared at some future date to regard the prospect of greater integration with the Republic at least on some matters with more favour if it can be shown to be in their economic interests. But more evidence than is to be found in the Forum Report as to the greater prosperity to be enjoyed in a unitary state would need to be forthcoming.

C. A Federal or Confederal State

The main argument for adopting a federal or confederal constitution in preference to a unitary state is that it would permit a degree of self-government for the Northern majority within a united Ireland and thus provide some compensation for the loss of power inherent in the change from majority to minority status. This would help to resolve some of the differences on matters of social legislation between the predominantly Protestant community in the North and the almost exclusively Catholic community in the rest of Ireland. Since under the 1920 settlement the Northern majority has never enjoyed more than the limited power of a subordinate legislature in a state in which authority on such matters as taxation, defence and foreign relations have been reserved for the central government it may be argued that the effective power of the Northern Unionists would be no less in a federal or confederal Ireland than with certain devolved powers within the United Kingdom. The distinction between a federal and a confederal constitution in this respect is largely formal. In a federation, residual power on matters not explicitly conferred on the constituent states is exercisable by the central or federal government; in a confederation, residual power on matters not explicitly conferred on the cen-

35. The Macroeconomic Consequences of Integrated Economic Policy, Planning and Co-ordination in Ireland, Study prepared for the New Ireland Forum by Davy Kelleher McCarthy Ltd., Economic Consultants (available by writing to the Stationery Office, St. Martin’s House, Waterloo Road, Dublin 4).
36. Id.
eral or confederal government is exercisable by the constituent states. Within the context of a process of unification by consent, however, there may be some political advantages in a confederal model in that the representatives both of the Republic and of Northern Ireland would be seen to be agreeing to confer certain explicit powers on a newly established joint confederal government rather than submerging their established identities in a new federal state.

There are nonetheless substantial difficulties with the federal or confederal model, in addition to those of obtaining the consent of Unionists and making satisfactory economic arrangements. Federal systems of government depend on a basic level of agreement as to national objectives which could not be assumed to exist in the case of Northern Ireland and the Republic. There is a deeply felt commitment to independence and neutrality within the Republic, which is unlikely to be shared by the majority in Northern Ireland. There would also be a fundamental imbalance in the constituent units of the federal or confederal state, unless a new set of provincial governments were established within the Republic. This difficulty has proved to be a major obstacle to the idea of a federation within the United Kingdom, given the huge disparity between the populations of England, Scotland, Wales and Northern Ireland and the lack of any general desire for regional government within England. Nor is it clear how the interests of the minority within a federal Northern Ireland are to be protected. There is in effect a fundamental dilemma for proponents of the federal or confederal model: the larger the powers of a central government within a federation, the less likely it is—though it is in any event highly unlikely—that Northern Unionists would agree to it; but if the powers of a central confederal government are severely restricted, the more necessary it is to provide effective protections for the minority within Northern Ireland, thus raising the same problems which have proved so intractable within the current constitutional framework, as discussed in greater detail below.

D. Joint Authority

The third option considered by the Forum is a system of joint authority under which 'the London and Dublin governments would have equal responsibility for all aspects of the government of Northern Ireland,' thus according equal validity to the two traditions in Northern Ireland and reflecting the reality of their divided
The word 'authority' appears to have been chosen in preference to 'sovereignty' to permit Britain to recognize the Irish dimension of the Northern Ireland problem without breaking its oft-repeated guarantee to the people of Northern Ireland that their status as part of the United Kingdom would not be altered without the consent of a majority of voters in Northern Ireland. This method of accommodating the competing claims of Britain to exclusive authority over Northern Ireland and of the Republic to exclusive authority over the whole island of Ireland is initially attractive. It would recognize the fact that both Britain and the Republic have an interest in Northern Ireland which neither can afford to be seen to abandon, however much one may suspect that both would like to be able to do so. It would give both the majority and minority communities in Northern Ireland a ready way of asserting their citizenship of the state to which they want to belong. It could prove to be to Northern Ireland's advantage at the European Community level and it might help to resolve some of the persistent security problems which arise from the existence of the border and of two separate legal systems.

The major drawback to this model is that it is essentially undemocratic. The precedents for joint sovereignty, like those of the Sudan and the New Hebrides, involved the division of the spoils of conquest by two colonial powers without reference to the wishes of the local inhabitants. There is a brief reference in the Forum Report to the possibility of the devolution of some powers to a local assembly. As in the case of the proposal for a federal or confederal state, however, there is no discussion of how the effective participation of representatives of both communities is to be achieved. Nor is there any discussion of how the joint authority of the two sovereign states is to be exercised or of how any differences of opinion are to be resolved. What appears to be envisaged is a more or less permanent system of direct rule, with a number of ministers representing London and Dublin. It is stated that 'the overall level of public expenditure would be determined by the two governments.' While the Report does not say how this would be done, the economic study commissioned suggests that the tax rates in Northern Ireland might continue to be those

38. Id. at paragraph 8.3.
39. Id. at paragraph 8.6.
that prevail in Britain and that the cost of subvention would be borne jointly by Britain and the South in proportion to their respective GNP's. Solutions to come of these difficulties could be found. Provision might be made for the direct election of representatives from Northern Ireland to the Oireachtas in Dublin and Parliament in London so as to achieve a measure of democratic accountability if not responsibility for governmental decisions. But it is not easy to see how the consent of the majority community to arrangements of this kind is to achieved given their long-standing objection to any direct involvement by the government of the Republic in Northern Ireland.

IV. AN ALTERNATIVE FRAMEWORK FOR ACTION

A. A Process, Not A Blueprint

The essential objection to each of the options which the Forum has produced is that none is likely to secure the consent of the majority community in Northern Ireland for the foreseeable future. Nor does the Forum provide any indication of how the long-standing problem of finding a form of government within Northern Ireland which will provide for the effective involvement of representatives of both communities is to be resolved. If a process of constitutional and legislative change which would help to produce peace and stability without threatening the established position of Northern Ireland within the United Kingdom can be found, there are strong pragmatic arguments for adopting that less radical approach.

The complex inter-relationships between the two parts of Ireland, Britain and the rest of the European Community can be more readily accommodated by making a number of ad hoc institutional adjustments than by attempting to start with a clean slate on which some new ideal model is to be drawn up. The objective should be to devise a programme of constitutional, legal and governmental action to provide more effectively for the long-standing interdependence of the peoples and states of Britain and Ireland rather than to build models with the traditional but outdated concepts of national independence and exclusive state sovereignty. This programme should reflect the realities of the relationships between the peoples of Britain and Ireland as a whole and the

two communities within Northern Ireland on a number of different levels:

(i) the recognition in practical terms of the differing identities and loyalties of the two communities within Northern Ireland;
(ii) the provision of effective mechanisms for the exercise of appropriate rights by the majority and minority communities in Northern Ireland at a political level;
(iii) the legal protection of both individual and communal rights within Northern Ireland and the Republic;
(iv) the recognition in practical terms of the inter-relationships between the peoples of Britain and Ireland;
(v) the development of formal and practical arrangements for security before, during and after the implementation of any new arrangements;
(vi) the formal recognition of these new arrangements as binding international agreements.

B. The Recognition of Identities and Loyalties within Northern Ireland

The right of members of the minority community in Northern Ireland to aspire to and assert their political support for a united Ireland has come to be accepted by the British government as legitimate only in the past decade.41 Before that, the aspiration of the minority for unification was recognized and supported only by the Republic, which itself refused to recognize the legitimacy of Northern Ireland. Most Unionists in turn regarded (and continue to regard) the aspirations of Northern Catholics as both illegitimate and disloyal. The formal acceptance by the government of Ireland of the legitimacy of Northern Ireland, and by the government of Britain of the legitimacy of the aspiration for unification, may be dated to the Sunningdale Communique in December 1972, which contained the following parallel declarations:42

The Irish Government fully accepted and solemnly declared that there could be no change in the status of Northern Ireland until a majority of the people of Northern Ireland desired a change in that status.

42. Sunningdale Communique, December 1982.
The British Government solemnly declared that it was, and would remain, their policy to support the wishes of the majority of the people of Northern Ireland. The present status of Northern Ireland is that it is part of the United Kingdom. If in the future, the majority of the people of Northern Ireland should indicate a wish to become part of a united Ireland, the British Government would support that wish.

It was further agreed at Sunningdale that a formal agreement incorporating these declarations would be signed and registered with the United Nations. The constitutionality of the Irish government's position, however, was contested, and the Supreme Court concluded that the declaration was at most a *de facto* rather than a *de jure* recognition of Northern Ireland's status within the United Kingdom, that it did not constitute an agreement on fact or principle, but that if it had, it might have infringed Articles 2 and 3 of the Irish Constitution.\(^4\) No formal agreement was ratified or deposited at the United Nations by the governments.

Despite this setback and the collapse of the power-sharing Executive in Northern Ireland in 1974, both sides have moved towards a more general acceptance of the validity of the two traditions of unionism and nationalism. This is clearly expressed in respect of Northern Ireland in the British government's White Paper, published in 1982 in preparation for the setting up of the current Northern Ireland Assembly, and in respect of Ireland as a whole by the Forum Report.\(^4\) Despite some preliminary studies under the auspices of the Anglo-Irish Inter-Governmental Council established in 1980, however, little positive action has been taken to give legal or practical effect to these expressions. Neither state has been prepared to make binding international agreements or to pass internal legislation to clarify the rights to self-determination of the two communities within Northern Ireland. It has never been conceded by Unionist or British governments that the nationalist minority were inadequately consulted as to the arrangements leading to partition. Nor has the right of Northern Unionists not to join a united Ireland been formally conceded by the Republic in its constitution. In international law such conflicts between peoples claiming conflicting rights to self-determination are not uncommon. Their resolution is likely to depend on a distinction

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between the right to internal and external self-determination. The right of a majority community to self-determination cannot be absolute if the corresponding right of a minority is to be recognized. But the right of the minority must also be constrained, and may have to be limited to matters of communal and cultural identity and citizenship.

In the Northern Ireland context, this would involve a series of measures to facilitate the tangible expression of Irish identity by members of the nationalist minority short of the incorporation of Northern Ireland into an all-Ireland state. The right of citizens of Northern Ireland to assert and exercise the entitlements of Irish citizenship which is already accorded to them under the Irish Constitution\textsuperscript{45} and the Irish Nationality Act 1956,\textsuperscript{46} without thereby losing any rights within Northern Ireland, should be expressly recognized by law. This would involve the immediate repeal of the provisions of the Electoral Law Act (Northern Ireland) 1962\textsuperscript{47} which disqualified from standing for or voting in local elections in Northern Ireland all citizens of the Irish Republic not already on the register in 1949. The bar on joint membership of the British Parliament or Northern Ireland Assembly and the Oireachtas which caused such difficulties following the appointment of Seamus Mallon, deputy leader of the SDLP, to the Irish Senate, should also be removed.\textsuperscript{48} The question whether any more formal arrangements should be made for the permanent representation in the Oireachtas of those in Northern Ireland who assert their Irish identity would be a matter for the Republic. But the right of the Republic to make such arrangements and to hold any necessary elections within Northern Ireland should be formally recognized. On a more practical level, provision should be made for the establishment of consular offices for Irish citizens in Belfast and other centres as may be thought appropriate.

In return for these tangible expressions of the right of members of the minority community to be Irish, the government of the

\begin{footnotes}
\item[45] \textit{Bunreacht Na Heireann} (Constitution), arts. 2 & 3 (Ireland).
\end{footnotes}
Republic would be required to grant full and explicit recognition of the constitutional status of Northern Ireland as part of the United Kingdom, and thus to remove the ambiguous and controversial provisions of the Irish Constitution which appear to, but do not in practice, claim jurisdiction over Northern Ireland.

The purpose behind these various measures would be to reflect an acceptance by Britain that the partition settlement and the guarantees made to the majority in Northern Ireland in 1949 and 1973 had not given due regard to the right of the minority to its own national identity, and an acceptance by the Republic that their aspiration for national unity and their concern for the minority within Northern Ireland had not given due regard to the right of the majority to their national identity. Both Britain and the Republic would thus be recognizing the respective rights of the majority to determine the constitutional status of Northern Ireland and of the minority to express their Irish identity in ways which do not conflict with that status.

C. Majority Rule, Power-Sharing and Minority Participation in Government within Northern Ireland

Many of the problems which have arisen within Northern Ireland may likewise be attributed to a lack of precision about the respective rights of majority and minority communities in a divided society. The British legal and constitutional tradition within which both Northern Ireland and the Republic evolved, is to identify democracy with majority rule and to ignore the position of minorities. This may work in a relatively homogeneous society in which there are no fundamental differences in political objectives and in which there is a reasonable prospect of different political parties winning sufficient electoral support to form or participate in a majority government. It is wholly inappropriate in a communal society more or less permanent domination over another and in which the political objectives of different communal groups are fundamentally opposed. The problems which this has created within Northern Ireland are well-recognized. But there would, of course, be similar problems within any new all-Ireland state in which about a quarter of the population shared a communal identity and an entirely different set of commitments and loyalties.

49. Bunreacht Na Heireann (Constitution) arts. 2 & 3 (Ireland).
The alternative to majority rule which has been most widely advocated for Northern Ireland is generally known as 'power-sharing'. The underlying concept, that representatives of all major groups should be entitled to participate in government, is attractive. But the precise mechanisms for such a system are not usually very clearly defined. The short-lived 'power-sharing' Executive of 1974 was constituted under a formal provision which permitted the Secretary of State to choose an Executive from parties which appeared to him to command widespread support in the community, and contained ministers drawn from Unionist, Alliance, Northern Ireland Labour and Social Democratic and Labour Parties but not from the Democratic Unionist Party and other Loyalist groupings. The current provisions for 'rolling devolution' are essentially the same, in that power may not be devolved to the Northern Ireland Assembly unless the Westminster Parliament is satisfied that an order for the devolution of particular powers is likely to command widespread acceptance throughout the community. These provisions have reserved the final decision on what is acceptable by way of power-sharing to the British government and parliament and in so doing have created an obvious incentive for parties in Northern Ireland to hold out for the maximum advantage which they think they may be able to persuade the authorities in London to concede. A rather more precise approach favoured by Fine Gael and the SDLP would guarantee a place as of right in any executive or cabinet to representatives of all major parties on the basis of proportional representation. Those who refused to participate would thus forfeit the opportunity to participate in government.

The essential weakness of both these forms of power-sharing is that neither provides a mechanism for the resolution of disputes within the government. If the principle of majority rule within an executive or cabinet is to be applied, then the representatives of the majority community will be able to maintain their domination by forming an internal cabal. If, on the other hand, there is a requirement of unanimity, it is not at all clear how differences of policy are to be resolved. Nor is it clear under either system what

is supposed to happen when a large section of the executive or cabinet resigns or when it otherwise becomes apparent, or might be thought, that it no longer commands widespread acceptance. Under the statutes of 1973 and 1982, there was and is an obvious implication that the alternative to agreement is continued direct rule. But this, or its alternative under a federal all-Ireland state or a system of joint authority, cannot be regarded as a satisfactory method of resolving the kind of differences which regularly lead to the formation of new governments in other states. In more general terms, it is hard to accept that a system of government which in effect requires everyone to agree all the time is suitable for a province in which there are very deep divisions on very many issues. Those in Britain or the Republic who favour power-sharing in Northern Ireland need only consider what their reaction would be to the imposition of a similar principle in London or Dublin to realize that there are serious objections to a system in which the refusal of a relatively small minority to co-operate on any issue can bring down the government. It is significant that the Forum has not proposed power-sharing as a means of meeting and assumed desire of Northern Protestants to share in the government of a new all-Ireland state.

Since the arrangements for internal government within Northern Ireland are crucial to any settlement, whether within the current constitutional framework as argued here or otherwise, some more realistic system than the highly discretionary structures adopted or proposed in the past is clearly required. Though a voluntary broad-based coalition of all or most parties might be both attainable and workable for an initial period of reconstruction, more detailed rules for decision-making on various matters will be required in the longer term. The most practical approach would be to provide that both legislation and other governmental decisions requiring a formal administrative order should require a weighted majority of votes in respect of matters of particular communal concern, notably education, the location of major industrial development, local government, policing and security and all matters of an electoral or constitutional nature. It would not be necessary to require the same weighted majority for all these matters. A sixty percent majority might be thought sufficient for some decisions and a seventy-five percent majority for more fundamental and constitu-

53. See supra notes 51 and 52.
tional changes. To ensure that all relevant decisions were duly approved by the requisite majority, the affirmative vote procedure should be prescribed for all delegated legislation and statutory orders. The concept that different decisions require different majorities is well-established in constitutional law in other jurisdictions. It is also established in both British and Irish company law as the primary mechanism for the protection of minority shareholders. A structure of this kind linked with a generally agreed system for the appointment of scrutiny committees with wide powers to question ministers and officials and with chairmen and members drawn from all parties on a proportional basis would provide the best means of involving representatives of all parties in Northern Ireland in the processes of government without requiring the unrealistic degree of consensus on all matters which is involved in the power-sharing model.

E. The Protection of Individual and Communal Rights

In addition to the right to participate in political processes a cohesive communal minority in any state is entitled to special protection both for their rights as individuals and for their collective or communal rights. The recognition of individual rights is well established in both national and international law. Both the United Kingdom and the Republic are signatories of the European Convention on Human Rights and Fundamental Freedoms and both have had to adjust their internal legislation and practices in response to proceedings before the European Commission and the European Court at Strasbourg. The specific recognition of communal rights is a more recent development. The most general provision is to be found in Article 27 of the United Nations International Covenant on Civil and Political Rights which reads as follows:

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.\textsuperscript{59}

This Covenant has been ratified by the United Kingdom, but not by the Republic. It should be ratified by the Republic and both states should accept the right of individual petition, under the Covenant's Optional protocol, to the Human Rights Committee. It would also be appropriate to spell out some additional and more specific protections. The provisions of the Public Health and Local Government Act\textsuperscript{60} requiring all street names to be in English are offensive to many members of the minority community and there are no express provisions to guarantee appropriate rights to use the Irish language and Irish symbols in other contexts.\textsuperscript{61} Nor is there any direct and enforceable expression of the right of parents to have their children educated in schools of their choice, whether of a Protestant, Catholic, Gaelic or integrated character. In the economic sphere, there is also scope for greater protection of the rights of communities, notably in respect of employment opportunities. There is as yet no general obligation either in the public or private sector to ensure that employment opportunities are fairly shared between the two communities.

Though problems of this kind are not so pervasive in the Republic as in Northern Ireland, there are some matters on which specific rights might be provided for members of the religious minority, notably in respect of divorce, contraception and schooling. In all these respects, there is a strong case for strengthening the international supervision and enforcement of the relevant rights.\textsuperscript{62} In so far as more detailed provisions for the protection of communal rights in Northern Ireland and the Republic were incorporated in national legislation as part of any general settlement, a body should be charged with the specific function of monitoring the implementation of these measures. The parliamentary tier of the Anglo-Irish

\textsuperscript{59} Id., art. 27.
\textsuperscript{61} Welsh Language Act, 1967, ch. 66.
\textsuperscript{62} By incorporation for example of the European Convention on Human Rights, now favoured by the Ulster Unionist Party. See DEVOLUTION AND THE NORTHERN IRELAND ASSEMBLY: THE WAY FORWARD (Ulster Unionist Party, Belfast, 1984).
Intergovernmental Council could play a useful role in this respect, as suggested below.

F. Security

A similar approach may be suggested in respect of the problems posed by the continuing high level of activity by paramilitary bodies both North and South of the border. Though a general political settlement is essential if the problem of terrorism in its various forms is to be solved, there is no reason to believe that political violence will cease immediately if a general settlement is reached. There is a long history of paramilitary activity in all parts of Ireland and 'emergency' powers to deal with the sporadic and more recently continuous incidence of politically motivated crime have become a more or less permanent feature of law enforcement both in Northern Ireland and the Republic. In the context of a more general settlement a further Law Enforcement Commission might be appointed to review progress on security matters, and in particular, the provisions agreed at Sunningdale to extend the jurisdiction of the courts in Northern Ireland and the Republic to deal with offences for which extradition was not at that time possible. The possibilities for making some concessions in respect of the strict rules of territorial sovereignty in the border area or alternatively of establishing a joint law enforcement agency to deal with these matters should be examined. A useful role in monitoring the operation of new procedures and powers in the security field might be found for the parliamentary tier of the Anglo-Irish Intergovernmental Council, as suggested for the protection of individual and communal rights.

G. Relationships Within the Islands of Britain and Ireland

The relationships between Britain and Ireland have always been complex. Even since the securing of sovereign independence by the Republic there have been continuing anomalies and many of


the laws and practices established before 1920 have been permitted
to continue to operate. With the exception of the provisions of the
Prevention of Terrorism Act, freedom of movement and settle-
ment has been granted on a reciprocal basis to British and Irish
citizens. Full voting rights are already accorded to Irish citizens
in Great Britain, though not in Northern Ireland, and legislation
to grant equivalent rights to British citizens in the Republic should
soon be enacted. At a political level, the close relationship between
the two countries has already been recognized by the establish-
ment of the Anglo-Irish Intergovernmental Council and its cultural
counterpart Anglo-Irish Encounter. It would clearly be appropriate
for a representative parliamentary tier to be added to give public
expression to matters of joint concern between the two countries.
It would be desirable for such an interparliamentary council to
include separate representation of both the majority and minority
communities in Northern Ireland, based on their proportional
strength in the Northern Ireland Assembly or any other parlia-
mentary body which might replace it. The primary function of the
parliamentary tier would be to debate and scrutinize the plans and
performance of the various governments on matters of joint con-
cern. It might also be granted some executive powers in respect
of agreed joint agencies such as the established Foyle Fisheries
Commission and a new joint security authority which might be
established, including the powers of appointment and funding.
Objections to direct representation on a body of this kind may be
expected from some Unionists, but should not be permitted to pre-
vent the development of institutions to reflect the special rela-
tionship between Britain and Ireland at all levels.

H. Mode of Enactment

The mode of enactment for the various measures which would
form part of a general settlement along the lines outlined above
requires careful consideration. If peace and stability are to be
achieved on a lasting basis, it is important to confer the greatest

66. Sections 1 and 2 of the Representation of the People Act, 12 & 13 Geo. 6, ch. 68,
(1949) accord full voting rights to citizens of the Republic of Ireland resident in Great Bri-
tain. In the Republic of Ireland, the Ninth Amendment to the Constitution Act 1984 enables
the Dail franchise to be extended by legislation to such categories, in addition to Irish
citizens, as may be determined by legislation. See also House of Commons Home Affairs
Committee report, supra note 48.
possible degree of legitimacy on the main elements in an initial settlement. In the Republic this will clearly require the amendment of Articles 2 and 3 of the Irish Constitution and the addition of some other articles on matters of individual and group rights. This will necessarily involve a referendum. There is no equivalent method of entrenching constitutional and other fundamental measures in the British constitution. But a new comprehensive constitution for Northern Ireland could be enacted including a Bill of Individual and Communal Rights and endorsed by one or more referendums, for which there is already statutory provision. On an interstate level the procedure agreed at the Sunningdale Conference, but not subsequently implemented, might be revived. This would involve the adoption of a new treaty between the United Kingdom and the Republic setting out the principal provisions of a new settlement including provision for resolving disputes and its registration at the United Nations.
NOTES

THE PUBLIC USE LIMITATION ON EMINENT DOMAIN AFTER HAWAII HOUSING AUTHORITY V. MIDKIFF, 104 S. CT. 2321 (1984): DOES IT STILL EXIST?

On May 30, 1984, the United States Supreme Court reached a decision that sent waves of concern rippling throughout the legal community as well as throughout society at large. The decision affects basic notions about the inviolability of property rights and the extent to which the state may interfere with and redistribute those rights. The decision caps a long line of case history that has slowly led to permitting states increasingly wider latitude in the interference with property rights, opening up some avenues heretofore unavailable to the states. After Hawaii Housing Authority v. Midkiff, a state may now use the power of eminent domain to effect the reallocation of fee simple title from one private property owner to another private party.

This note will focus on the Court’s decision in the case which virtually extinguishes the “public use” requirement, a constitutionally mandated protection against condemnation of privately-owned property for private use, by declaring that the public use requirement is coterminous with the scope of the state’s police powers. In addition, it will demonstrate the Court’s departure from established precedent by permitting private property to be condemned and retransferred to other private individuals without being pursuant to an overall development plan.

I. EVENTS PRECIPITATING THE DECISION

A. Procedural History and Significant Facts

_Hawaii Housing Authority v. Midkiff_ arose in the United States District Court for the District of Hawaii in 1979 when private land-
owners, trustees of an estate, sought relief from the condemnation of a portion of their land for reconveyance to individual tenants residing thereon.⁶ They urged the court to find such a condemnation to be for a "private use" and in violation of the fifth and fourteenth amendments to the United States Constitution, and also sought a preliminary injunction against such action pending a final determination of the issues of constitutionality.⁷ The court issued a preliminary injunction restraining the Hawaii Housing Authority from ordering the trustees to engage in mandatory arbitration confined to certain methods of property valuation⁸ and rendered a final decision in favor of the Hawaii Housing Authority.⁹ The trustees appealed the decision to the United States Court of Appeals which held that condemnation of the land was "not a taking 'by the law of the land' and [was] therefore invalid under the fifth and fourteenth amendments to the Constitution of the United States."¹⁰ The Hawaii Housing Authority then appealed the decision to the United States Supreme Court which noted probable jurisdiction and heard the case.

Of considerable concern to the Court in *Hawaii Housing Authority v. Midkiff,*¹¹ was the land ownership pattern in the island state of Hawaii. There are eight major islands in the Hawaiian chain and these comprise the more than four million acres of land within the state. Of this land, the 28,800 acre island of Kahoolawe is virtually owned by the federal government. The island of Niihau, consisting of nearly 46,000 acres, is in the almost total ownership of a single family-owned company. Lanai, a 90,000 acre island, is predominantly

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owned by Castle & Cooke, Inc., a company founded more than a century ago by early American settlers. All in all, the state government owns a little less than thirty-nine percent of the total acreage in the state and the federal government owns just under ten percent. This amounts to forty-nine percent, or nearly half of the state's total acreage, having fee simple title vested in government hands.

Even more telling is the composition of ownership of fee simple titles in the hands of private individuals. Of Hawaii's total four million acres, forty-seven percent of the land is owned by only seventy-two private landowners who own tracts of 1,000 acres or more. Of these seventy-two landowners, the eighteen largest landholders, with tracts of at least 21,000 acres, own more than forty percent of the total land area. On the most urbanized and most heavily populated of the islands, Oahu, only twenty-two landowners owned seventy-two and one half percent of all land on the island as of 1975. Of these landowners on Oahu, three major landowners hold fifty-eight percent of privately-held land which is nearly fifty percent of the island's total area. The Bishop Estate, a private trust whose trustees initiated this suit in the United States District Court, alone owns twenty-two percent of the privately-held land on Oahu, fifteen percent of the island's total land.

The above breakdown by ownership of land holdings illustrates the allocation of fee simple titles in Hawaii. The breakdown clearly demonstrates that only about four percent of the land in Hawaii is available for fee simple ownership by a population of almost one million inhabitants. The Bishop Estate owns nine percent of all the land of the state.12

The Bishop Estate/Kamehameha Schools is a perpetual educational trust established in 1887 under the will of Princess Bernice Pauahi Bishop.13 The corpus of the trust is made up primarily of Hawaiian land which, when leased, generates almost all of the income of the trust. This income stream emanates from annual lease rentals of more than 13,500 single family residential lots. The entire net income of the Bishop Estate/Kamehameha Schools is devoted to the operation of the schools in Honolulu, Oahu, and ex-


tension programs at other places in Hawaii. Only about fifteen percent of the operating cost of the schools is covered by tuition and fees paid by the more than 2,600 full-time students attending the schools.\textsuperscript{14} The remaining eighty-five percent of costs are met by the rental receipts.

The schools provide regular curricula for full-time elementary, intermediate and high school students as well as a variety of special education programs for children and adults. Many of these programs such as campus summer experience, family education, and programs for school drop-outs are provided at no charge to the 60,000 annual participants taking advantage of them. Additionally, extensive educational research is carried on in cooperation with the University of Hawaii and the State of Hawaii Department of Education, such research being directed at formulating successful techniques for the instruction of culturally deprived children. The schools depend almost totally on net income from the land leases and the relatively insignificant tuition fees as their sole means of support.\textsuperscript{15}

The Bishop Estate is one of a rather small group of private landowners that together own forty-seven percent of all Hawaiian land. It is the practice of these landowners to lease their land rather than sell individual lots for residential use. This scheme of land use is not new in Hawaii and indeed was an established practice prior to World War II, although at that time there were fairly few leaseholds as compared to lots owned in fee simple.\textsuperscript{16} After World War II, heavy demand for single family residences and a minimum of capital available to those families seeking housing resulted in a substantial increase in leasehold lots.

There were, however, reasons for this pattern of leasing rather than selling—reasons that were external to and transcended the mere wish of private landowners to retain absolute ownership of their land. The group desirous of purchasing residential lots consisted primarily of veterans and other young people who could not afford to purchase fee simple title to both a homesite and a residence.\textsuperscript{17} The private landowners themselves were under finan-

\begin{itemize}
\item \textsuperscript{14} Id. at 3.
\item \textsuperscript{15} Id.
\item \textsuperscript{16} Appellee's Brief in the United States Supreme Court at 5, Hawaii Housing Authority v. Midkiff, 104 S.Ct. 2321 (1984).
\item \textsuperscript{17} Id. at 6.
\end{itemize}
cial pressures not to sell lots. Since these private landowners had held their land for decades, they had an extremely low tax "basis" on the land. Were they to sell off lots from their holdings they would have been classed as "dealers" for income tax purposes and would have had to pay ordinary income tax on nearly 100 percent of the sales price of any fee simple titles they sold. Still further hindrances to such sales were trust restrictions prohibiting sales of fee simple title. The Bishop Estate trust had concerns both with protecting the status of the trust as a tax-exempt organization and with following the terms of the trust which stipulated that the lands owned by the trust be kept and managed rather than sold.¹⁸

Since the Bishop Estate cannot sell the private trust-owned lands without incurring major tax consequences or without violating the trust provisions, it instead leases lots for residential use. Their leases typically run for a fifty-five year term having a fixed annual rental for the first twenty-five to forty years of the lease. When the initial fixed rental period expires, both the lessor and lessee renegotiate a new rent based upon a percentage of the market value of the land not including the value of any structures on the land.¹⁹ Arbitration in the event of disagreement is provided for by the majority of leases. The renegotiated or arbitrated rent for the remainder of the original lease is subject to certain legislative restrictions on amount. Lessees can, however, freely assign and mortgage their leases.²⁰

It is in the context of this pattern of land leasing that the Hawaiian legislature enacted the Hawaii Land Reform Act.²¹ The need for this act became apparent based on extensive legislative findings. The findings set forth in the Session Laws of Hawaii in 1967 state that a primary goal of the United States is the promotion of the public welfare and the securing of liberty as set forth in the United States Constitution through the attainment of fee simple ownership of residential lots by the greatest number of people.²² This is further supported by the Hawaiian State Constitution which provides in part: "All persons are free by nature and are equal in their inherent and unalienable rights. Among these

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18. Id.
19. Id. at 7.
20. Hawaii Rev. Stat. §§ 516-63, 66 (1967). (If state monies are used for the purchase of the owner's basis, there is a ten-year restriction on transfer).
22. Id.
rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property... ." The findings elaborate on the expansion and rapid growth of the economy and population which has brought increased demand for single-family residential lots, particularly in the urban areas. Attention is drawn to the concentration of fee title to land in the hands of the few. Historical reference is made to the days of the Hawaiian monarchy when all the lands were held by the Hawaiian kings and chiefs.

As a result of this continued concentration of land ownership, a critical shortage of land has developed causing large landowners to enter into residential leaseholds which in turn has pushed the price of available fee simple residential units to very high levels. These high prices have in turn artificially raised the prices for leasehold units which further encourages the development of leasehold residential units rather than of fee simple units. The result is that upon renegotiation of rentals a 400 to 1000 percent increase often occurs since the renegotiated rental is inextricably tied to the fee simple market value of the land; the tenant finds himself paying a higher price to rent his lot than his monthly mortgage payment for the residence he has built upon the lot.

The rental renegotiations favor the lessor, and the lessee must either consent to his terms or give up both his house and lot as a result of this inequality of bargaining power. The higher renegotiated rental causes a decline in the leasehold value and severe economic hardship to the lessee who, as he advances in age and his income potential declines, is at the mercy of increased rentals and is forced to abandon the lease to look for other accommodations. If the lessee stays for the entire lease period he will be, because of age, income, and lack of any salable value remaining in the leasehold, unable to purchase another home. The findings go on to declare that there will be a need for over 250,000 low and middle income housing units by 1985 and that the economy has lagged in production to meet these needs.

25. Id. § 1(d)(4) at 408-09.
26. Id. § 1(e) at 409.
The conclusion of these findings is that the land of Hawaii is considered the source of life, dignity, and economic freedom for its inhabitants and that it is state policy that each person making his home on the land shall have the right to ownership of that land. It is also the policy that a residential lessee, so long as he retains that status, shall have the right to enjoy his leasehold estate under reasonable leasehold terms and to have rentals set at reasonable prices.28 The public health, safety, and welfare of the Hawaiian people call for implementation of Act 307,29 and for enactment of additional laws to prevent these continued economic burdens on the masses of lessees living on leased residential homesites.30

The response to these findings is delineated in the Hawaiian Revised Statutes31 setting forth the terms and methods by which the state-authorized Hawaiian Housing Authority may condemn private property and reconvey fee simple title to other private parties. Under this statute, the Authority may acquire all or a portion of a development tract through the exercise of the power of eminent domain or through voluntary action of the parties. The Authority then reconveys fee simple title to the private lessee or purchaser. Only one residential lot per private party may be reconveyed pursuant to the policy of the Hawaiian Housing Authority to encourage the widespread fee simple ownership of residential lots.32

B. Issues Presented

It is this combination of concentrated fee simple land ownership by a small group of private landowners and the legislature’s chosen means of redistributing fee simple titles that culminated in Hawaii Housing Authority v. Midkiff.33 The precise issues presented to the United States Supreme Court were: 1) whether the District Court had properly refused to abstain since there were no ambiguous state law provisions counseling Pullman-type abstention.

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tion and no extant state judicial proceedings counseling Younger-type abstention; and 2) whether the public use clause of the fifth amendment, made applicable to the states through the fourteenth amendment, prohibited the state from taking residential property from lessors and transferring it to lessees in order to reduce the land oligopoly in Hawaii. The Court held that the District Court was not required to abstain from exercising its jurisdiction and that the public use clause of the fifth amendment, made applicable to the states through the fourteenth amendment, did not prohibit the state from taking residential property from lessors and transferring it to lessees in order to reduce the land oligopoly in Hawaii.\(^{35}\)

II. HISTORICAL CONTEXT OF Hawaii Housing Authority v. Midkiff

A. Eminent Domain

Eminent domain is the rubric under which the Hawaiian Housing Authority is proceeding to condemn and redistribute fee simple title to land. The term "eminent domain" has developed through history and the name itself is of relatively recent origin, although the power to take private property has been used since the days of the Romans. The phrase itself was completely unknown at common law.\(^{36}\) By definition, eminent domain is the power of the sovereign to take property for public use without the owner's consent upon making just compensation.\(^{37}\)

1. Original Theory

The theory behind eminent domain is described by Grotius who

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34. Pullman abstention is limited to uncertain questions of state law and federal courts need not abstain on Pullman grounds when a state statute is not fairly subject to an interpretation which will render unnecessary the decision of the Federal Constitutional question, where the statute is not of an uncertain nature and has no reasonable limiting construction, or where abstention is not required for interpretation of state constitutional provisions which parallel provisions of the Federal Constitution. Railroad Commission of Texas v. Pullman Company, 312 U.S. 496 (1941). Younger-type abstention is required only when state court proceedings are initiated before proceedings of substance on the merits have taken place in the federal court and is inappropriate where state proceedings are not begun until after the federal court has issued a preliminary injunction. Younger v. Harris, 401 U.S. 37 (1971).

35. Hawaii Housing Authority at 2327 and 2332.


is credited with originating the phrase. His theory, not often well-received, is that the power to “take” private property is a reserved right of the sovereign. The state has both original and absolute ownership of the whole property currently possessed by the individual members prior to their possession of it. Since their possession and enjoyment of the land is derived through a grant from the sovereign, it is then held subject to an implied reservation that possession of such land might be resumed by the sovereign and in addition, all individual rights to such property were subject to any rightful exertion of this ultimate ownership by the state.

Grotius' theory has some support by constitutional analogy forming the basis of the doctrine of escheat whereby unclaimed property reverts to ownership by the state. Since it is thought that the “people” possess the ultimate and original title and that all private titles in land are held from them as from the political sovereign, regardless of any term used to describe an individual’s title as absolute, there is a theoretical title in the state of an ultimate nature.

Grotius' theory received great criticism from both political philosophers and the judiciary. The criticism is based on the concept that there is an existence in this country of two sovereignties. This being so, the fact that each has power over the same property in fact nullifies Grotius’ theory. This is an obvious conclusion since they cannot both be vested simultaneously with the ultimate title which is the foundation of the reserved powers. An illustration of this is that title to all land privately owned in the original thirteen states came from grants from governors or colonial proprietors or by the states succeeding them. In this sense, clearly, the federal government’s power through an alleged reserved right cannot be based on a notion of an original grant from the United States. This is factually impossible to support. And in the newer states formed after the original thirteen states, private titles in land derived from the federal government during a time prior to statehood. How then

38. 1 NICHOLS, supra note 36, at § 1.13. The term “dominium eminens” was first used in 1625 by Hugo Grotius in his work De Jure Belli et Paris.
39. Id. at § 1.13.
40. Id. at § 1.13[2].
41. Id. at § 1.13[3].
42. Id. at § 1.13[2][3].
43. Id. at § 1.13[3].
can a state claim a reserved power to reassume title based upon a grant allegedly made by it before it was even in existence? Curiously enough, these historical facts notwithstanding, there has been no dispute that a federal government or a state may exercise the power of eminent domain in the factual patterns just described.

2. Current View

Today Grotius' theory of reserved rights of the sovereign as justification for the state's use of eminent domain to acquire title to property is not generally accepted. It is now well-settled that the power of eminent domain is based on the sovereignty of the state, that is, it is an attribute of sovereignty. However, such power is not a property right nor an exercise by the state of an ultimate ownership in the soil.

The principle of the power of eminent domain as an attribute of sovereignty is derived from two schools of thought. The natural law theory conceptualizes the power to take property as based on the superior right of the state over the private property. It follows from this that the exercise of this power is subject to the reciprocal product of the natural law: that the individual has a right to compensation for the land taken and that no constitutional requirement is needed to vest the sovereign with the power to take or to vest the individual with the right to compensation.

The second school of thought elaborating the basis of eminent domain power is the sovereignty concept. This theory is that eminent domain power is an inherent power, one that is necessary to the very existence of government. The power arises upon the creation of the government and is viable for only so long as the government endures. The power derived in this fashion therefore requires no constitutional recognition to be valid. Because eminent domain power derived in this sense is an absolute and unlimited power, state constitutions must contain provisions which place limitations on a power deemed to be already in existence and which

44. Id.
45. Id.
46. Id. at § 1.13[4].
48. 1 Nichols, supra note 36, at § 1.14[1].
49. Id. at § 1.14[2].
would otherwise be unlimited. The final conclusion of both of these schools of thought is that the power of eminent domain is an attribute of sovereignty.

3. History

Little evidence exists on the use of eminent domain in ancient times. The power was apparently used by the Romans to acquire property for the furtherance of an array of public purposes notwithstanding the strong Roman emphasis on the inviolability of private property. English law went in another direction despite our fondness of the notion that eminent domain was well-established by the time of the American Revolution. What appears to be eminent domain takings in England are actually “expropriations,” and prior to their first permanent statute on the subject in 1845, the power to take property and the duty to pay compensation were spelled out in each of many individual acts that were directed at particular projects. These acts illustrated the relative powers of the king, parliament, and the landowners and although the king could never take possessory estates in land, parliament could.

As the concept of eminent domain developed through time it became clear that it was subject to two requirements: 1) that the individual be compensated for his property “taken”; and 2) that the property be taken for a public use. The “public use” limitation is of major importance in Hawaii Housing Authority v. Midkiff.

B. Public Use

The fifth amendment to the United States Constitution provides in relevant part that “No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” The fourteenth amendment to the United States Constitution provides that “No State shall ... deprive any person of life, liberty, or property, without due process of law.” The

50. Id.
53. Id. at 563.
56. U.S. CONST. amend. XIV.
"public use" clause is an explicit limitation on federal use of eminent domain embodied in the fifth amendment. The "public use" limitation is made applicable to the states through incorporation into the fourteenth amendment. The limitation basically means that a person may not have his property condemned and taken from him unless that property is to serve some "public use."

Whether or not the intended use is "public" seems largely a question to be determined by the state legislature pursuant to whose authority the taking has occurred. The limitation is illustrative of the "prevailing ideology of private property" and "accommodates political challenges that might arise if the state's ability to take property ever seemed to be completely unfettered."7 The "public use" requirement has never been imposed in England.8 In America, it is the "linchpin" between the state and the economy.9

The first recorded use of eminent domain which was deemed a public use in America was for building roads. Private owners of landlocked parcels could also condemn rights-of-way across adjacent properties and this was considered a public use because the general public would also travel the road to reach the property.10 A relatively common practice in pre-revolutionary times was facilitated by various Mill Dam Acts which permitted downstream riparian owners to dam streams and condemn the flooded property of upstream owners, this being a public use because local farmers brought their grain to the mill to be ground for the benefit of the entire community.11

But the question of the uses to which condemned property could be put was still in embryonic form and at this point in the development of the doctrine the power to condemn was split between government bodies and private parties.12 That the power of eminent domain "could bypass market processes and override traditional property rights" made it a "potent and highly desired power."13

57. Meidinger, The "Public Uses" of Eminent Domain: History and Policy, II ENVTL. L. 1, 2 (Fall 1980).
58. 1 Nichols, supra note 36, at § 1.112[3].
59. Meidinger, supra note 57, at 12.
60. 2A Nichols, supra note 36, at § 7.06[2].
61. 1 Nichols, supra note 36, at § 1.22[8] (citing Virginia's 1667 statute as the earliest one recorded).
62. Meidinger, supra note 57, at 16 Governments were acquiring property to build roads and private individuals were acquiring property by construction of mill dams which flooded upstream lands.
63. Id. at 16.
and the uses to which it could be put had not yet been clearly
delineated.

Cases concerning interpretation of the "public use" limitation
hinge on the limitation clause in the federal constitution and either
the same or equivalent language in state constitutions which pro-
vide that no person shall be deprived of his life, liberty or property
without due process of law.\(^6\) The general principle now is that
"any form of legislative interference with private property which
was customary when the constitutions were adopted and which
was not specifically forbidden by them"\(^6\) results in a taking by
due process of law.

In examining state constitutions reference must be made back
to the time of their creation. At the time of the American Revolu-
tion neither theory nor reality served to limit the use of eminent
domain to public uses. As an example, in 1776 only two state con-
stitutions even contained the words "public use" and no constitu-
tion specifically had this limitation.\(^6\) Although some states had
adopted provisions in their constitutions referring to public use,
none other than Pennsylvania and Virginia even expressed the con-
cept of public use at the time of independence.\(^7\)

One commentator postulates that this oversight or lack of men-
tion of a "public use" restriction may have been because it was
never contemplated that property might be taken for other than
a public use or, it was assumed that of course it could be, and
perhaps the subject had not been considered important.\(^6\) However,
a search of the literature does yield conflicting information leading
to the conclusion that the taking of land through eminent domain
was indeed considered important, important enough to engender
concern and discussion on the topic.\(^6\)

It was common in the original colonies for officials of the crown
to grant vast tracts of land to proprietors who then permitted
settler tenants to live on the land, either under stated long-term
leases, or under grants amounting to long-term leases due to the

\(^{64}\) 1 Nichols, supra note 36, at § 1.4.
\(^{65}\) Id. at § 1.4.
\(^{66}\) Stoebuck, supra note 52, at 591-92.
\(^{67}\) Id. at 591.
\(^{68}\) Meidinger, supra note 57, at 16-17.
\(^{69}\) 1 Annals of Congress 433-36 (Gales & Seaton ed. 1789) (citing Madison's fifth amend-
ment draft discussing acquisition of property where necessary for a public use and with
just compensation).
proprietor's reserving to himself perpetual obligations of payment from his tenants in the form of "quit rents." Quit rents were money payments due for an indefinite term exacted by landowners from their tenants in lieu of actual rents. The Revolution of 1776 led to the widespread abolition of quit rents and other aristocratic vestiges by, "summarily abolishing quit rents in 1779, declaring the reservation of royal mines of quit rents and all other reservations in the grants of formerly royal lands to be null and void."

Despite the founding fathers' desire to rid the new nation of aristocratic vestiges, the omission of explicit restrictions to public use on land taken was not clarified by the Bill of Rights. Madison's draft of the fifth amendment referred to the use of eminent domain when necessary for public use but when ratified, it became "nor shall private property be taken for public use without just compensation." Varying interpretations have been put on this change in the original draft which had provided for "use of eminent domain when necessary for public use." One thing is clear, the Framers of the Constitution and statesmen of the time were concerned with the protection of property rights against any arbitrary acquisition.

After the Revolution, road and mill dam building were the primary uses of eminent domain but other situations arose which constituted a taking for the public use such as takings to carry on government functions. For example, there existed takings to build town halls, capitols, and fire stations. A later family of takings to develop under the heading of public use was for aesthetic purposes such as to establish parks and to preserve historic properties. However, these takings were rarely subject to the public use limitation and were actually accomplished under police power regulations because they did not significantly interfere with property rights. The assumption was that the stated purpose could be validly accomplished under eminent domain power if necessary.

As the development of public use doctrine progressed it became clear that it was incapable of a precise definition. It is impossible to reconcile the varying state court decisions because courts are

71. Act of May 1779, 10 HENINGS STATS. AT LG. 64, ch. 13, § 6 (1822).
72. 1 ANNALS OF CONGRESS 433, 433-36 (Gales & Seaton ed. 1789).
73. 1 NICHOLS, supra note 36, at § 1.22[8].
74. Id. at §§ 7.45, 7.49.
75. 2A NICHOLS, supra note 36, at § 7.45[2].
influenced by customs established at the time their particular state constitutions were adopted. However, two views have emerged that attempt to define what the term means.

1. "Narrow View" v. "Broad View"

The narrow view holds that "public use" is "use by the public" and that the public must be entitled to use or enjoy the property taken. The term means either "use of the many" or "by the public." So long as the use is not for a particular individual, it may be limited to the common use of the residents of a small locality and still be considered public use. Under this view, whether a use is public or not requires an inquiry into the particular facts and is determined by the extent of the "right of public to its use and not by the extent to which that right is or may be exercised."

The broad view, on the other hand, holds that public use means "public advantage" and that "anything tending to enlarge the resources and promote the production power of a considerable number of the inhabitants of a state" does contribute to the general welfare, hence the prosperity brought to the entire community constitutes public use. Judicial opinion following the broad view considers the narrow view to no longer prevail. Under the broad view the prevention of evil may constitute a public use and this is exactly the phraseology the Court used in Hawaii Housing Authority v. Midkiff to justify the taking as for public use.

As a result of an earlier period of accelerated industrial development, the broad view is typically used today. An example of this was shown by the drive to develop western resources when Colorado allowed the use of eminent domain to almost any source of capital that could use it. What had been considered conventional private uses were constitutionally declared public and some state constitutions declared that property could be taken for private use.

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76. Id. at § 7.02.
77. Id. at § 7.02[1].
80. 2A NICHOLS, supra note 36, at § 7.02[2].
81. Hawaii Housing Authority at 2330.
82. 2A NICHOLS, supra note 36, at § 7.03.
83. Id. at § 7.60.
84. Id. at § 7.6; COLO. REV. STAT. § 38-2-104 (1972) (Statute grants mineral landowners the
2. Role of the United States Supreme Court

It was the common practice for the states to condemn land on behalf of the federal government, but when this practice failed, the United States Supreme Court stated that the federal government had its own eminent domain power. At this point a body of federal doctrine began and developed its own concept of public use, relying heavily on the state cases defining public use. The Supreme Court sidestepped taking a position on the "narrow versus broad" public use test and its tendency to apply a general one soon became clear.

It was not until 1896 that the United States Supreme Court finally held outright that the fifth amendment public use requirement applied to the states. In this case, for the first and only time, it invalidated a state exercise of eminent domain. But generally, the United States Supreme Court shows great deference to state court findings and has not reviewed a state court finding of public use in some time.

III. Reasoning of the Court

The Court in Hawaii Housing Authority v. Midkiff began its discussion of the case with a recital of the history of landholding systems from the time of Hawaii's settlement by Polynesian immigrants, through a period of feudal land tenure in which there was no private ownership of land, to the current system in which private ownership of fee simple title is concentrated mainly in the hands of only a few private landowners. Citing the legislature's conclusion that "concentrated land ownership was responsible for

right to condemn property necessary to connect, construct, and operate railway spurs from their tracts across land owned by other private individuals.

85. Trombley v. Humphrey, 23 Mich. 471 (1871) (The practice failed because it was held to be unconstitutional, not within the sphere of state powers, and an appropriation of individual property without due process of law for a state to condemn property on behalf of the federal government).

86. Meidinger, supra note 57, at 30.

87. Id.


89. Id. at 417. (The Court held that the state's taking of one person's private property for the private use of another, without the owner's consent, violated the fourteenth amendment to the United States Constitution and was not due process of law).


skewing the state's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare," the Court, after recognizing that the legislature had accommodated the landowner's federal tax concerns and had created an agency and procedural guidelines for condemning and retransferring titles, reversed the decision of the United States Court of Appeals below. The United States Supreme Court held that:

the public use clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, did not prohibit the state from taking residential property from lessors and transferring it to lessees in order to reduce the land oligopoly in Hawaii.

The Court discussed earlier decisions which diluted the public use doctrine. Three cases were cited in the opinion for support of the holding which stated that the Hawaii Land Reform Act of 1967 did not violate the public use requirement of the fifth amendment. The first, Berman v. Parker, represents one of the broadest constructions of the public use limitation to date. The case involved the District of Columbia Redevelopment Act of 1945 for the redevelopment of substandard housing and blighted areas in the District of Columbia. It delegated to an agency the authority to acquire real property in certain designated areas through eminent domain for possible sale or lease to private interests. The authority granted was pursuant to an overall plan of development; and, non-blaited properties, if located within the designated area, were susceptible to condemnation and transfer to private interests. The Court held that redevelopment of the district was a public purpose for which the Congress could properly exercise its police power and the power of eminent domain. It also held that Congress could attain that purpose on an area basis. The Court then went on to speak of its role in passing on the action of the legislature in granting this authority by stating that "each case must turn on its own facts." The public use definition is a product of the legislature's determinations and "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." The legislature is the main guardian of the public

92. Hawaii Housing Authority at 2325.
93. Id. at 2332.
94. Id. at 2324.
96. Id. at 32.
97. Id.
needs to be served, and not the judiciary. The Court in Berman cited Old Dominion Land Co. v. United States which stated that "the role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one." Second, in People of Puerto Rico v. Eastern Sugar Associates, the Court of Appeals for the First Circuit considered whether a taking of private land to provide means for squatters and slum dwellers to acquire parcels of land on which to build their homes was for a public use. The court concluded that the lands belonging to Eastern Sugar Associates could be condemned and transferred to private parties pursuant to an overall plan to relieve acute economic distress to its inhabitants.

The third, United States ex. rel. Tennessee Valley Authority v. Welch, also permitted condemnation of land and relocation of private parties as part of an "inseparable transaction" and pursuant to the overall construction plan to build the Fontana Dam on the Little Tennessee River in North Carolina. As part of the project a reservoir had been built which cut off the sole road to a residential area. The TVA's condemnation of the isolated section was upheld as part of the overall project. The decisions rendered in TVA, Berman, and Eastern Sugar Associates are the foundation upon which the Court's decision rests.

In reaching its decision, the Court's starting point for analysis of the constitutionality of the Land Reform Act of 1967, under whose authority the condemnations were occurring, was the Berman v. Parker case. The Court quoted extensively from the language of that case in which the District of Columbia Redevelopment Act of 1945 provided that the power of eminent domain could be used "to redevelop slum areas and for the possible sale or lease of the condemned lands to private interests." Addressing the question of whether such a use constituted a "public use," the Court in Berman was quoted as saying that "each case must turn on its

98. Id.
100. 156 F.2d 316, 318, cert. denied, 329 U.S. 772 (1946).
101. Id. at 324.
102. 327 U.S. 546 (1945).
103. Id. at 552-53.
105. Hawaii Housing Authority at 2328.
106. Id.
own facts" and that, "subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." In Berman, one of the means chosen was the use of private enterprise for redevelopment of an area. The Court there decided that the taking did not amount to a taking from one businessman for the benefit of another businessman and that once the public purpose for the taking had been established by Congress, the means of accomplishing that purpose were for Congress alone to determine. Relying on Berman as the foundation for both the holding of the case and the necessity for judicial deference to legislative determinations of public purpose, the Court in Hawaii Housing Authority v. Midkiff concluded that the "public use requirement is thus coterminous with the scope of a sovereign's police powers."

The Court then moved into a more detailed discussion of the role that courts should play when reviewing the legislature's judgment of what constitutes a "public use," given that the eminent domain power is equated with the police power. It quoted from Berman the principle that the judicial role of review is "an extremely narrow" one and from Old Dominion Land Company v. United States, cited with approval in Berman, that judicial deference to the legislature's determination of public use is required "until it is shown to involve an impossibility." United States of America ex. rel. Tennessee Valley Authority v. Welch was cited as recognizing the proposition that such judicial restraint must be shown, otherwise, courts would decide on what is and is not a governmental function, doing so on the basis of their opinion at the particular moment of decision. The Court then buttressed its approval of judicial deference with support from United States v. Gettysburg Electric Railway Company stating that a court should

107. Id. quoting Berman v. Parker at 32.
108. Id. at 2329, quoting Berman v. Parker at 32.
110. Id.
111. Hawaii Housing Authority at 2329.
112. Id.
113. Id. quoting Berman at 32.
115. Hawaii Housing Authority at 2329 quoting Old Dominion Land Co. at 66.
117. Hawaii Housing Authority at 2329.
118. 160 U.S. 668 (1896).
not substitute the legislative determination of public use with its own "unless the use be palpably without reasonable foundation." 119

The Court then reiterated that one person's property could not be acquired to benefit another private person without a justifiable public purpose. 120 It restated the test requiring only a rational relation of the eminent domain use to a conceivable public purpose, noting that it had never held a compensated taking to be prohibited by the public use clause. 121 On this basis the Court concluded that the Hawaiian Land Reform Act was constitutional in serving the public purpose of regulating oligopoly and the evils associated with it and that it was a classic exercise of a state's police powers. 122 To support this conclusion it cited People of Puerto Rico v. Eastern Sugar Associates 123 which upheld the condemnation of privately-owned land for reconveyance to other private parties under a program of agrarian reform. 124 The Court flatly stated that the land market was malfunctioning and that the market dilution goals and guidelines of the Hawaiian Housing Authority were a "comprehensive and rational approach to identifying and correcting market failure." 125

Given that it was decided to be a rational exercise of eminent domain power, the statute then was subject to the scrutiny of the public use clause. 126 Flatly rejecting the lower court's call for more strict scrutiny of public use determinations than mere rationality, the Court without further comment moved into a discussion of whether it was the taking's purpose or the taking's mechanics that had to pass scrutiny under the public use restriction. 127 Focusing on the taking's purpose, the Court cited with approval another case that had held it was "not essential that the entire community, nor even any considerable portion, ... directly enjoy or participate in any improvement in order [for it] to constitute a public use." 128 The Court held that property may be "transferred in the first

120. Hawaii Housing Authority at 2329.
121. Id. at 2329-2330.
122. Id. at 2330.
123. 156 F.2d 316 (1st Cir. 1946), cert. denied, 329 U.S. 772 (1946).
124. Id. at 324.
125. Hawaii Housing Authority at 2330.
126. Id.
127. Id. at 2331.
instance to private beneficiaries" and that the government does not have to use the property to make the taking legitimate. Instead, it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the public use clause. The Court's final assertion that no purely private taking was involved in this case ended the discussion. A reversal of the lower court's decision of unconstitutionality of the Land Reform Act was entered.

IV. ANALYSIS

In Hawaii Housing Authority v. Midkiff a unanimous Court pushed the public use restriction on eminent domain takings to its furthest point, if not to complete extinction. Since the United States Supreme Court seldom hears cases on this issue and has established a history of great judicial deference to legislatures' determination of "public use," it is of some import that this case was even heard. It also appears that the Court has used a novel approach of equating the public use requirement with the scope of the sovereign's police power.

Bluntly stating that the public use requirement is coterminous with the scope of the police power, the Court is announcing that the public use requirement is subsumed and that the only test that need be met is, as for the state use of police power, whether the regulation of property rights is for the safety, morals, health, or general welfare of the public. Since regulation of property by police power is only an "interference" not deemed to be a "taking" until it rises to the level of significant and substantial interference with the owner's use and enjoyment of property, it need not meet the two restrictions placed on an exercise of eminent domain power:

129. Hawaii Housing Authority at 2331 quoting with approval Block v. Hirsh, 256 U.S. 135 (1921) ("[W]hat in its immediate aspect [is] only a private transaction may . . . be raised by its class or character to a public affair." The fact that condemned property is "transferred in the first instance to private beneficiaries [does] not condemn that taking as having only a private purpose." Block at 155).
130. Hawaii Housing Authority at 2331.
131. Id.
132. Id. at 2332.
133. United States ex. rel. Tennessee Valley Authority v. Welch, 327 U.S. 546 (1946) (Having found the existence of constitutional power, eminent domain may be employed and the court will assume the existence of public use. In TVA, the condemnation was pursuant to an overall plan, an inseparable transaction, and this was in keeping with relevant case history. Hawaii Housing Authority v. Midkiff broke away from that precedent. See infra text accompanying notes 141-146).
134. U.S. Const. amend. V.
1) that the individual receive compensation for his property "taken"; and 2) that the property "taken" be for a public use. By placing the public use restriction on equal footing with the exercise of police power which has only a requirement of a minimal rational means-to-objective relationship, it seems that the Court has sidestepped having to justify its findings of constitutionality of the statute here in question through judicial examination of the facts determinative of "public use." Consonant with this evasive maneuver is the careful attention the Court gave in the immediate ensuing discussion to detailing exactly how great the judicial deference must be when the public use restriction is coterminous with the scope of the police power, as it stated it was here. It is interesting to note that if the alleged public use in this case were facially "public" and not necessitous of interpretation, there would be no need to equate the public use requirement with the scope of the police power to escape meeting the public use test.

The Court declared that regulating the evils associated with the land oligopoly in Hawaii was a classic exercise of police power and upheld the "regulation" as being a "rational" approach. But the problem here is that the "regulation" is more than mere interference with property rights—it amounts to a "taking" that invokes the requirement of compensation and public use. Hence, the mere rationality of the statute cannot alone save it.

The Court does seem to draw back from the stance it takes in equating the public use requirement with the scope of state police power by stating that beyond being a rational exercise of eminent domain power, the statute must pass the scrutiny of the public use clause. Facially, this appears to emasculate the loosening of the public use restriction that they had just accomplished; factually it does not. The Court summarily rejected the lower court's plea for more strict scrutiny in public use determinations and continued with an emphasis on substance over form by stressing the importance of the taking's purposes rather than its mechanics. By focusing on "purpose" rather than "use" or form, almost any means can withstand constitutional analysis. Granted, the purpose is important and must be within the legislature's ambit of authority to

135. Id.
136. Hawaii Housing Authority at 2330.
137. Id. at 2329.
138. Id. at 2331.
139. Id.
effectuate, but to ignore the mechanics by which the statute operates is to disregard what amounts to an unprecedented interference with private property rights. To do so in this case permits the transfer of fee simple title to land from one private party to another.

Hawaii Housing Authority pushes the "public use" restriction to its outer limits and then beyond that. Historically, some incidental private benefit has always been permitted so long as the basic use of the condemned property was "public." It now appears that the benefit may be primarily private and only incidentally public. The Court has broken precedent in holding for the first time that a transfer of property rights need not be pursuant to an overall development plan.\footnote{Id.} In \textit{Berman v. Parker},\footnote{348 U.S. 26 (1954).} which the Court cites as the starting point of its analysis, the condemnation of private property and subsequent sale or lease to private interest was permissible as part of an overall redevelopment plan to eradicate slums and blight in designated areas. Other cases extending the public use limitation were similarly linked to overall plans.\footnote{See infra notes 143-146 and accompanying text.}

In \textit{People of Puerto Rico v. Eastern Sugar Associates},\footnote{156 F.2d 316 (1st Cir. 1946), cert. denied, 329 U.S. 772 (1946).} a condemnation of land for sale or lease to other private parties for use by them personally was upheld as part of an overall program of agrarian reform having a direct effect on all islanders dependent upon the land for their livelihood. In \textit{United States ex. rel. Tennessee Valley Authority v. Welch},\footnote{327 U.S. 546 (1946).} the condemnation of private property was upheld in order to relocate private parties who had been isolated from road access and police and fire protection by the TVA's construction of a dam. This "additional" land taken was viewed as part of an inseparable transaction and was held to be taken for a public use as part of the overall Fontana Dam project.\footnote{Id. at 548-549.}

What sets \textit{Hawaii Housing Authority v. Midkiff} apart from the above cases is the fact that the condemnation and redistribution of fee simple titles has no relation to any overall plan of development. The redistribution of land ownership can now be effected merely upon the request of the individual lessee.\footnote{Hawaii Housing Authority at 2331.}

\begin{itemize}
\item \textbf{140.} Id.
\item \textbf{141.} 348 U.S. 26 (1954).
\item \textbf{142.} See infra notes 143-146 and accompanying text.
\item \textbf{143.} 156 F.2d 316 (1st Cir. 1946), cert. denied, 329 U.S. 772 (1946).
\item \textbf{144.} 327 U.S. 546 (1946).
\item \textbf{145.} Id. at 548-549.
\item \textbf{146.} Hawaii Housing Authority at 2331.
\end{itemize}
This sort of situation was foreshadowed years earlier by four Justices dissenting in a decision to uphold emergency legislation permitting tenants to hold over on their leases during a two-year period by simply continuing to pay the rent.\(^{147}\) The dissent cried out against creeping socialism but what they were actually addressing was the opening of the door for massive interference with property rights, be that interference by the state or by individuals.\(^{148}\) The case had held that this cutting down of the landlord's use and possession of his property was made necessary by conditions resulting from World War I.\(^{149}\) The dissenters warned against this first step in the invasion of property rights by quoting a maxim, "Withstand beginnings;"\(^{150}\) and then questioning, "who can know to what end they will conduct?"\(^{151}\) The effect and evil of the legislation was that it withdrew the dominion of property from its owners on the mere basis that the "disproportion in landlords to tenants somehow made a tyranny in the landlord and an oppression to the tenant."\(^{152}\) The case turned on housing as a necessity of life and the dissenters feared that other things that were as necessary "might also be taken from the direction of their owners and disposed of by the government."\(^{153}\) "If the public interest may be concerned . . . with the control of any form of property, it can be concerned with the control of all forms of property."\(^{154}\) The dissenters' worst fears—that interests beyond a landlord's right to use and possess his property could be consumed by police power—have been realized in *Hawaii Housing Authority v. Midkiff.*

If this approach can be taken to effect the redistribution of fee simple title in land from one private individual to another, what other interests may also be redistributed? Will the government now "compel a citizen to surrender his productive and attractive property to another citizen who will use it predominantly for his own private profit just because such private alternative use is considered preferable in the subjective notion of governmental authorities . . . ?"\(^{155}\) Does the state now have "the power to take

\(^{147}\) Block v. Hirsh, 256 U.S. 135, 158-170 (1921).

\(^{148}\) *Id.* at 162.

\(^{149}\) *Id.* at 158.

\(^{150}\) *Id.* at 160 quoting Boyd v. United States, 116 U.S. 616 (1886).

\(^{151}\) Block *at* 160.

\(^{152}\) *Id.* at 161.

\(^{153}\) *Id.*

\(^{154}\) *Id.* at 161-62.

\(^{155}\) City of Owensboro v. McCormick, 581 S.W.2d 3, 4 (Ky. 1979) (holding that condem-
an ongoing business” and retransfer it to private ownership “to prevent it from leaving a particular area?” These questions and others arise. Now such takings need only be within the scope of the police power and no longer pursuant to an overall development plan. The unanimous holding in Hawaii Housing Authority v. Midkiff indicates that the public use limitation is no longer extant.

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nation of a citizen’s property by a local industrial development authority to reconvey it to another citizen who will use it predominantly for his own private profit is repugnant to state constitutional protections).

156. City of Oakland v. Oakland Raiders, 32 Cal.3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982) (remanding the case so that the City of Oakland should have the opportunity to prove its case concerning condemnation of all property rights associated with Oakland Raiders’ ownership of a professional football team).
NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS: A QUANTUM LEAP FOR OHIO?
PAUGH V. HANKS, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983).

In Schultz v. Barberton Glass Co., the Ohio Supreme Court recently held that a cause of action may be stated by one who alleges negligent infliction of serious emotional distress even if he suffers no contemporaneous physical injury. By so holding, the court drastically changed Ohio law, overruling its seventy-five year old rule to the contrary and joining the more liberal jurisdictions in recognizing that an individual's right to emotional tranquility is entitled to independent legal protection. The dissent, while conceding that a change in the law was overdue, criticized the majority for its failure to guide future courts in the application of this "boundless" law.

Three months later the court demonstrated just how far it was willing to go in order to allow a plaintiff to present her case to the courts. In Paugh v. Hanks, the plaintiff was not physically harmed, but she claimed emotional distress because of her fear of what might have happened to her children as a result of the noncontemporaneous negligence of three different defendants. The court extended Schultz to allow a bystander, fearful for the safety of another, to recover whether or not the direct victim was actually harmed. Realizing that "some may view our decision today as an unsettling quantum leap into this difficult area of the law," the court nonetheless believed it was a necessary decision if Ohio courts were to keep pace with the twentieth century law and society.

This note will review the experiences of other jurisdictions in dealing with the evolution of the tort of negligent infliction of emotional distress. It will then: one, look at the previous Ohio law

1. 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983).
2. Id. at 136, 447 N.E.2d at 113.
5. Schultz, 4 Ohio St. at 140, 447 N.E.2d at 116 (Holmes, J., dissenting).
6. 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983).
7. Id. at 80, 451 N.E.2d at 767.
8. Id. at 74, 451 N.E.2d at 762.
and the changes brought about by the Schultz and Paugh decisions; two, examine the special problems Ohio may expect to encounter as it applies general negligence principles and the Paugh guidelines to this new mental distress tort; and three, consider the implications for the future as Ohio adopts what is undoubtedly the most liberal approach to date in providing a remedy for the plaintiff who alleges a violation of her right to emotional tranquility.

I. EARLY HISTORICAL DEVELOPMENT OF THE NEW MENTAL DISTRESS TORT

Traditionally, the courts have refused to grant relief for mental suffering alone. According to the Restatement (Second) of Torts § 436A there can be "no recovery for mental distress alone unless accompanied by physical impact or resulting in physical injury or objective manifestations thereof." Since a literal application of this rule would have very harsh results, the courts have long recognized exceptions in certain cases. For example, recovery has been allowed for the negligent transmission of death messages by telegraph companies and for negligent mishandling of corpses. Courts also have been willing to grant "parasitic" damages for mental suffering that accompanies physical harm. The common law rule is that damages are aggravated by mental or emotional suffering that results from the physical injury, but there can be no cause of action for such suffering alone.

9. Jurors can more easily understand physical injury that they can see and to which they can possibly relate. With emotional distress it is more speculative as to the "extent or even the existence of any lasting emotional injury." Note, Molien v. Kaiser Foundation Hospitals: Negligence Actions for Emotional Distress and Law of Consortium Without Physical Injury, 69 Calif. L. Rev. 1142, 1158 (July 1981) [hereinafter cited as Note, Emotional Distress].
All states make an exception to the no-recovery rule when the emotional distress is intentionally inflicted. The Restatement (Second) of Torts, however, requires that the defendant's behavior be "extreme and outrageous" and the emotional stress "so severe that no reasonable man could be expected to endure it." Even though no physical impact or injury is demonstrated, the courts have found that the plaintiff has stated a cause of action because such conduct can be evaluated objectively by the jury.

Thus, in situations where there has been an intentional infliction of emotional distress, courts have been more willing to grant relief than in situations where the alleged emotional harm was negligently inflicted. The reluctance of the courts to grant recovery for emotional distress stemmed from a fear that recovery would result in unlimited liability or liability out of proportion to the culpability of the tortfeasor which would put an unreasonable burden on members of society. Therefore, for public policy reasons,

15. The tort of intentional infliction of emotional distress was not recognized in Ohio until 1983 in the case of Yeager v. Local Union 20, 6 Ohio St. 3d 369, 453 N.E.2d 666 (1983), which was decided four months after Schultz v. Barberton Glass Co., 4 Ohio St. 2d 131, 447 N.E.2d 109 (1983) in which Ohio adopted tort of negligent infliction of emotional distress.

16. § 46. Outrageous Conduct Causing Severe Emotional Distress

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.

RESTATEMENT (SECOND) OF TORTS § 46 (1965).

17. Id. at § 46, comment j.

18. See State Rubbish Collectors Association v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952), cited in Note, Emotional Distress, supra note 9, at 1154. "[T]he threatening conduct designed to intimidate plaintiff could serve as the objective basis for a jury inference of emotional distress." Id.

19. See Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969). In denying bystander recovery to a mother whose child was killed by a negligent motorist because the mother was not physically within the zone of danger, the court pointed out the potential for unlimited liability and insurance problems with such cases. The possibility of psychological harm exists when any parent loses a child, whether she views the "gore and exposed bone" or learns of it later. Id. at 617, 249 N.E.2d at 423, 301 N.Y.S.2d at 560. Cf. Bovsun v. Sanperi, 61 N.Y.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 (1984). The Bovsun Court distinguished Tobin on its facts, in effect overruling the Tobin no-recovery rule. The court continued, however, to restrict recovery to those within the zone of danger in an attempt to prevent unlimited liability. See also Dillon v. Legg, 68 Cal.2d 728, 441
the courts have created various rules or artificial barriers to limit potential liability in cases alleging negligent infliction of emotional distress. While some jurisdictions have abolished the more arbitrary rules, all courts have found it necessary to limit liability in some way.\textsuperscript{20}

A major policy reason given by judges to justify the erection of barriers to recovery is that the difficulty of proving mental or emotional injury necessitates such barriers to prevent the bringing of fraudulent and fictitious claims by unscrupulous plaintiffs.\textsuperscript{21} In general, the courts have failed to recognize the advances in psychiatry and psychology in recent years and have thus assumed that the same proof problems that existed in 1900, for example, persist in present times.\textsuperscript{22} In 1897, the Massachusetts Supreme Court, in \textit{Spade v. Lynn & Boston R.R. Co.},\textsuperscript{23} pointed out that some physical impact was required to supplement a claim for emotional distress because “in practice it is impossible to administer any other rule.”\textsuperscript{24} Some modern courts, however, have held that even with proof problems, a plaintiff should not be denied an opportunity to present her case in court.\textsuperscript{25}

Courts have also cited their fear of a “flood of litigation” which would overburden the courts as another public policy reason justifying the rules restricting liability.\textsuperscript{26} Dean Prosser's famous reply to this was that:

\begin{quote}
P.2d 912, 69 Cal. Rptr. 72 (1968) (court sought to limit liability by requiring that the harm to plaintiff be reasonably foreseeable at the time of the accident).

20. Even the liberal Ohio Supreme Court requires that the emotional distress “be both serious and reasonably foreseeable.” Paugh v. Hanks, 6 Ohio St. 3d 72, 78, 451 N.E.2d 759, 765 (1983).


22. Kentucky for example still requires some physical impact or injury. \textit{See} Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980). The Kentucky Supreme Court, quoting Morgan v. Hightower's Administrator, 291 Ky. 58, 59-60, 163 S.W.2d 21, 22 (1942), held that there could be no action for mental anguish absent physical contact or injury because the “damages are too remote and speculative, are easily simulated and difficult to disprove, and there is no standard by which they can be justly measured.” Deutsch v. Shein at 145-46. \textit{But see} Batalla v. State of New York, 219 N.Y.S.2d 34, 176 N.E.2d 729, 10 N.Y.2d 237 (1961) (New York's highest court held that a legal remedy could not be denied in all cases merely because of the possibility of fraud or problems of proof in some cases. The court reasoned that lower courts could rely on the contemporaneous sophistication of the medical profession, and on the jury to weed out dishonest claims).


24. \textit{Id.} at 265, 47 N.E. at 89.


It is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation'; and it is a pitiful confession of incompetence on the part of any court to deny relief upon the ground that it will give the courts too much work to do.\(^{27}\)

As indicated, some courts and writers agree with Prosser and no longer find the "flood of litigation" reason persuasive. It remains, however, a viable concern in many jurisdictions today.\(^{28}\)

Because of such fears and concerns, the first courts to allow recovery for negligently inflicted emotional distress required a showing that the plaintiff had suffered some physical impact or injury as a result of the defendant's negligence. This "impact rule" originated in England in 1888, but was abolished in that country by 1901.\(^{29}\) The rule was first adopted in the United States in *Mitchell v. Rochester Ry. Co.*\(^{30}\) There the plaintiff, waiting to board the defendant's horse-drawn carriage, was so frightened by the negligently managed horses that she was rendered unconscious when they came near her, even though they did not physically touch her. After hearing medical testimony that the fright produced a miscarriage and physical illness, the court denied recovery because there was no immediate personal impact.\(^{31}\)

While many courts were rejecting seemingly legitimate claims for lack of impact,\(^{32}\) others were straining to overcome this harsh, mechanical rule by finding impact in any tenuous or minimal contact.\(^{33}\) The classic case pointing out the absurdity of this rule

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\(^{30}\) Id.

\(^{31}\) See *Gilliam v. Stewart*, 271 So.2d 466 (Fla. 1972) rev'd, 291 So.2d 593 (Fla. 1974) (no recovery for plaintiff who suffered chest pains and a subsequent heart attack after defendant crashed into her house); In Estate of Harper v. Orlando Funeral Homes, Inc., 368 So.2d 126 (Fla. Dist. Ct. App. 1979) (no recovery for relatives' who observed decedent's casket fall apart while being transported to grave site); Spade v. Lynn & B.R. Co., 168 Mass. 285, 47 N.E. 88 (1897) (no recovery for emotional distress if no injury from without); Sullivan v. H.P. Hood & Sons, Inc., 341 Mass. 216, 168 N.E.2d 80 (1960) (swallowing fecal matter of a mouse in milk did not satisfy the impact rule).

\(^{32}\) See, e.g., Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980) (court found impact in X-rays which "bombarded" patient's body); Louisville & Nashville R.R. Co. v. Roberts, 207 Ky.
is Christy Bros. Circus v. Turnage in which the court found sufficient impact when a prancing horse defecated in the plaintiff's lap. By allowing damages for the most trivial contact, the courts undermined their own purpose in creating the rule, which was to ensure the genuineness of claims.

The impact rule has been criticized as one which will deter "honest claimants" rather than those intent upon deceiving the courts. Most jurisdictions have abolished the impact rule because of its harsh and unfair results. But instead of recognizing the negligent infliction of emotional distress as an independent tort as urged by some writers, a majority of courts have opted to maintain some kind of judicially-created limitation on liability.

II. MODERN TREND

The modern trend has been a gradual development by the courts of different theories under which a plaintiff may recover for negligently inflicted mental distress. These theories of recovery vary somewhat in application, but basically, courts allow recovery to two groups of potential plaintiffs; those who are physically located within the zone of actual danger, and those bystanders who, though not within the zone of danger themselves, are injured physically or mentally by the defendant's conduct. The different

310, 269 S.W. 333 (1925) (requirement of impact satisfied by slight jolt); Conley v. United Drug Co., 218 Mass. 238, 105 N.E. 975 (1914) (plaintiff fainted after explosion and bruises from fall constituted impact).
34. 38 Ga. App. 581, 144 S.E. 680 (1928).
35. See, e.g., Deutsch v. Shein, 597 S.W.2d 141, 146 (Ky. 1980) (damages for mental distress must be the direct and natural result of physical contact no matter how minimal or slight); Porter v. Delaware, L & W R.R. Co., 73 N.J.L. 405, 63 A. 880 (1906) (dust in eyes from a railway bridge accident irritated eyes); Potere v. City of Philadelphia, 380 Pa. 581, 589, 112 A.2d 100, 104 (1955) (court stated that bodily injuries, though trivial and minor, combined with mental suffering caused by the defendant's negligence transforms the mental suffering into an element of damages).
37. For an extensive list of courts abandoning the impact rule, see Id., pp. 9-11.
39. See, Joseph, supra note 38. The author sees this as a step-by-step "controlled growth" which allows the courts to feel more secure as they move toward eventually removing the duty limiters and applying general tort principles in these cases. Id. at 20-21.
40. See Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).
jurisdictions have added their own special requirements for recovery such as physical injury to the bystander, injury or death of the victim, or foreseeability of harm.\textsuperscript{42}

Under the "zone of danger" rule, a plaintiff who is physically endangered by a defendant’s negligence and who fears for his own safety may recover for the emotional distress he suffers even if he experiences no physical impact or injury.\textsuperscript{43} Such a plaintiff might be a direct victim of the defendant’s negligence or a bystander located within the zone of danger who observes another person physically harmed as a result of the defendant’s negligence.

A leading case refusing to extend bystander recovery to one outside the zone of danger is \textit{Waube v. Warrington},\textsuperscript{44} in which a mother died of emotional shock after seeing her daughter killed by a negligent motorist. Balancing the defendant’s duty against the plaintiff’s rights, the court determined that no duty was owed to a person located outside the zone of physical danger.\textsuperscript{45} The \textit{Waube} court expressed its fears of the ramifications of a less strict rule, stating that there would be "no sensible or just stopping point."\textsuperscript{46}

In a 1983 case, \textit{Rickey v. Chicago Transit Authority},\textsuperscript{47} Illinois abolished its eighty-six year old impact rule and adopted the "zone of danger" rule. Robert Rickey, a minor, watched as his younger brother was seriously injured when his clothing caught in the workings of a descending escalator. Robert suffered no impact or injury at the time, but alleged that as a result of seeing his brother injured, he suffered serious emotional distress manifested by physical injury.\textsuperscript{48} The court held that a bystander who is within the zone


\textsuperscript{44} 216 Wis. 603, 258 N.W. 497 (1935).

\textsuperscript{45} Id. at 603, 258 N.W. at 501. The court relied on \textit{Palsgraf v. Long Island R.R.}, 248 N.Y. 339, 162 N.E. 99 (1929) in holding that the plaintiff must be located in an area of risk and sue because of a personal wrong to him. \textit{Id.} at 501, 258 N.W. at 498. \textit{But see Johnson v. Jamaica Hospital}, 95 A.D.2d 598, 467 N.Y.S.2d 634 (App. Div. 1983) (court which then precluded all bystander recovery refused to characterize parents of kidnapped infant as bystanders and allowed them to recover as direct victims to whom defendant hospital owed a duty).

\textsuperscript{46} \textit{Waube v. Warrington}, 216 Wis. 603, 258 N.W. 497, 501 (1935).

\textsuperscript{47} \textit{Ill.}2d 603, 457 N.E.2d 1 (1983).

\textsuperscript{48} \textit{Id.} at 603, 258 N.W. 497. There was no allegation that Robert feared for his own safety. \textit{Id.}
of physical danger and who fears for his own safety has a right of action for physical injury or illness resulting from the defendant's negligence. The court pointed out that a majority of jurisdictions considering bystander recovery have adopted this rule which requires close proximity to the accident, a high risk of impact, and resulting physical injury or impact.

While the "zone of danger" rule is broader than the impact rule, it still excludes an important group of potential plaintiffs, bystanders who are in no danger themselves, but who fear for the safety of others. Concern for such plaintiffs led the California Supreme Court to adopt the bystander-recovery or foreseeability rule in the seminal case of Dillon v. Legg. The particular facts of Dillon were persuasive. A mother, outside the zone of physical danger to herself, watched as her infant daughter was killed by a negligent motorist. She alleged that as a proximate cause of the defendant's negligence, she suffered physical injury. The court considered the possibility of fraudulent claims in this type of bystander case, but concluded that such a possibility, highly unlikely in a mother-child situation, was no justification for erecting artificial barriers to recovery. Applying a foreseeability analysis, the court held that it would be anomolous to allow the decedent's sister, and not the mother, to recover simply because the sister was geographically closer to the accident.

While acknowledging the need of a plaintiff such as Ms. Dillon to recover, the California court was not yet ready to recognize negligent infliction of emotional distress as an independent tort.

49. Id. at __, 457 N.E.2d at 5.
50. Id.
51. The zone of danger rule encompasses more potential plaintiffs because it includes not only those who were actually touched but those who narrowly escaped being touched. Under the impact rule, these "near misses" were totally excluded even though they could have been just as frightened as those who suffered an "impact." See, Lambert, supra note 36, at 5.
52. The first Restatement of Torts contained a caveat as to whether such plaintiffs should recover. Restatement of Torts § 313 (1934). The caveat was not included in the Restatement (Second) of Torts which allows recovery for "shock or fright at harm or peril to a member of his immediate family occurring in his presence." Restatement (Second) of Torts, § 436 (3) (1965).
53. 68 Cal.2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
54. Id. at __, 441 P.2d at 914, 69 Cal. Rptr. at 74.
55. Id. at __, 441 P.2d at 917, 69 Cal. Rptr. at 77-78.
56. The standard is what the reasonable man under such circumstances should have foreseen. Id. at __, 441 P.2d at 921, 69 Cal. Rptr. at 81.
57. Id. at __, 441 P.2d at 925, 69 Cal. Rptr. at 85.
capable of resolution using general negligence principles alone. Limiting recovery to plaintiffs who were physically injured as a result of the emotional shock, the court set out specific guidelines for future cases:

In determining, in such a case, whether defendant should reasonably foresee the injury to plaintiff, or, in other terminology, whether defendant owes plaintiff a duty of due care, the courts will take into account the following: (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after the occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with absence of any relationship or the presence of only a distant relationship.

Applying these guidelines to subsequent cases, the California Supreme Court has been criticized as transforming the "flexible Dillon guidelines into immutable requirements" resulting in a denial of recovery for any deviation. California no longer strictly adheres to these requirements. In Molien v. Kaiser Foundation Hospitals, the court dropped the physical injury requirement and allowed recovery for negligent infliction of emotional distress alone. Several jurisdictions have adopted the Dillon foreseeability analysis or a variation of it. New York, for example, recently combined Dillon guidelines with several strict, "zone of danger" requirements in the case of Bovsun v. Sanperi. Lifting its absolute bar to any bystander recovery, the court was very specific as to when a bystander may recover. It held:

Where a defendant's conduct is negligent as creating an unreasonable risk of bodily harm to a plaintiff and such conduct is a substantial factor in bringing about injuries to the plaintiff in consequence of shock or fright resulting from his or her contemporaneous observation of serious physical injury or death inflicted by the defendant's conduct on a member of the plaintiff's immediate

58. Id. at ___, 441 P.2d at 920, 69 Cal. Rptr. at 80.
59. Id.
60. Note, supra note 29, at 242.
61. 27 Cal.3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).
family in his or her presence, the plaintiff may recover damages for such injuries.\textsuperscript{64}

It is obvious that it would be much easier to recover under the more flexible Dillon requirements. The New York requirements that the accident occur in the plaintiff's presence to a member of his immediate family is very restrictive and the court indicated that in order to recover, a plaintiff would have to come strictly within this rule. New York had previously excluded all bystander recovery in Tobin v. Grossman,\textsuperscript{65} because of its fears of unlimited liability. The Bovsun court pointed out that the result in Tobin would have been the same under the new rule because the plaintiff in Tobin was not within the "zone of danger" of bodily harm.\textsuperscript{66} The court was careful to emphasize that it was merely enlarging the scope of recovery, and not creating a new cause of action.\textsuperscript{67}

Other courts have gone the opposite way and broadened the foreseeability rules to allow more plaintiffs to recover. These cases fall within a "beyond-bystander,"\textsuperscript{68} or beyond Dillon, rule. The Supreme Judicial Court of Massachusetts adopted a reasonable foreseeability standard for bystander recovery, but did not require that the bystander actually observe the injury to the victim in Dziokonski v. Babineau.\textsuperscript{69} In Dziokonski, a mother, who did not witness her daughter's death, arrived on the accident scene shortly thereafter. The mother died while she was a passenger in the ambulance transporting her injured daughter to a hospital. In extending Dillon to cover a mother who does not meet the first two Dillon requirements, the court reasoned that the zone of danger rule "is an inadequate measure of the reasonable foreseeability of the possibility of physical injury resulting from a parent's anxiety arising from harm to his child."\textsuperscript{70} The court then added additional requirements in an effort to prevent undue liability: one, there

\textsuperscript{64} Id. at 223-24, 461 N.E.2d at 232-33, 473 N.Y.S.2d at 358.
\textsuperscript{67} Id.
\textsuperscript{68} See Lambert, supra note 36, at 1. Beyond-bystander cases are those in which the plaintiff does not actually see the accident but sees the "bruised and bloodied body" of the victim shortly thereafter. \textit{Id.}
must be proof of "substantial physical injury" and two, proof that the injury was caused by the defendant's negligence.\textsuperscript{71} The Massachusetts court retained this requirement in \textit{Payton v. Abbott Labs,}\textsuperscript{72} where the plaintiffs sued to recover for emotional distress caused by the increased statistical likelihood that they might develop a serious illness because their mothers, while pregnant, had taken the drug diethyinstilbestrol, or DES, to prevent miscarriage. The court held that there must be physical harm "manifested by objective symptomatology and substantiated by expert medical testimony" and that the plaintiff can recover only for that degree of emotional distress which a "reasonable person, normally constituted, would have experienced under those circumstances."\textsuperscript{73}

More liberal courts have dropped the physical injury requirement altogether. These courts have held that freedom from emotional distress is worthy of legal protection and have applied the general tort principles of a negligence cause of action; duty, breach of duty, causation, damages, and foreseeability.\textsuperscript{74} The \textit{Dillon} line of cases dealt primarily with whether the negligent defendant reasonably should have foreseen the harm to the plaintiff. The Hawaii Supreme Court, in \textit{Rodrigues v. State}\textsuperscript{75} and \textit{Leong v. Takasaki,}\textsuperscript{76} looked not at the foreseeable physical harm, but at how the plaintiff would react mentally to the emotional trauma.

In \textit{Leong}, for example, the plaintiff, a ten-year old child, was walking hand-in-hand with his step-grandmother across a three-lane highway when she was struck and killed by a motorist. The plaintiff, who had stopped walking when he saw the automobile approaching, was not touched. He claimed permanent emotional injuries as a result of the nervous shock he sustained.\textsuperscript{77} The court pointed out that the deceased lived with plaintiff and his family

\textsuperscript{71} \textit{Id.}
\textsuperscript{72} 386 Mass. 540, 437 N.E.2d 171 (1982).
\textsuperscript{73} \textit{Id.} at \_\_\_, 437 N.E.2d at 181. \textit{See also} D'Ambra v. United States, 354 F. Supp. 810 (D.R.I. 1973), (federal court found that negligent infliction of emotional distress could exist as independent tort but would only be allowed under Rhode Island law if there were subsequent physical symptoms), \textit{modified on other grounds}, 481 F.2d 14 (1st Cir. 1973).
\textsuperscript{75} 52 Hawaii 156, 472 P.2d 509 (1970).
\textsuperscript{76} 55 Hawaii 398, 520 P.2d 758 (1974).
\textsuperscript{77} \textit{Id.} at 399-400, 520 P.2d at 760.
“and that she cared for him as if she were his natural grandmother.” Believing that some shock to the plaintiff was inevitable, the majority stated that it would be up to the trial court to determine whether the mental stress was such that a reasonable man could not be expected to cope with it. The court concluded that when it is reasonably foreseeable that a reasonable plaintiff-witness to an accident would not be able to cope with the mental stress engendered by such circumstances, the trial court should conclude that defendant's conduct is the proximate cause of plaintiff's injury and impose liability on the defendant for any damages arising from the consequences of the negligent act.

In addition to granting recovery to direct victims, foreseeable bystanders, and certain plaintiffs who qualify under the various beyond-bystander rules, some courts have allowed the spouse of such persons to recover for loss of consortium. In *Molien v. Kaiser Foundation Hospital*, the plaintiff's wife, after a routine physical examination, was advised by the defendant that she needed treatment for syphilis. Mrs. Molien was subsequently treated at the hospital with massive injections of penicillin. She was advised to inform her husband of her diagnosis and of his need to be tested for the disease which is communicated sexually. Mr. Molien's blood test was negative. It was eventually determined that Mrs. Molien had been negligently examined and tested and that her diagnosis was erroneous, but as a result of the emotional strain this event placed on their marriage, the Moliens initiated dissolution proceedings. Mr. Molien alleged that because of the emotional distress his wife suffered as a result of the defendant's negligence, he was "deprived of the love, companionship, affection, society, sexual relations, solace, support and services of his wife."

Under *Dillon*, Mr. Molien could not have recovered because he was not physically present when his wife was negligently diagnosed and he did not suffer physical injury at the time. The court, however, refused to be bound by the *Dillon* requirements and granted recovery because the emotional harm was a foreseeable

78. *Id.* at 400, 520 P.2d at 760.
79. *Id.* at 410, 520 P.2d at 766.
80. *Id.* at 410, 520 P.2d at 765.
81. 27 Cal.3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).
82. *Id.* at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832.
83. *Id.* at 920, 616 P.2d at 814-15, 167 Cal. Rptr. at 832-33.
84. *Id.* at 920, 616 P.2d at 815, 167 Cal. Rptr. at 833.
result of defendant's "objectively verifiable actions." The court also allowed Mr. Molien to recover for loss of consortium because his spouse had suffered a disabling, even if nonphysical, injury. After recognizing that emotional injury can be as serious and as disabling as physical injury, the court no longer had any reason to require that a plaintiff's spouse suffer physical injury in order for the plaintiff to allege loss of consortium.

No consistent rule emerges from these cases, but the trend seems to be toward removing the artificial barriers to recovery, relying on general tort principles to limit liability. As with all tort law, the rules governing this area of the law are constantly changing. The courts, acknowledging that the medical profession is better able to diagnose and treat mental illness today, are more likely to allow a plaintiff to present his claim of mental distress in court but in most jurisdictions this has been a slow process. Many jurisdictions still feel compelled to rely on some artificial barrier or restriction to recovery, such as the physical injury requirement. These barriers exist because it is difficult to prove that the mental distress exists, and even more difficult to prove that it is caused by a particular event. Even the modern courts limit liability by requiring, for example, that the plaintiff suffer "serious emotional distress." Others have emphasized the ability of jurors to consider the circumstances and apply the reasonable man standard as in other negligence cases. Another limitation on liability would be a requirement that the plaintiff present objective proof such as expert medical testimony. These limitations on liability have allowed the courts a measure of control as they expanded their law and moved toward acknowledging the negligent infliction of emotional distress as an independent tort. It seems likely that the need for such barriers to recovery will continue until medical science can offer more exact methods of proving that a person suffers emotional distress and that it was directly caused by a particular event.

III. PRIOR OHIO LAW

Since 1908 the Ohio courts have required that the plaintiff suffer a contemporaneous physical impact or injury in order to recover

85. Id. at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.
86. Id. at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832.
87. W. PROSSER, supra note 10, § 54.
88. See Rodrigues v. State, 52 Hawaii 156, 175 n.8, 472 P.2d 509, 521 n.8.
89. See supra notes 25-27 and accompanying text.
for emotional distress.\textsuperscript{90} When any physical impact—no matter how slight—was proven, the plaintiff could recover. In \textit{Morton v. Stack},\textsuperscript{91} the Ohio Supreme Court, straining to find impact, held that inhalation of smoke was sufficient impact to assure physical injury. The Ohio courts have also allowed recovery for emotional distress in special circumstances, such as malice on the part of the wrongdoer,\textsuperscript{92} invasion of the right to privacy,\textsuperscript{93} and invasion of the right of burial of the dead.\textsuperscript{94}

In 1983, Ohio overruled its prior case law by holding, in \textit{Schultz v. Barberton Glass Co.},\textsuperscript{95} that a cause of action may be stated for negligent infliction of emotional distress without proof of a contemporaneous physical injury. The plaintiff in \textit{Schultz}, a direct victim, was driving behind the defendant's truck when a huge sheet of glass fell from the truck and shattered the windshield of the plaintiff's car. Mr. Schultz was hit by the glass fragments but was uninjured physically. The trial court awarded damages but was reversed by the court of appeals for lack of any contemporaneous physical injury.\textsuperscript{96} In reversing the court of appeals, the Ohio Supreme Court reasoned that judges and juries are capable of deciding such cases by considering "the credibility of witnesses and the genuineness of the proof as they do in other cases."\textsuperscript{97} Consequently, physical impact or injury is no longer necessary to substantiate the plaintiff's claim. The fact that there was a physical impact when Mr. Schultz was hit by the glass is irrelevant. The only objective proof contemplated by the majority was expert testimony of medical doctors and psychologists, but this was not

\textsuperscript{90} See Miller v. Baltimore & Ohio S.W. R.R. Co., 78 Ohio St. 309, 85 N.E. 499 (1908). See also, Davis v. Cleveland Ry. Co., 135 Ohio St. 401, 21 N.E.2d 169 (1939) (plaintiff was denied recovery for emotional distress suffered when trapped between padded doors because there was no physical injury); Koontz v. Keller, 52 Ohio App. 265, 3 N.E.2d 694 (Ct. App. 1936) (impact required for recovery for emotional distress resulting when plaintiff viewed her murdered sister's mangled body); Barnett v. Sun Oil Co., 113 Ohio App. 449, 172 N.E.2d 734 (Ct. App. 1961) (oil company not liable for death of woman who died of heart disease while trying to escape a fire caused by collision of defendant's gasoline truck with a utility pole).

\textsuperscript{91} 122 Ohio St. 115, 170 N.E. 869 (1930).

\textsuperscript{92} Columbus Finance Co. v. Howard, 42 Ohio St. 2d 178, 327 N.E.2d 654 (1975).

\textsuperscript{93} Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956).

\textsuperscript{94} Brownlee v. Pratt, 77 Ohio App. 533, 68 N.E.2d 798 (Ct. App. 1946).

\textsuperscript{95} 4 Ohio St.3d 131, 447 N.E.2d 109 (1983).

\textsuperscript{96} \textit{Id.} at 132, 447 N.E.2d at 110.

\textsuperscript{97} \textit{Id.} at 135, 447 N.E.2d at 112.
expressly required. The court merely pointed out that it was used in this case and that in most instances it will be helpful to the plaintiff in establishing his claim of negligent infliction of emotional distress.

IV. PAUGH V. HANKS

After significantly changing the law in the Schultz case, the Ohio Supreme Court, in Paugh v. Hanks, stated that it intended to offer guidance as to "the limitations and scope of Ohio's recognition of the tort of negligent infliction of serious emotional distress." In her deposition, Laurie Paugh testified that on three different occasions between December 28, 1977 and August 26, 1978, her sleep was interrupted when three different defendants negligently crashed their automobiles into her property. In the first and third incidents the automobiles actually damaged the Paugh home. In the second accident, defendant Mekina collided with a fence post which Paugh described as being near an area where her children normally play during the daytime. Paugh testified that after the first incident she was "very shook up" and feared for the safety of her children, but did not visit a doctor. After the second accident involving the fence post, she testified that she feared "somebody was hurt awfully bad" but that she "knew we were all okay, because it didn't hit." Paugh further testified that after the third incident she "became quite hysterical" because of her fear for the children and was "quite sick." She was treated by a medical doctor for anxiety later in the day. The next day she was treated at a hospital and subsequently at a mental health facility for fainting and hyperventilating. She complained of fears of leaving her home, of driving a car, and of being in traffic in general. In October of 1978 she was admitted to a psychiatric

98. Id.
99. Id.
100. 6 Ohio St.3d 72, 451 N.E.2d 759 (1983).
101. Id. at 74, 451 N.E.2d at 762.
102. See Record of Appellants at 7-8, 13, 17; Paugh v. Hanks, 6 Ohio St.3d 72, 451 N.E.2d 759 (1983).
103. Id. at 15.
104. Id. at 9.
105. Id. at 13.
106. Id. at 20.
107. Paugh, 6 Ohio St.3d at 73, 451 N.E.2d at 762.
hospital where she was taught to deal with her anxiety. She did not faint again until her daughter became ill in February 1979.108

The plaintiffs alleged that the defendants' negligence caused her to suffer emotional distress and property damage and Mr. Paugh to suffer a loss of his wife's services and a loss of consortium.109 The trial court denied recovery on its finding of no contemporaneous physical injury and the court of appeals affirmed, except for granting damages for the property loss.110 On appeal, the Ohio Supreme Court reversed and remanded, holding that a bystander who fears for the safety of another may state a claim even if the victim is unharmed and the plaintiff suffers emotional distress alone.111 The fact that the victims for whose safety she feared were not physically harmed makes the Paugh decision much more liberal than any other case to date in allowing bystander recovery for emotional distress.

A. The Court's Reasoning

In addressing the issue of bystander recovery, the Paugh court rejected the zone of danger rule112 for the same reason the Dziokonski court rejected it; it excludes foreseeable plaintiffs, such as a mother, who is not geographically close enough to the accident to be within the zone of danger.113 The Ohio court also rejected the three Dillon proximity restrictions as mandatory requirements or guidelines, stating that they are merely factors to be considered in determining whether the emotional injury was foreseeable.114 Further, while stating that a physical manifestation of harm would be an aid to the jury, the court found physical harm unnecessary,115

108. Id.
109. Id.
110. Id. at 74, 451 N.E.2d at 762.
111. Id. at 80, 451 N.E.2d at 767.
112. Id. at 75, 451 N.E.2d at 763.
113. See supra notes 62-64 and accompanying text.
114. The Ohio rule is similar to Hawaii's in that the guidelines are only relevant considerations and not absolute requirements for recovery. See Leong, 55 Hawaii 398, 520 P.2d 758, 760. But see Kelly v. Kokua Sales & Supply, Ltd., 56 Hawaii 204, 532 P.2d 673 (1973). In Kelly, the court denied recovery to a plaintiff whose decedent died of a heart attack in another state when he learned by telephone of the death of his daughter and grandchildren. The court held that the bystander must be "located within a reasonable distance from the scene of the accident." Id. at 209, 532 P.2d at 676. The Kelly case could be construed as a step backwards, towards strict adherence to the Dillon factors as requirements for recovery.
115. Paugh, 6 Ohio St.3d at 77, 451 N.E.2d at 764.
and, in so finding, rejected the *Payton v. Abbott Labs* line of cases.\(^{116}\) The majority agreed with the California court that a physical injury requirement is both under-inclusive in that it excludes worthy plaintiffs who experience no physical injury, and over-inclusive because a plaintiff could possibly recover for the most trivial injury.\(^{117}\) After abolishing the physical injury requirement, the Ohio court, like the California court, had no logical reason to deny Mr. Paugh's claim for loss of consortium.

The court reasoned that the plaintiff should not recover unless the emotional distress was both serious and reasonably foreseeable.\(^{118}\) To prove that the harm was reasonably foreseeable, the plaintiff need not prove that all the *Dillon* factors were satisfied, but only that the ordinary man under similar circumstances would have foreseen the harm.\(^{119}\) The court suggested that the jurors can rely on their own experiences in determining causation and on expert medical testimony as to the seriousness of the injury.\(^{120}\) As in *Schultz*, however, the court did not expressly require objective testimony.

**B. Analysis**

Dean Prosser has written:

> [i]t would be absurd for the law to seek to secure universal peace of mind, and many interferences with it must of necessity be left to other agencies of social control. 'Against a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be.' But this is a poor reason for denying recovery for any genuine, serious mental injury.\(^{121}\)

By its decision in *Paugh*, a very plaintiff-oriented Ohio Supreme Court has mandated that worthy plaintiffs in Ohio shall not be denied their rights to recover for such mental injury.

\(^{116}\) 386 Mass. 540, 437 N.E.2d 171 (1982) (court required some physical injury to ensure that the emotional distress is genuine).


\(^{118}\) *Paugh*, 6 Ohio St.3d at 78, 451 N.E.2d at 785.

\(^{119}\) *Id.* at 79, 451 N.E.2d at 786.

\(^{120}\) *Id.* at 80, 451 N.E.2d at 787.

While the natural evolution of the law in other jurisdictions has been to allow more recovery for emotional harms, Ohio has bypassed the steps taken by other states, and declared that all future cases will be decided on a case-by-case basis, utilizing general tort principles. There will be no further need to prove that the plaintiff was physically touched or injured at the time of the accident. The court's recognition of an individual's right to emotional tranquility as an interest entitled to independent legal protection imposes a duty on others to refrain from unreasonably interfering with this right. In each case the court will balance the plaintiff's rights against the burden on the defendant in order to determine whether the defendant owed a duty to the plaintiff. It is generally recognized that any motorist owes such a duty to others, but it is doubtful that all future cases will be restricted to negligent motorists. Courts will have to make policy decisions as to whether a duty was owed in the particular case. The plaintiff will bear the burden of proving that the duty was breached, that he suffered actual loss or injury, and that there is a causal connection between the defendant's conduct and the plaintiff's injury. To prevent undue liability, the court will look at the factual situation of each case to determine if the injury was reasonably foreseeable.

It would seem that the application of these general tort principles would result in greater fairness to both the plaintiff and the defendant. Theoretically, it should sufficiently limit liability so that no further rules and restrictions would be necessary. The problem, however, is one of proof which is aggravated by the very nature of mental illness or distress. Mental distress has been defined as "any traumatically induced reaction which is medically detrimental to the individual." This definition is very broad and could well include reactions to those minor irritations that Dean Prosser felt must be left to social control. These reactions have been classified as "primary reactions" that are transient and include the emotions of fear, grief, anger, shock or humiliation. Since the only method whereby a plaintiff would be able to convince a jury that he suffered these emotions is by subjective testimony, the modern courts have attempted to eliminate them by requiring

122. See Comment, Independent Tort, supra note 21, at 1254.
123. See W. Prosser, supra note 10, at 143-49.
124. See Comment, Independent Tort, supra note 21, at 1255.
125. See supra note 121 and accompanying text.
126. See Comment, Independent Tort, supra note 21, at 1249-50.
that the emotional distress be serious. Laurie Paugh’s testimony that she felt sick, that she feared for the children, and that she became hysterical is subjective testimony of this sort. The Paugh court leaves it up to the jury to determine whether or not she is sincere and whether or not her symptoms are serious. A “secondary reaction” to a traumatic event is longer lasting and is caused by the person’s inability to cope with the situation.127 These reactions are more easily observed and documented by either a lay or expert witness. Ms. Paugh’s fainting spells, phobias, and possibly, the nightmares, are examples of secondary reactions.

Whether the reaction is primary or secondary, many of the symptoms of emotional or mental distress are necessarily subjective (e.g., headache, weakness, backache, phobias, etc.). Therefore, they are more easily feigned than symptoms of physical injury or illness which are often, although not always, observable or verifiable by diagnostic tests such as X-ray or laboratory tests. Generally, with subjective symptoms, the trier of fact is forced to rely on the plaintiff’s statement that she experienced the symptom; with physical illness the proof is more objective. Because of these proof problems, there is a greater possibility for fraud in emotional distress cases than in other cases. Despite this increased possibility for fraud, the court has declared that “[s]erious emotional distress can be as severe and debilitating as physical injury and is no less deserving of redress.”128 Like the other more liberal courts, the Paugh court’s awareness of the problems inherent in proving mental distress is reflected in its requirement that the mental distress be “serious.” Relying on an opinion from one of the more liberal jurisdictions for its definition of serious, the Paugh court would find serious emotional distress “where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case.”129

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127. Id. at 1250.
128. Paugh, 6 Ohio St. 3d at 78, 451 N.E.2d at 765.
129. Id. citing Rodrigues v. State, 52 Hawaii at 173, 472 P.2d at 520. But see supra notes 16-17 and accompanying text. The RESTATEMENT (SECOND) OF TORTS requirement that the emotional distress be “severe” and such that “no reasonable man could be expected to endure it” before a plaintiff can recover for intentional infliction of emotional distress would be much more difficult to meet than the Paugh court’s requirement of “serious” and “foreseeable” emotional distress. Thus, the more culpable defendant—one who intentionally inflicts emotional distress on another—would be less likely to be held liable for his conduct under the RESTATEMENT (SECOND) rule than would the less culpable defendant who was merely negligent under Ohio law. See also Yeager v. Local Union 20, 5 Ohio St.3d 369, 453 N.E.2d
One foreseeable difficulty for future courts will be the determination of whether or not the emotional distress is "serious." Future plaintiffs would be well-advised to use medical doctors, psychiatrists and psychologists as expert witnesses. While the expert must also rely to some extent on the plaintiff's subjective description of her symptoms, the expert's professional education enables him to render an opinion as to whether such symptoms are real, and whether they might be expected to result from such an event. Psychiatrists and clinical psychologists today routinely use objective tests such as the Minnesota Multiphasic Personality Inventory which they claim can prove, among other things, whether a person is lying or malingering.

The end result, if such objective testimony is relied upon, should not be markedly different from other personal injury, medical malpractice, or products liability cases in which expert witnesses are routinely used. The court urged that lay witnesses be utilized to aid the jury in determining whether the defendant's conduct caused the plaintiff's injuries. It would, therefore, be helpful to have a lay witness who could testify as to her perception of plaintiff's behavior before and after the accident, focusing on any impaired ability to carry on her daily activities. The court believed that the jurors would be capable of weighing the evidence and deciding whether or not the plaintiff suffered emotional harm. The court also stated that the jury members may refer to their own experiences when making a determination. The problem with this approach is that it also makes the proof very subjective, depending on a particular juror's experiences, which could prove to be unfair to the individual defendant.

Whether the serious emotional injury was caused by the par-

666 (1983). In Yeager, the Ohio Supreme Court, while quoting Paugh, and Schultz, adopted the more stringent RESTATEMENT (SECOND) standard in its recognition of the independent tort of intentional infliction of emotional distress. Yeager at 374, 453 N.E.2d at 671. Therefore, the burden will be greater on a plaintiff who attempts to prove intentionally inflicted "severe" emotional distress than on a plaintiff who must merely prove negligently inflicted "serious" emotional distress that was foreseeable.

130. See Comment, Independent Tort, supra note 21, at 1252.

131. The Minnesota Multiphasic Personality Inventory, while not foolproof, is a highly reliable test which contains four (4) validity scales to alert the diagnostician to distortions, i.e., whether one is lying, being evasive, or trying to put herself in the best possible light. ROSENHAM & SELIGMAN, ABNORMAL PSYCHOLOGY (1984).

132. Paugh, 6 Ohio St.3d at 80, 451 N.E.2d at 767.

133. Id.

134. See Note, Emotional Distress, supra note 9, at 1166.
ticular defendant's negligence will be more difficult to determine than whether the plaintiff actually suffered such injury. As pointed out in Niederman v. Brodsky,\textsuperscript{135} however, problems of proving causation should not preclude a plaintiff from presenting his case to the jury.\textsuperscript{136} The Niederman court noted that in the first Restatement of Torts there was reference to the possibility that the medical profession might be incapable of showing causation, but that the deletion of this caveat in 1948 indicated a belief that the profession could indeed determine causation.\textsuperscript{137} The Ohio court did not explicitly mention cause-in-fact in Paugh, but expert medical testimony as to whether the traumatic event was a significant cause-in-fact of plaintiff's injury and testimony as to whether plaintiff has a history of mental problems, are examples of objective proof that could be presented to the jury. In Schultz, Justice Holmes, the lone dissenter in both Schultz and Paugh, expressed his concern over the fact that the majority did not require the plaintiff to corroborate his testimony with such objective proof.\textsuperscript{138} He feared that a plaintiff who is truly but erroneously convinced that the defendant caused her to suffer emotionally, or one who is intent on bringing a fraudulent claim, may convinces the trier of fact to the detriment of an innocent defendant if no objective proof is offered.\textsuperscript{139}

As to proximate, or legal, cause, the court required only that it be "reasonably foreseeable" that the plaintiff-bystander would be unable to cope with the situation.\textsuperscript{140} This will be a major issue in the future, and the Paugh court offered some guidance. To the general Ohio rule that a defendant need not foresee the exact injury but only that "his act is likely to result in injury to someone,"\textsuperscript{141} the court added a variation of the Dillon foreseeability factors. The court stressed that the Dillon factors are not to be construed as new artificial barriers to recovery, but instead are to be used as flexible guides. The factors are to be considered along with all the other circumstances of the case to determine whether an

\textsuperscript{135} 436 Pa. 401, 261 A.2d 84 (1970).
\textsuperscript{136} Id. at 412, 261 A.2d at 89.
\textsuperscript{137} Id. at 406 n.3, 261 A.2d at 86 n.3.
\textsuperscript{138} Schultz v. Barberton Glass, 4 Ohio St.3d 131, 139-40, 447 N.E.2d 109, 115-16 (Holmes, J., dissenting).
\textsuperscript{139} Id. at 139, 447 N.E.2d at 115.
\textsuperscript{140} Paugh, 6 Ohio St.3d at 81, 451 N.E.2d at 767.
\textsuperscript{141} Id. at 78, 451 N.E.2d at 766.
ordinary person should have foreseen that his action or inaction would result in the plaintiff's injury. If so, proximate cause is established.\footnote{142. Id. at 76, 451 N.E.2d at 764.}

It is now possible for a plaintiff to recover for the negligent infliction of emotional distress by proving the elements of a negligence cause of action. Because of the problems of proving damages and causation, however, the Ohio Supreme Court should heed Justice Holmes' warning and require that the plaintiff corroborate her testimony with objective proof. Otherwise, one might well view the Paugh decision as a "quantum leap," and one that has gone too far. This is apparent when the Ohio decision is compared to recent decisions in other jurisdictions. For example, Illinois only recently adopted the "zone of danger" rule,\footnote{143. See Rickey v. Chicago Transit Authority, ___ Ill. ___, 457 N.E.2d 1 (1983).} and New York, while overruling its absolute bar on bystander recovery, requires strict adherence to the Dillon foreseeability guidelines in addition to its requirements of bodily harm to the bystander and serious injury or death of the victim.\footnote{144. Bovsun v. Sanperi, 61 N.Y.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 (1984).}

Ohio could have limited liability by adding these or similar restrictions on the plaintiff's right to recover. It did not, however, and it remains to be seen whether the courts will indeed be flooded with litigants seeking redress for the most trivial wrongs. The fact that Laurie Paugh, a bystander, claimed she was fearful for what might have happened to her children is significant. The bystander cases previously adjudicated have generally involved plaintiffs whose emotional distress resulted from witnessing the serious injury or death of a loved one. The Ohio court has expressly stated that harm to the victim is no longer necessary for recovery.\footnote{145. Paugh, 6 Ohio St.3d at 80, 451 N.E.2d at 767.} Such a ruling increases not only the number of potential plaintiffs who may bring a lawsuit, but also the potential for the bringing of fraudulent claims. It further raises the question of how much of a burden will be put on society if insurance rates are significantly raised as a result of this case.\footnote{146. Amaya v. Home Ice, Fuel and Supply Co., 59 Cal.2d 295, 314, 379 P.2d 513, 525, 29 Cal. Rptr. 33, 45 (1963) cited in Joseph, supra note 38, at 14.} A significant increase in the number of claims brought, especially if fraudulent, accompanied by an increase in insurance rates would not escape scrutiny by the legislature. The legislature, if pressured by insurance companies,
for example, may take steps similar to those taken by many state legislatures to resolve the medical malpractice crisis that developed during the 1970's. By 1975 insurance coverage for physicians was rapidly becoming cost-prohibitive because of the increased number of successful lawsuits against physicians. Ohio, like many other states, enacted medical malpractice statutes which protect physicians by setting very strict standards for when and how a medical claim may be brought.\(^{147}\) A similar reaction by the state legislature to claims for emotional distress is foreseeable.

In general, Ohio should be commended for revising its outdated law to keep pace with changes in society and medicine. The court, however, in allowing the plaintiff to sue for emotional distress brought about because of her speculation as to what might have occurred as a result of three different accidents, should require more than subjective evidence that the person suffered emotional distress. Justice Holmes' suggestion in *Schultz* that the consequences be "objectively ascertainable"\(^{148}\) is therefore one that the majority should consider incorporating into their new rule. They have recognized that there is a special problem with proof that is not encountered in other tort cases. Because of this, they had added the requirement that the emotional distress must be serious. They could require instead that it be both serious and objectively ascertainable. To meet the latter requirement, a plaintiff could introduce experts to testify as to the nature and cause of her mental distress and lay witnesses to describe plaintiff's behavior before and after the incident in addition to proof of the method and expense of treatment.\(^{149}\) A requirement of positive, objective proof such as medical testimony, would aid the jury and help prevent the bringing of frivolous claims. As one writer has noted, "[a] requirement of evidence which objectively documents symptoms of emotional distress neither predicates recovery upon an uncertain physical injury nor overburdens a jury with unlimited discretion."\(^{150}\)

By including plaintiffs such as Laurie Paugh under its new rule,


\(^{148}\) *Schultz*, 4 Ohio St.3d at 139, 447 N.E.2d at 115 (Holmes, J., dissenting).

\(^{149}\) See Note, *Emotional Distress*, supra note 9, at 1166.

the court seems to be reaching the outermost parameters of the rule, but actually this liberal rule opens up many new possibilities. It remains to be seen how the courts will deal with cases that do not involve automobiles, or cases involving plaintiffs who suffer serious emotional distress but who are located many miles away or are not closely related to the victim. Another unanswered question is whether a mother who witnesses the death of her child may sue a negligent automobile manufacturer for her emotional distress. Finally, the courts may expect to deal with a number of unusual cases such as Burke v. Pan American World Airways, Inc., in which the twin sister of an airplane crash victim sued for emotional distress which she alleged was a result of "extrasensory empathy" with the deceased at the moment of the crash.

V. CONCLUSION

Over fifty years ago the United States Supreme Court declared that:

So long as proper guidance by a trial court leaves the jury free to exercise its untrammeled judgment upon the worth and weight of the testimony, and nothing is done to impair its freedom to bring in its verdict and not someone else's we ought not be too finicky or fearful.

In essence, that is what the Paugh court has said. The court has affirmed its faith in the ability of juries to use their common sense in weeding out fraudulent claims, in weighing the evidence presented by the adversaries, and in coming to a just decision. The court has determined that it is possible to do this even where the plaintiff alleges purely emotional, rather than physical harm. Since the court has previously refused to grant recovery for mental or emotional suffering without some contemporaneous physical impact or injury, this is a significant change in the case law of Ohio.

The Ohio court, by its decision in Schultz and Paugh, refused to be bound by rigid requirements created by the courts to limit

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151. E.g., Haught v. Maceluch, 681 F.2d 291 (1982) (plaintiff alleged emotional distress as a result of defendant doctor's negligent treatment of her during eleven hours of labor).
152. E.g., Kelly v. Kokua Sales & Supply, Ltd., 56 Hawaii 204, 532 P.2d 673 (1975) (court which had adopted general tort principles and abolished all arbitrary limits on liability held that defendants could not reasonably foresee death of person located in another state).
153. See generally, Joseph, supra note 38, at pp. 42-51.
undue liability, to prevent fictitious or fraudulent claims, or to avoid a flood of litigation. It has recognized that emotional illness or injury is at least on a par with physical illness or injury and that one who suffers from emotional distress negligently inflicted by another should not be denied a remedy merely because mental illness is more difficult to prove than physical illness. By abolishing the contemporaneous physical impact or injury rule, and in refusing to adopt such artificial barriers to recovery as strict compliance with the Dillon foreseeability guidelines or requirement of resulting physical injury to the plaintiff or victim, the Ohio court’s new rule is the most liberal of any jurisdiction to date.

To apply the new law, courts will utilize general tort principles on a case-by-case basis to determine liability. The Ohio Supreme Court’s recognition of the plaintiff’s right to emotional tranquility, in effect, creates a duty not to interfere with that right. In Paugh, the defendants had a duty not to crash into Laurie Paugh’s house. The jury will now determine whether that duty has been breached, and if so, whether the defendant’s negligence resulted in emotional injury to Laurie Paugh. Theoretically, this should be sufficient to limit liability and assuage the court’s traditional fears, but because of the subjective nature of emotional or mental distress, courts dealing with such claims in the future will be faced with special proof problems not found in physical injury cases where the injury is easily observed or documented. The Schultz and Paugh courts, realizing that emotional distress is more difficult to demonstrate to the jury and, more importantly, easily feigned, mandated that in order to recover for negligently inflicted emotional distress the plaintiff must prove the emotional injury was both foreseeable and serious. The jury will decide whether the defendant should have foreseen the danger of injury to the plaintiff and whether her reaction to the traumatic event was one that could be expected of a reasonable, normally constituted person. To aid the jury in making these determinations the court should incorporate Justice Holmes’ suggestion that the plaintiff be required to present proof of injury that is “objectively ascertainable.”

Such a restriction does not seem unreasonable when one considers the potential disruptive and traumatic effect a lawsuit will have on the defendant’s life.

In adopting the new tort of negligent infliction of serious

156. Schultz, 4 Ohio St.3d at 139, 447 N.E.2d at 115 (Holmes, J., dissenting).
emotional distress, the Ohio court realized that many would criticize it as going too far and of making a "quantum leap into a difficult area of the law." But whether the Paugh decision is such a leap forward or perhaps a "cautious growth back toward normal tort principles," it is a move in the right direction. As Justice Holmes pointed out, however, perhaps the court has gone too far and needs to temper its liberal decision by requiring that the proof be objectively ascertainable in order to insure that the defendant will be treated fairly and that the jury will be aided in its task of coming to a just decision.

JUNE TYLER

157. Paugh, 6 Ohio St.3d at 74, 451 N.E.2d at 762.
158. Joseph, supra note 38, at 20. This writer views the modern trend of allowing bystander recovery under Dillon as a step back to using general tort principles to allow recovery. Id.
159. Schultz, 4 Ohio St.3d at 138, 447 N.E.2d at 113 (Holmes, J., dissenting).
160. Id. at ——, 447 N.E.2d at 115.

In August 1975, petitioners, Stephen Bolaris and Valerie H. Bolaris, purchased a home in San Jose, California, which was used as their principal residence from August 1975 until October 1977.1 In July 1977, petitioners began construction of a new principal residence, and occupied it upon its completion in October 1977.2

On July 14, 1977, petitioners gave a realtor an exclusive listing of their old residence for ninety days.3 The realtor failed to acquire any offers of purchase, so the petitioners decided to rent the old residence because of an increased need for income to meet their expenses arising from the ownership of both their old and new residences.4 The petitioners continued their efforts to sell their old residence, however, for they had moved into their new home and had no intention of returning to their old residence.5

The petitioners successfully rented their old residence within a short time of moving to their new home.6 The first tenant began occupying the residence in October of 1977.7 At the request of the petitioners, the tenant vacated the premises eight months later for the petitioners decided their chance of receiving an acceptable offer might be increased if the residence was vacant.8 Six weeks later the petitioners did receive an offer to purchase the residence.9 Due to problems in obtaining financing, the residence was initially rented to the purchasers and eventually sold to them for $70,000.00 on August 14, 1978.10

The residence was rented to both tenants at its fair market

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2. Id. at 842.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id.
8. Id.
9. Id.
10. Id. at 842-43.
value. For the years 1977 and 1978, petitioners received rental income of $1,271.00 and $2,717.00, respectively. Petitioners reported this income on their tax returns for those years and claimed deductions for expenses attributable to the period during each year that the old residence was rented. In addition, petitioners claimed depreciation deductions during those periods. Thus, petitioners' 1977 and 1978 tax returns reflected losses due to the rental of their old residence as well as a gain that was realized on the sale of their old residence. The recognition of such gain was deferred pursuant to Internal Revenue Code (hereinafter I.R.C.) § 1034.

The Commissioner disallowed petitioners' claimed deductions for depreciation (I.R.C. § 167), insurance (I.R.C. § 162), and miscellaneous expenses (I.R.C. § 212) incurred while renting their old residence on the grounds that the requirements of the respective I.R.C. sections had not been satisfied. Specifically, the claimed deductions were disallowed by the Commissioner upon a determination that they were attributable to an "activity not engaged in for profit".

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<td>Miscellaneous expenses</td>
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<td>6,324.12</td>
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11. Id. at 843.
12. Id.
13. Id.
14. Id. Petitioners claimed depreciation deductions in the amounts of $373.00 for 1977 and $1,120.16 for 1978.
15. Id. Petitioners claimed losses in the amounts of $3,738.00 for 1977 and $4,727.28 for 1978, and a gain of $20,708.45 for 1978.
   (a) Nonrecognition of Gain.—If property (in this section called "old residence") used by the taxpayer as his principal residence is sold by him and, within a period beginning 2 years before the date of such sale and ending 2 years after such date, property (in this section called "new residence") is purchased and used by the taxpayer as his principal residence, gain (if any) from such sale shall be recognized only to the extent that the taxpayer's adjusted sales price (as defined in subsection (b)) of the old residence exceeds the taxpayer's cost of purchasing the new residence.
17. Bolaris at 843. I.R.C. §§ 167, 162 and 212 provide as follows:
   (a) General Rule.—There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—
   (1) of property used in the trade or business, or
within the meaning of I.R.C. § 183. In addition, the Commissioner claimed an increased deficiency for the taxable year 1978 as petitioners would not be entitled to the benefits of I.R.C. § 1034 if the tax court reversed the Commissioners’ findings and held that petitioners were entitled to deductions under I.R.C. §§ 167, 162 or 212.

The United States Tax Court determined that two issues were presented concerning petitioners’ rentals and sale of their old residence: (1) whether petitioners were entitled to the benefits of I.R.C. § 1034, and (2) whether petitioners were entitled to deduct depreciation under I.R.C. § 167, or insurance and miscellaneous expenses under §§ 162 or 212.

In addressing the first issue, the tax court adopted the reasoning of Clapham v. Commissioner and the legislative history of I.R.C.
§ 1034\(^{23}\) that, "under appropriate facts and circumstances, a taxpayer could vacate and temporarily rent his old residence and still be entitled to the nonrecognition treatment under I.R.C. § 1034."\(^{24}\) Based on the instant case's similarity to *Clapham*, the tax court noted that petitioners' primary motive in renting their old residence was to sell it as soon as an offer of purchase was received.\(^{25}\) Thus, the tax court held that the rentals of their old residence were temporary rentals\(^{26}\) and, in accordance with I.R.C. § 1034, petitioners would be allowed to defer recognition of the gain realized on the sale.\(^{27}\)

As to the second issue, the tax court declared that the petitioners were required to prove that the primary intent and motivation for their rental activities was to make a profit in order to be entitled to the deductions under I.R.C. §§ 162, 167 or 212.\(^{28}\) Based on its holding as to the first issue, that the rentals of the old residence were temporary rentals,\(^{29}\) the tax court held that it precluded the petitioners from having a profit objective.\(^{30}\) Accordingly, the tax court decided that petitioners would not be allowed deductions for depreciation, insurance, or miscellaneous expenses relating to the rentals of their old residence.\(^{31}\)

I. THE HISTORY OF I.R.C. SECTIONS 212, 183 and 1034

The decision of the tax court effectively treats I.R.C. § 212 and I.R.C. § 1034 as mutually exclusive.\(^{32}\) The objective of this note is to examine case law concerning these sections and determine whether the tax court reached the proper decision.

\(^{23}\) H.R. Rep. No. 586, 82d Cong., 1st Sess. 109 (1951); S. Rep. No. 781 (Part 2), 82d Cong., 1st Sess. 32 (1951), paraphrased as follows:
The term "residence" is used in contradistinction to property used in trade or business and property held for the production of income. Nevertheless, the mere fact that the taxpayer temporarily rents out either the old or the new residence may not, in the light of all the facts and circumstances in the case, prevent the gain from being not recognized.

\(^{24}\) *Bolaris* at 846.

\(^{25}\) *Id.* at 847.

\(^{26}\) *Id.*

\(^{27}\) *Id.*

\(^{28}\) *Id.* at 849.

\(^{29}\) *Id.* at 847.

\(^{30}\) *Id.* at 849.

\(^{31}\) *Id.* at 850.

\(^{32}\) *Id.* at 853.
A. I.R.C. Sections 212 and 183

I.R.C. § 212 was first enacted as I.R.C. § 23(a) of the Revenue Act of 1936, and then amended by I.R.C. § 121 of the Revenue Act of 1942. Section 212 of the Internal Revenue Code of 1954 allows individuals to deduct all ordinary and necessary expenses paid or incurred during the taxable year for the production of collection of income or for the management, conservation, or maintenance of property held for the production of income.

The leading case addressing the issue of whether a residence has been converted to property held for the production of income under I.R.C. § 212(2) is Robinson v. Commissioner. In 1931, Robinson abandoned her home and moved to another residence. Then, in early 1932, Robinson listed the former home for rent or sale with two real estate firms. Although the firms made diligent efforts and had negotiations with prospects, neither firm was able to rent or sell the property. The tax court held that, for purposes of I.R.C. § 121, the residence had been converted to property held for the production of income and both maintenance expense and depreciation were deductible, even though the firms were unable either to rent or sell the residence.

In 1951, the tax court in Horrmann v. Commissioner encountered
a situation similar to that found in Robinson. In Horrmann, the petitioner acquired the family residence by devise upon the death of his mother in February 1940. Petitioner moved into the family residence, but found it to be unsuitable and abandoned it as a residence in October 1942. After making several unsuccessful attempts to rent or sell the property, the petitioner was finally able to sell it in June of 1945. The tax court, relying on Robinson, noted that the mere abandonment of a residence does not mean that it is held for the production of income. However, since the petitioner made sufficient efforts to rent the property, it was permissible to claim the property as held for the production of income, "even though no income [was] in fact received from the property, and even though the property [was] at the same time offered for sale."

The tax court in Jasionowski v. Commissioner confronted the crucial issue in Bolaris as to whether loss deductions are allowable in connection with the rental of a residence in all situations. In Jasionowski, petitioner rented a residence to a friend who had recently deeded the residence to the petitioner in order to avoid foreclosure. The rental was at a rate below fair-market value and petitioners never attempted to sell the property. Regarding the deductions claimed by petitioners on the rental, the Commis-

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<td><strong>2,658.55</strong></td>
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sioner allowed the amount of interest and taxes paid on the residence.64 However, the Commissioner disallowed the claimed deductions for the remaining expenses and depreciation55 because "the rental activity was not a trade or business."56

The tax court first noted that the operating expenses and depreciation associated with the rental of the residence would have been deductible as business expenses if the residence had been "used in a trade or business or held for the production of income" under I.R.C. §§ 162(a), 167(a)(1) and (2), and 212.59 Next, the tax court noted that the losses incurred in the rental would also be deductible "if incurred either in a trade or business or a transaction entered into for profit" under I.R.C. §§ 165(a), 165(c)(1) and (2).61 However, the tax court declared that before any deduc-

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<tr>
<td>Building</td>
<td>1,638.91</td>
<td>1,507.80</td>
</tr>
<tr>
<td>Carpet</td>
<td>70.00</td>
<td>70.00</td>
</tr>
<tr>
<td>Total</td>
<td>1,935.79</td>
<td>1,779.80</td>
</tr>
</tbody>
</table>

54. Id. at 315.
55. Id. at 315. Because he determined that petitioners' rental of the residence did not constitute a trade or business, the Commissioner disallowed the following claimed rental expense deductions:

56. Jasionowski at 318.
   (a) In General.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . . .
   (a) General Rule.—There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—
      (1) of property used in the trade or business, or
      (2) of property held for the production of income.
   In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—
      (1) for the production or collection of income;
      (2) for the management, conservation, or maintenance of property held for the production of income. . . .

Jasionowski at 318.
   (a) General Rule.—There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.
   (c) Limitation on Losses of Individuals.—In the case of an individual, the deduc-
tions could be allowed under any of these provisions "it must be shown that the activity in question was undertaken with the primary intention and motivation of making a profit." 62

The tax court in *Jasionowski* noted that I.R.C. § 183 was enacted in 1969 to create an objective standard to decide if a taxpayer was attempting to create losses to offset against other income or was engaged in a business to make a profit. 63 As such, in addressing the question of a profit motive by petitioners, the tax court focused on post-1969 case law and I.R.C. § 183. 64 Prior case law was not ignored, however, for the nine separate factors to be utilized in a profit-motive determination, as enumerated in Treasury Regulations §§ 1.183-2(b)(1)-(9), 65 are derived from prior case law. 66 Treasury Regulation § 1.183-2(b) 7 states that "all the facts and circumstances with respect to the activity are to be taken into account [as] these enumerated factors are neither exclusive nor necessarily controlling in each case." 67 Finally, the tax court noted that the I.R.C. § 183 test is whether the petitioners' intention and expectation of profit is bona fide rather than whether such intention and expectation is reasonable. 68

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63. *Jasionowski* at 321 (See S. REP. No. 91-552, to accompany H.R. 13270, 91st Cong., 1st Sess. 104 (1969)).


65. Treas. Reg. § 1.183-2 (1973) lists the following as relevant factors in determining whether an activity is one not engaged in for profit:

1. Manner in which the taxpayer carries on the activity;
2. The expertise of the taxpayer or his advisors;
3. The time and effort expended by the taxpayer in carrying on the activity;
4. Expectation that assets used in activity may appreciate in value;
5. The success of the taxpayer in carrying on other similar or dissimilar activities;
6. The taxpayer's history of income or losses with respect to the activity;
7. The amount of occasional profits, if any, which are earned;
8. The financial status of the taxpayer;
9. Elements of personal pleasure or recreation.


68. *Jasionowski* at 321.

69. *Id.*
In holding that petitioners' rental constituted an "activity not engaged in for profit" within the meaning of I.R.C. § 183(c), the tax court reasoned that the primary and dominant intention of petitioners was to assist a friend. The rental of the residence at less than fair-market value proved that petitioners did not intend to make a profit. Specifically, the tax court explained the operation of I.R.C. § 183 as follows:

Section 183(c) defines an "activity not engaged in for profit" as an activity for which deductions under section 162 or section 212(1) or (2) would not be allowable. If under subsection (c) an activity is determined to be not engaged in for profit, the allowable deductions attributable to such activity are set forth in section 183(b). In general the statutory scheme of section 183(b) is as follows: paragraph (1) allows all those deductions that are not predicated on the existence of a profit motive (e.g., interest and taxes) and paragraph (2), in addition, allows all deductions which do depend upon the existence of a profit motive (e.g., depreciation and trade or business expenses). These paragraph (2) deductions, however, are deductible only to the extent that the gross income from such activity exceeds those deductions allowable under paragraph (1). In other words, a taxpayer will only be permitted to utilize paragraph (2) deductions when his gross income from the activity not engaged in for profit exceeds the paragraph (1) deductions and, then, only to the extent of such excess.

In accordance with I.R.C. § 183, the tax court held that the claimed business and depreciation expenses must be disallowed as the gross income did not exceed the interest and taxes paid, and thus there was no gross income to apply against the claimed business and depreciation expenses.

B. I.R.C. Section 1034

The predecessor of § 1034 of the Internal Revenue Code of 1954

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70. Id. at 322.
71. Id.
72. Id. at 320-21.
73. Id. at 315. During the years at issue, petitioners reported as income on their returns rental payments on the residence as follows:

<table>
<thead>
<tr>
<th></th>
<th>Taxes</th>
<th>Insurance</th>
<th>Total rent received</th>
<th>Gross rental income returned</th>
</tr>
</thead>
<tbody>
<tr>
<td>1969</td>
<td>$408.58</td>
<td>$202</td>
<td>$610.58</td>
<td>$408.66</td>
</tr>
<tr>
<td>1970</td>
<td>407.58</td>
<td>202</td>
<td>669.58</td>
<td>507.84</td>
</tr>
</tbody>
</table>

was § 112(n)\textsuperscript{75} of the Internal Revenue Code of 1939. The current I.R.C. § 1034(a) provides in general that if a taxpayer sells his principal residence and, within two years before or after the sale, purchases a new principal residence, then any gain from the sale of the old principal residence is recognized only to the extent the adjusted sales price of the old principal residence exceeds the cost of the new principal residence.\textsuperscript{76}

In addressing the issue of whether petitioner is entitled to the nonrecognition of gain from the sale of a residence under I.R.C. § 1034, the courts have adopted a general rule that, within two years of the date of sale, the petitioner must have "actually occupied" the principal residence for I.R.C. § 1034 to apply.\textsuperscript{77} The "actual occupancy" rule was created by the tax court in \textit{Stolk v. Commissioner}.\textsuperscript{78} In 1953, the petitioner in \textit{Stolk} moved out of his old residence with no intention of returning.\textsuperscript{79} The petitioner rented an apartment until late in 1955 when he purchased a new residence.\textsuperscript{80} Having sold his old home in 1955, the petitioner then attempted to use I.R.C. § 1034 to defer recognition of the realized gain on the sale.\textsuperscript{81}

The tax court first noted that the I.R.C. § 1034 phrase "used by the taxpayer as his principal residence" means that the old residence has been continuously occupied as the principal residence.\textsuperscript{82} Accordingly, the tax court held that petitioner's gain on the sale of his old residence did not qualify for the benefits of I.R.C. § 1034 since the old residence had not been actually used

\textsuperscript{75} I.R.C. § 112 (1939). \textit{Recognition of Gain or Loss.}

\textsuperscript{(n)} \textit{Gain from Sale or Exchange of Residence.}

\textsuperscript{(1)} \textit{Nonrecognition of Gain.}—If property (hereinafter in this subsection called "old residence") used by the taxpayer as his principal residence is sold by him and, within a period beginning one year prior to the date of such sale and ending one year after such date, property (hereinafter in this subsection called "new residence") is purchased and used by the taxpayer as his principal residence, gain (if any) from such sale shall be recognized only to the extent that the taxpayer's selling price of the old residence exceeds the taxpayer's cost of purchasing the new residence.

\textsuperscript{76} I.R.C. § 1034 (1984); \textit{See generally, Maule, Rental of Principal Residence Before Sale: Retaining 1034 Treatment and Rental Deductions, 55 J. Taxn. 8 (1981).}

\textsuperscript{77} Lipton, \textit{Handling the Treatment of Renting a Former Residence While Awaiting Its Sale, 58 J. Taxn. 170 (1983).}

\textsuperscript{78} 40 T.C. 345 (1963), aff'd 326 F.2d 760 (2d Cir. 1964).

\textsuperscript{79} \textit{Id.} at 347, 326 F.2d at 761.

\textsuperscript{80} \textit{Id.}

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} \textit{Id.} at 355, 326 F.2d at 762.
by him as his principal residence within the statutory period. The “actual occupancy” rule has been explained by one author as not requiring the taxpayer to occupy his old residence “until the date on which he purchases and occupies his new home [as] such a stringent requirement would flatly contradict the language of [I.R.C.] section 1034.” Moreover, if the taxpayer purchases a new residence within two years of the date of moving from the old residence, then I.R.C. § 1034 will treat any rentals of the old residence during this period as “temporary” rentals. However, should the taxpayer move from his old residence and not sell it within two years of that date, then I.R.C. § 1034 will not be applied to the gain realized on the sale in accordance with the “actual occupancy” rule.

Two significant exceptions to the “actual occupancy” rule of Stolk have been recognized by the courts. The first exception originated in the case of Trisko v. Commissioner. Trisko accepted a temporary position abroad with the federal government. During the three years he was away, he rented his home but intended to one day return and reside in the residence. Unfortunately, upon his return to this country, he was unable to regain immediate occupancy of his residence and had to buy a new residence.

The tax court began by noting that the narrow question presented was whether the words “used . . . as his principal residence” precluded the application of I.R.C. § 112(n). In holding that the residence sold by the petitioner was his principal residence despite the temporary rentals, the tax court relied on the legislative history of I.R.C. § 112(n) in reasoning that the property was used as a residence in contradistinction to property used in trade or

83. Id. See also, Houlette v. Commissioner, 48 T.C. 350 (1967) (where the tax court reaffirmed their view in Stolk).
84. Lipton, supra note 77, at 173.
85. Id.
86. Id.
87. Id.
88. 29 T.C. 515 (1957).
89. Id. at 516.
90. Id.
91. Id. at 517.
92. Id. at 519.
business and property held for the production of income. Of significance, the tax court limited its decision strictly to the facts presented in the case.

The exception formulated in Trisko was utilized by the tax court in Barry v. Commissioner, where the petitioner did not occupy his principal residence for six years while on military service assignments, rented it for the first five years of his duty, and claimed depreciation and maintenance deductions on the residence. First, the tax court noted that it was not determinative of a conversion to “property held for the production of income” that petitioner rented the residence and claimed deductions for depreciation and maintenance. The tax court next observed that a determination that property is used as a principal residence depends upon all the facts and circumstances in the case. Based on the fact that petitioner: one, intended to return at all times to this residence; two, rented it in order to provide for its care and maintenance; and three, realized no significant profit from the rental, the tax court held that the property was petitioner’s principal residence.

The second exception to the “actual occupancy rule,” as set forth in Clapham v. Commissioner, is broader than the Trisko exception. In 1966, petitioners moved from their old residence and listed it for sale with a real estate broker. Petitioner then

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94. Trisko at 520.
95. Id.
96. 80 T.C.M. (CCH) 757 (1971).
97. Id. at 758.
98. Id. at 759.
   *Property used by the taxpayer as his principal residence.* (i) Whether or not property is used by the taxpayer as his residence, and whether or not property is used by the taxpayer as his principal residence (in the case of a taxpayer using more than one property as a residence), depends upon all the facts and circumstances in each case, including the good faith of the taxpayer. The mere fact that property is, or has been, rented is not determinative that such property is not used by the taxpayer as his principal residence. For example, if the taxpayer purchases his new residence before he sells his old residence, the fact that he temporarily rents out the new residence during the period before he vacates the old residence may not, in the light of all the facts and circumstances in the case, prevent the new residence from being considered as property used by the taxpayer as his principal residence.
100. Barry at 780.
101. 63 T.C. 505 (1975).
102. Lipton, supra note 77, at 173.
103. Clapham at 506.
rented the house because of financial circumstances. Finally, in 1969, petitioners sold the residence after purchasing another residence in 1968. The tax court recognized that the only issue was the applicability of I.R.C. § 1034 and this depended on the facts and circumstances in the case.

In addressing this question, the tax court noted that Congress intended to allow a lease of either the old or new residence for a "temporary" period, under appropriate facts and circumstances, to be consistent with I.R.C. § 1034. Since the petitioner's old residence was their principal residence, the rentals were necessitated by the exigencies of the real estate market and were ancillary to sales efforts, the tax court held the leasing of the residence was an "involuntary conversion" requiring relief under I.R.C. § 1034.

In 1981, the Internal Revenue Service (hereinafter I.R.S.) issued Letter Ruling 8132017, which disclosed its view of the Clapham exception. By way of an example, the I.R.S. adopted the holding of the court in Clapham. In 1975, taxpayer moved out of his residence and tried to sell it. After several unsuccessful months attempting to sell the residence, the taxpayer rented it at fair rental value. In 1978, taxpayer sold the residence, and in 1978, he purchased a new residence. The I.R.S. ruled that taxpayer did not possess a profit objective in renting the residence and the residence continued as his principal residence. Thus, the I.R.S. ruled that I.R.C. § 1034 could be applied as the residence was not held for the production of income or used in a trade or business.

Of even greater significance, however, the I.R.S. stated that when taxpayers temporarily rent their residences it does not preclude

104. Id. at 506-07.
105. Id. at 507.
106. Id.
107. Id. at 508 citing Stolk v. Commissioner, 40 T.C. 345, 354 (1963), aff'd per curiam 326 F.2d 760 (2d Cir. 1964) and Houlette v. Commissioner, 48 T.C. 350, 354, 355 (1967).
109. Id. at 512.
110. 1981 PRIVATE LETTER RULINGS (PH) ¶4784(81).
111. Lipton, supra note 77, at 173.
112. 1981 PRIVATE LETTER RULINGS (PH) ¶4784(81).
113. Id.
114. Id.
115. Id.
116. Id.; Lipton, supra note 77, at 173.
the application of I.R.C. § 1034. 117 After temporary rentals of their residence, taxpayers will be allowed to defer recognition of gain on the sale. The application of I.R.C. § 1034, the I.R.S. reasoned, also required I.R.C. § 183 to apply. 118 Moreover, I.R.C. § 1034 will defer recognition of gain on the sale of the residence, but I.R.C. § 183 will disallow the loss incurred on the rental of the residence prior to its sale. 119

II. THE COURT'S REASONING IN BOLARIS V. COMMISSIONER

The United States Tax Court faced two "distinct but related" issues: first, whether the petitioners were entitled to defer recognition of the gain realized on the sale of their old residence under I.R.C. § 1034; and second, whether the rental of their old residence constituted property held for the production of income within the meaning of I.R.C. sections 167(a)(2) and 212. 120

In deciding the former issue, the tax court noted that the dispute as to "whether the rental of the old residence prior to its sale precluded the application of I.R.C. section 1034" was clarified by Clapham. 121 Moreover, the tax court accepted the reasoning of the Clapham decision and the legislative history of I.R.C. § 1034 that, "under appropriate facts and circumstances, a taxpayer could vacate and temporarily rent his old residence and still be entitled to the nonrecognition treatment under [I.R.C.] Section 1034." 122 In applying Clapham to the facts of this case, the tax court reasoned that the rental of their old residence arose from its use as their principal residence and was subordinate to sales efforts caused by the exigencies of the real estate market. 123 Specifically the petitioners' "primary motive" in renting their old residence "was to sell it at the earliest possible moment rather than to hold it for the production of income." 124 The tax court concluded, based on Clapham, that petitioners' rentals constituted a temporary rental contemplated by Congress and did not preclude application of I.R.C. § 1034 to the sale of their old residence. 125

117. 1981 PRIVATE LETTER RULINGS (PH) ¶4784(81).
118. Id.
119. Id.
122. Id. at 846.
123. Id. at 847, citing Clapham at 512.
124. Id.
125. Id.
Considering the second issue, the tax court recognized that the successful rental of a taxpayer's former residence normally establishes the conversion of the residence to business use from personal use, and the requisite profit motive is usually implied from the rental of the residence at its fair market value.\(^{126}\) However, the same factors that entitled the petitioners to the benefits of I.R.C. § 1034 precluded them from classifying their rental activity under I.R.C. §§ 167(a)(2) and 212 as an activity engaged in for the production of income.\(^{127}\) The tax court concluded that the rental activity in this case, as in *Clapham*, did not entitle the petitioners to deductions under I.R.C. §§ 162, 167, or 212.\(^{128}\)

In a concurring opinion, Judge Korner agreed with the majority opinion as to both its reasoning and result.\(^{129}\) However, Judge Korner concurred to explain that I.R.C. § 183(b) provides for the deductions which are allowed in this case.\(^{130}\) Specifically, I.R.C. § 183(b)(1) allowed petitioner to deduct his expenses relating to mortgage interests and property taxes.\(^{131}\) However, Judge Korner noted that I.R.C. § 183(b)(2) disallows deductions for depreciation and maintenance in excess of the gross income attributable to the activity not entered into for profit less the deductions allowable in any event.\(^{132}\)

In a strong dissent, Judge Wilbur argued that the majority erred in treating I.R.C. § 212 and I.R.C. § 1034 as mutually exclusive by "conditioning the applicability of [I.R.C.] section 212 on the applicability of [I.R.C.] section 1034."\(^{133}\) Additionally, Judge Wilbur asserted that Congress did not intend this result.\(^{134}\) Referring to the majority's application of I.R.C. § 183 to limit the petitioners' deductions, Judge Wilbur opined that this is inconsistent with the established principle that when property is rented in an arm's length transaction at its fair market value it is held for the production of income under I.R.C. §§ 167 and 212.\(^{135}\)

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127. Developments, A.B.A. Section of Taxation Newsletter, *supra* note 120.
128. *Bolaris* at 850.
129. *Id.*
130. *Id.* at 851.
131. *Id.*
132. Developments, A.B.A Section of Taxation Newsletter, *supra* note 120.
133. *Bolaris* at 853.
135. *Bolaris* at 853. (See Briley v. United States, 298 F.2d 161 (6th Cir. 1962); Horrmann
III. ANALYSIS

The decision of the tax court appears to apply the Clapham exception of the "actual occupancy" rule. However, applying the exception to this case should not have been necessary as the sale of the old residence occurred within two years after the petitioners had vacated it. One author has noted that I.R.C. § 1034 has consistently been "viewed as allowing the taxpayer to rent his old principal residence for at least two years," and having gain deferred when the house is sold during this period, if the other requirements of I.R.C. § 1034 are satisfied. In addition, the author stated that I.R.C. § 1034 applies in this situation regardless of "whether the rental constitutes an activity engaged in for profit." However, the tax court has literally accepted the Internal Revenue Service’s view that for I.R.C. § 1034 to apply, the rental must not be engaged in for profit.

Based on the tax court applying Clapham, it now seems apparent that any rental of an old residence, regardless of whether it is within two years of its sale, will have to be justified as a "temporary" rental for I.R.C. § 1034 to apply. Thus, in future cases, the tax court will not recognize all rentals of the old residence as "temporary" during the two year period prior to sale. Moreover, the tax court is now strictly following the legislative history of I.R.C. § 1034, which states that "the mere fact that the taxpayer temporarily rents out either the old or the new residence may not, in light of all the facts and circumstances in the case, prevent the gain from being recognized." Hence, the determination of whether I.R.C. § 1034 applies to the sale of a residence after its rental must be made on a case-by-case basis. Specifically, the tax court asserts that the court in Stolk and Houlette did not create an "actual occupancy" rule, but established the principle that "whether or not property is the principal residence of the taxpayer

v. Commissioner, 17 T.C. 903 (1951); Robinson v. Commissioner, 2 T.C. 305 (1943); Treas. Reg. § 1.212-1(h).

136. Bolaris at 847.

137. Lipton, supra note 77, at 173.

138. Id.

139. Id. For the tax court’s view see Trisko v. Commissioner, 29 T.C. 515 (1957) and Clapham v. Commissioner, 63 T.C. 505 (1975); for the I.R.S. view, see LETTER RULINGS (CCH) 8132017 (1981) PRIVATE LETTER RULINGS (PH) 4784(81).

140. Bolaris at 846.

141. Id. (citations omitted) (original emphasis).
depends upon all the facts and circumstances in each individual case.”

Furthermore, in future cases, once the taxpayer proves he is entitled to the benefits of I.R.C. § 1034, then he will automatically prove whether or not his deductions for depreciation and maintenance expenses should be allowed. In other words, if a taxpayer is successful in having I.R.C. § 1034 apply, then I.R.C. §§ 162, 167, or 212 will not apply as it has already been proven that the taxpayer did not have a profit objective in the rental of the residence. However, if the taxpayer is successful in having I.R.C. §§ 162 and 167 or 212 apply, then I.R.C. § 1034 will not apply because “the term ‘residence’ is used in contradistinction to property used in trade or business and property held for the production of income.” Thus, Judge Wilbur is correct in his dissenting opinion when he asserts that the majority is treating I.R.C. § 1034 and I.R.C. § 212 as mutually exclusive.

Unfortunately, Judge Wilbur fails to realize that the majority’s opinion is correct since the presence of a profit motive means I.R.C. § 1034 will not apply. In addition, the majority’s position has ample support in prior case law and legislative history.

As to the denial of petitioner’s deductions under I.R.C. §§ 162, 167, and 212, the tax court is correct in its reasoning that a profit motive must exist in connection with the rental activities. As one noted author has previously discussed:

I.R.C. section 212 is limited to expenses arising in profit-oriented activities, [and] [i]ndeed, even if the property is held only to minimize a loss with respect thereto and is neither currently productive nor likely to be productive, expenses allocable to it are deductible under [I.R.C.] section 212(2) provided it is held for investment rather than for personal purposes.

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142. Id. at 845-46, citing Clapham v. Commissioner, 63 T.C. 505 (1975). See Stolk v. Commissioner, 40 T.C. 345 (1963), aff’d per curiam 326 F.2d 760 (2d Cir. 1964) and Houlette v. Commissioner, 48 T.C. 350 (1967).
143. Id. at 846.
144. Id. at 853 (Wilbur, J., dissenting).
145. Id.
146. Id. at 846-50.
147. Id. at 849.
148. Lang, supra note 35, at 294.
149. Id. at 302.
In addition, the court also noted that property "held for investment" (i.e. held for production of income) requires the presence of a profit objective on the part of the taxpayer.\footnote{150}

One area of concern is the majority's failure to adequately discuss the issue of what deductions the petitioners are entitled to when I.R.C. §§ 162, 167, and 212 do not apply. In order to clarify this issue, Judge Korner wrote a concurring opinion on the deductibility of the depreciation and maintenance expenses on the residence.\footnote{151} Specifically, Judge Korner correctly finds that I.R.C. § 183(b) applies to determine the amount of deductions allowed.\footnote{152}

As the tax court previously held in \textit{Brannen v. Commissioner},\footnote{153} I.R.C. § 183 is applicable when the taxpayer is not engaged in an activity for profit and, therefore, not entitled to the deductions under I.R.C. § 162 or 212.\footnote{154} However, the tax court noted that the taxpayer would be entitled to deductions provided in I.R.C. § 183(b).\footnote{155} In determining the amount of deductions under I.R.C. § 183(b) for the temporary rental of a residence, it should be apparent that the amount of gross income produced by the rentals will control as to whether I.R.C. § 183(b)(2) will allow any deductions for depreciation and maintenance expenses.

\section*{V. Conclusion}

The decision of the tax court means that when a taxpayer attempts to utilize I.R.C. § 1034 on the sale of a residence, the Internal Revenue Service will apply I.R.C. § 183(b) to the unprofitable rental of the residence prior to its sale. Thus, taxpayers will have a choice of nonrecognition of gain on the sale of a residence under I.R.C. § 1034 or the deduction of maintenance expenses and depreciation under I.R.C. §§ 162, 167, and 212. Moreover, as previously discussed, when I.R.C. § 1034 applies to the sale of the residence, the tax court will also apply I.R.C. § 183 to the depreciation and maintenance expenses for the temporary rental period prior to the sale of the residence.

\begin{flushleft}
\footnote{150}{Bolaris at 850.}
\footnote{151}{Id. at 850-52 (Korner, J., concurring).}
\footnote{152}{Id. at 851.}
\footnote{153}{78 T.C. 471 (1982), aff'd, 722 F.2d 695 (11th Cir. 1984).}
\footnote{154}{Id. at 500.}
\footnote{155}{Id.}
\end{flushleft}
Depending on the relative tax benefits of using either I.R.C. § 1034 or I.R.C. §§ 162, 167, and 212, the taxpayer and his advisor should elect the course which produces the most advantageous tax results. However, it must be noted that I.R.C. § 1034's provisions are mandatory, and a taxpayer cannot elect to recognize the gain when this section is applicable.

RALPH W. SLOAN*

*J.D., Salmon P. Chase College of Law, Northern Kentucky University, 1984.

Our analysis showed that almost every candidate who had run as a third-party or independent candidate for the Presidency had basically gotten submerged in the problems of getting onto the ballot, and exhausted his or her resources by September or October, with nothing left to run a real campaign. The same thing happened to John Anderson.¹

On April 24, 1980 John Anderson declared his intention to be an independent candidate for the presidency of the United States. While major party candidates struggled with political strategies, John Anderson had to concern himself with trying to get his name on the ballot. In five states the deadlines for filing signature petitions had already expired.² Moreover, various other regulations required that an independent candidate disaffiliate himself from any political party a certain portion of time before entering the electoral race.³ An additional burdensome ballot access restriction faced by Anderson included Ohio's early March filing deadline.⁴ In April of 1983, long after the election had passed,⁵ the Supreme Court held Ohio's early filing deadline unconstitutional in Anderson v. Celebrezze.⁶

The aims of this note are to examine constitutional developments in the ballot access cases; to explore the basis of review applied in Anderson v. Celebrezze as compared with past ballot access cases; and to suggest alternate methods of ballot access adjudication.

I. RESTRICTIONS FACED BY ANDERSON

In 1980 an Ohio law required an independent candidate for President to file a statement of candidacy in March in order to appear

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² Id. at 131.
³ Id.
⁴ Section 3513.257 of the OHIO REVISED CODE provided in part, "Each person desiring to become an independent candidate . . . shall file no later than four p.m. of the seventy-fifth day before the day of the primary election" OHIO REV. CODE ANN. § 3513.257 (Page Supp. 1983).
⁵ Anderson was successful in placing his name on the 1980 Presidential ballot in all states including the District of Columbia. 69 A.B.A. J. 824 (1983).
on the general election ballot in November. On April 24, 1980 John Anderson announced that he was an independent candidate for the office of President of the United States. Anderson met all requirements for having his name placed on the ballot except the early filing deadline. Anderson and three voters brought suit challenging the early filing deadline for independent candidates.

The District Court for the Southern District of Ohio, granting plaintiff's motion for a preliminary injunction and summary judgment, held that the statutory deadline substantially abridged the rights of association of Anderson and his supporters. Moreover, the deadline violated the equal protection clause of the fourteenth amendment by discriminating against independent candidates in favor of partisan candidates. Therefore, the court allowed Anderson to place his name on the Ohio ballot.

The United States Court of Appeals for the Sixth Circuit reversed the District Court's summary judgment for Anderson, reasoning that the early filing deadline ensured voters the opportunity for a careful look at the candidates. The United States Supreme Court reversed the Court of Appeals' ruling in a five-four decision. Delivering the opinion for the Court, Justice Stevens held that the burdens placed on the voters' freedom of association unquestionably outweighed the state's minimal interest in imposing a March deadline.

II. THE IMPACT OF STATE REGULATIONS

The Constitution contains no express provision guaranteeing the right to become a candidate. However, the Supreme Court has

7. 460 U.S. at 783. See supra note 4.
9. Id.
12. Id.
14. Id. at 563.
16. 460 U.S. at 806.
recognized that the Constitution grants the states the power to enact laws regulating elections. Therefore, states are free to create restrictions on the ability to become a candidate provided such restrictions do not violate other Constitutional limitations.

All states extensively regulate the electoral process but all states do not regulate elections in the same manner. There is a need for ballot regulation as it often protects and upholds the integrity of the electoral system by keeping the ballot orderly, fair and honest. For example, ballot restrictions enable the states to limit the number of candidates who appear on the ballot, thereby reducing voter confusion. Other state interests served by ballot access regulations include restriction of the ballot to serious candidates, preservation of a two-party system, and administrative feasibility.

A. The Plight of Minority and Independent Candidates

Despite a constitutional mandate and valid state interests, ballot restrictive legislation can place substantial procedural hurdles before candidates, thereby impinging on constitutionally protected rights. While ballot access is virtually guaranteed to the Democratic and Republican nominees, minority party and independent candidates must usually qualify for a place on the ballot by meeting demanding statutory requirements.

For example, before a candidate is placed on the ballot he may be required to pay filing fees, show demonstrated support and meet numerous other restrictions. There is a wide variation from state to state as to the types of ballot access restrictions a candidate may encounter. However, they all make access to the ballot an arduous and expensive undertaking. "Minority parties and in-

18. See, e.g., Williams v. Rhodes, 393 U.S. 23, 29 (1968) (where the Court stated that there can be no question that Article II, Section 1 of the Constitution grants extensive power to the states to pass laws regulating the selection of electors).
22. Rada, Cardwell & Friedman, Access to the Ballot, 13 Urb. Law 793 (1981) (this is because the major parties received the required voter support in the last election) [hereinafter cited as Rada, Access].
23. See, e.g., Lubin v. Panish, 415 U.S. 709 (1974) (where candidates attacked California's, filing fee requirement); Moore v. Ogilvie, 394 U.S. 814 (1969) (a case which involved a demonstrated support statute in Illinois); See generally Nowak, Constitutional Law, supra note 17, 776-786 (for a detailed discussion of various statutory ballot access restrictions).
24. Rada, Access, supra note 22, at 793.
dependent candidates are often forced to spend a great deal of time and money on ballot access, exhausting scarce resources that might otherwise be used for campaigning.\textsuperscript{25}

The plight of the independent candidate as a result of state ballot regulation should not be underestimated. "Historically political figures outside of the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream."\textsuperscript{26} While minority parties and independent candidates rarely win major elections, their existence provides voters with an outlet for their frustrations with the established parties.\textsuperscript{27} If legitimate access to the ballot is denied to candidates who represent minority interests, supporters may be more likely to lose trust in the political system and turn to other means of expression that could undermine political stability.

Furthermore, the success or failure of an independent candidate in obtaining a place on the ballot in key states could vitally affect the outcome of an election. For example,

the campaign of Democratic presidential nominee Jimmy Carter was significantly aided when the United States Supreme Court rejected candidate Eugene McCarthy's request to set aside an order of a New York state court, which kept McCarthy's name off the presidential ballot in that state. Otherwise, McCarthy might have drained off the liberal vote, and thus tilted the state, its massive electoral vote, and conceivably the election away from Carter.\textsuperscript{28}

Independent candidates and minor parties have not been without redress when faced with barriers to ballot access. In the past several years, a significant number of candidates, with the support of voters, have challenged regulation of the electoral process.\textsuperscript{29} While the Supreme Court has recognized the power of the states

\textsuperscript{25} It has been noted that the John Anderson campaign's preoccupation with ballot access efforts was terribly detrimental to his overall presidential campaign. Frampton, \textit{supra} note 1, at 133.
\textsuperscript{26} Anderson v. Celebrezze, 460 U.S. 780, 794 (1983).
\textsuperscript{27} Note, \textit{supra} note 19, at 1123. See Sweezy v. New Hampshire, 354 U.S. 234, 251 (1957) (where the Court stated that all political ideas cannot and should not be channeled into two major parties).
\textsuperscript{29} See, \textit{e.g.} cases cited \textit{supra} note 23.
to control the electoral process in some ways, it has also held that various constitutional provisions limit the states' power.\textsuperscript{30}

\textbf{B. WILLIAMS V. RHODES—The Starting Point}

"The Court's initial forays into the realm of ballot access requirements were neither direct nor wholly consistent."\textsuperscript{31} The Supreme Court first considered the constitutionality of ballot access restrictions in 1968 in \textit{Williams v. Rhodes}.\textsuperscript{32} In \textit{Williams}, the Ohio American Independent Party successfully challenged Ohio election laws which required a new political party to file, by February of the election year, nominating petitions signed by a number of registered voters equal to at least fifteen percent of the voters in the last election.\textsuperscript{33} This law, in conjunction with other restrictive statutory provisions, made it virtually impossible for a new political party to get placed on the ballot.\textsuperscript{34} The American Independent Party argued that this law and other burdens denied the Party and certain Ohio voters equal protection of the laws under the fourteenth amendment.\textsuperscript{35}

In a divided opinion,\textsuperscript{36} the Court found that the Ohio scheme, when taken as a whole, imposed a burden on voting and associational rights of candidates in violation of the equal protection clause.\textsuperscript{37} In reaching this result, the Court applied a strict scrutiny standard requiring the state to demonstrate that the restrictions furthered a compelling state interest.\textsuperscript{38} Strict scrutiny of state interests is applied when fundamental interests are infringed or when

\begin{itemize}
\item \textsuperscript{30} NOWAK, \textit{CONSTITUTIONAL LAW supra} note 17, at 778.
\item \textsuperscript{31} L. TRIBE, \textit{AMERICAN CONSTITUTIONAL LAW} 777 (1978).
\item \textsuperscript{32} 393 U.S. 23 (1968).
\item \textsuperscript{33} \textit{Id.} at 24-25. See \textit{OHIO REV. CODE ANN.} \textsection 3517.01 (Page 1972).
\item \textsuperscript{34} \textit{Williams}, 393 U.S. at 24. The Ohio American Independent Party formed in January of 1968. During the following six months the campaign succeeded in obtaining over 450,000 signatures but the Party was told it would not be given a place on the ballot because it had not met the February deadline.
\item \textsuperscript{35} \textit{Id.} at 27.
\item \textsuperscript{36} Mr. Justice Black wrote the opinion of the Court, joined by Justices Douglas, Brennan, Marshall and Fortas. Justice Douglas also wrote a separate concurring opinion. Justice Harlan concurred in the result only, while Justices Stewart, White and Warren dissented separately.
\item \textsuperscript{37} \textit{Williams}, 393 U.S. at 34.
\item \textsuperscript{38} \textit{Id.} at 31.
\end{itemize}
the statute creates a suspect classification. Here, as the fundamental right to vote had been infringed upon by Ohio's law, strict scrutiny was applied.

Ohio offered four state interests to justify its ballot access restrictions. First, it claimed an interest in promoting the two-party system. Second, it asserted an interest in guaranteeing that all election winners are the choice of a majority of the state's voters. Third, Ohio contended that its system channelled factionalism and political competition into the primary. Fourth, the state asserted an interest in preventing voter confusion that might result from a laundry-list ballot. Applying a balancing test, the Court did not find these interests to be compelling.

Concurring in the result only, Justice Harlan stated he would have rested his decision entirely on the ground that Ohio's statutory scheme violated the basic right of political association assured by the First Amendment. Harlan argued that the right to have one's voice heard and one's views considered is at the core of the first amendment. Dissenting, Justice White stated that neither the equal protection clause nor the due process clause prohibited Ohio from this type of regulation so long as the state had a legitimate objective.

Williams v. Rhodes set the tone for future ballot access cases in what one commentator called a confusing judicial analysis. The Williams Court expressly stated that the question before the Court was whether Ohio's laws resulted in a denial of equal protection under the fourteenth amendment. However, in examining this issue, the Court used first amendment arguments. Latent in the Court's opinion, as a basis for strict scrutiny review under the

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41. *Id.* at 32.
42. *Id.* at 32-33.
43. *Id.* at 33.
44. *Id.* at 30. The balancing test included a consideration of the facts and circumstances behind the law, the interests which the state claims to be protecting, and the interests of those who are disadvantaged by the classification. *Id.*
45. *Id.* at 41.
46. *Id.* at 62. This standard of "minimum scrutiny" arises from the premise that state legislatures are presumed to have acted within their constitutional powers. *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).
47. L. *TRIBE, supra* note 31, at 779.
equal protection clause, is the notion of a first amendment right to vote equally deserving of a strict scrutiny analysis.

Furthermore, while the Court recognized as fundamental the right to associate politically and the right to vote, it did little to illuminate the precise nature and scope of these rights. In discussing the right of individuals to associate for the advancement of political beliefs, the Court commented, "The right to form a party... means little if a party can be kept off the election ballot..." Such language indicates that ballot access is a fundamental first amendment freedom. Yet the Court did not indicate whether a statute that encumbered ballot access could be invalidated upon a showing of a violation of associational rights alone or whether a violation of both the right to vote and the right to associate is required.

More importantly, because there was no claim in Williams that voters were denied the right to vote or that their vote was diluted, Williams implied that the right to vote included the right to vote for a particular candidate. In other words, every person has a constitutional right to vote for the candidate of his choice. Such an implication would be a significant departure from prior voting rights cases.

Historically, opinions vindicating voting rights were based primarily upon the fifteenth amendment and were characterized by judicial reluctance to intervene in state electoral processes unless racial discrimination was involved. The apportionment cases

50. Williams, 393 U.S. at 30-31.
52. Williams, 393 U.S. at 31.
53. In striking down a filing fee scheme in Bullock v. Carter, 405 U.S. 134 (1972), the Court stated that this "Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review." Id. at 142-43. The Court's rejection of the fundamental status of candidacy rights indicates that the right to vote and the right to associate are inextricably bound to one another.
54. L. Tribe, supra note 31, at 779.
55. Id.
56. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State..." U.S. Const. Amend. XV, § 1.
of the 1960's gave franchise rights an independent status apart from racially discriminatory conduct and were the initial step in recognizing the right to vote as fundamental. These early cases dealt with franchise restrictions or dilution of the weight of an individual's vote. However, Williams v. Rhodes indicated that the fundamental right to vote included the right to vote effectively. The "right to vote effectively" demonstrates the close nexus between voting rights and candidacy rights. The right to vote for the candidate of one's choice means little if that candidate is barred from the ballot. Taken to an extreme, such a right would lend constitutional foundation to the right of ballot access to any candidate supported by a single voter.

While ballot access jurisprudence has undergone considerable development in the sixteen years since the Court decided Williams v. Rhodes, the Williams decision failed to produce the offspring its broad language suggested. The Supreme Court has continued to adhere to the equal protection clause as its basis of review and has yet to rely solely upon the impingement of first amendment rights as compelling a rigorous judicial examination. Although the Court has continued to recognize the value of voting and associational rights, it has failed to label the right to candidacy as a fundamental right.

III. REASONING IN Anderson v. Celebrezze

In its analysis, the Court in Anderson v. Celebrezze scrutinized the fundamental rights of voting and association as applied to candidates and voters. After demonstrating that the crucial constitu-

58. Until 1962, the Court consistently refused to adjudicate claims concerning legislative apportionment of voting districts on the grounds that it presented political questions. Colegrove v. Green, 328 U.S. 549 (1946). However in Baker v. Carr, 369 U.S. 186 (1962), the Court held that Tennessee's apportionment scheme violated the Equal Protection Clause and thus presented a justiciable controversy. In Harper v. Virginia Board of Elections, 383 U.S. 663 (1966), the Court recognized the fundamental status of the right to vote.

59. See, e.g., Bullock v. Carter, 405 U.S. 134 (1972) (where the Court applied a middle-level of review); Jenness v. Fontson, 403 U.S. 431 (1971) (where a set of restrictions was so lenient that it was clearly constitutional). For numerous other ballot access cases see NOWAK, CONSTITUTIONAL LAW, supra note 17, at 777-784.


61. See supra note 53 and accompanying text.


63. 460 U.S. at 787-88.
tional interests at stake were first amendment rights, the Court alluded\textsuperscript{64} to an equal protection argument relied upon in prior election cases.\textsuperscript{65} The Court recognized that the March deadline infringed upon the fundamental rights of voters to associate for the advancement of political beliefs and also burdened the associational rights of independent candidates by denying them access to the political arena after the March deadline.\textsuperscript{66} The Court noted that while the filing deadline had a direct effect on candidates,\textsuperscript{67} it also had a correlative effect on voters.\textsuperscript{68} In its determination, the Court balanced the burden the restriction placed on the petitioners' constitutional rights against the interests advanced by Ohio.\textsuperscript{69} Ohio offered three interests which it sought to further by the early filing deadline. The following section will summarize the Court's analysis of these factors.

A. Voter Education

The Court recognized that the state has an important and legitimate interest in voter education.\textsuperscript{70} An interest in fostering an informed educated vote motivated the Framers' decision not to provide for direct popular election.\textsuperscript{71} Election by the people was disfavored at the Constitutional Convention of 1787 in part because of the concern over the ignorance of the people as to which candidates were better qualified.\textsuperscript{72} The Court in \textit{Anderson}, however, distinguished the present day situation from that of 1787. Today, the Court noted, the vast majority of the electorate is informed daily about events and issues that affect voter choices.\textsuperscript{73} In the modern world it is somewhat unrealistic to suggest that it takes more than seven months to inform the electorate about the qualifica-

\textsuperscript{64} In a footnote, the Court stated that it relied upon the Equal Protection analysis used in a number of prior election cases. \textit{Id.} at 786, n.7. However, the Court did not engage in a separate Equal Protection Clause analysis.


\textsuperscript{66} \textit{Anderson}, 460 U.S. at 787.

\textsuperscript{67} 460 U.S. at 794.

\textsuperscript{68} \textit{Id.}

\textsuperscript{69} \textit{Id.} at 789.

\textsuperscript{70} \textit{Id.} at 796.

\textsuperscript{71} \textit{Id.}

\textsuperscript{72} 460 U.S. at 797.

\textsuperscript{73} \textit{Id.}
tions of a particular candidate. As such, the Court held that Ohio's interest in voter education failed to justify the March deadline.

B. Equal Treatment of Candidates

Ohio claimed that similar treatment was afforded the different types of candidates because party candidates were also required to meet the March deadline by causing their delegates to file at that time in order to participate in the primary. However, the consequences of failing to meet the deadline were not the same for partisans and independents. If a party candidate failed to file by March, he was not barred from running as his party's choice in the election. An independent's failure to file by March, however, operated as a bar from the ballot.

The Court also noted that the benefits afforded the candidates were different. After the independent candidate filed his nomination papers, he did not participate in a primary election as did the partisan candidate. A successful primary participant generally acquires the automatic support of an experienced political organization. The independent candidate, on the other hand, must develop support by other means. Thus, the state's "equal treatment" of partisan and independent candidates actually served as an inequity. In short, equal treatment was not achieved by imposing the March deadline.

C. Political Stability

The state also alleged an interest in ensuring political stability of the two major parties. Ohio expressed a desire to protect existing political parties from competition for campaign workers,

74. Id.
75. Id. at 798.
77. Id. at 799.
78. Id. Because a major political party has earned the right to put on the ballot a candidate chosen at its national convention, a candidate could forego the Ohio primary process and if he should win at the national convention, still be placed on the ballot.
79. Id.
80. 460 U.S. at 800.
81. Id.
82. Id. at 801.
83. Id.
84. Id.
voter support, and campaign resources. In rejecting this interest the Court relied on its decision in *Williams v. Rhodes.* The protection of the two major parties from external competition cannot justify the virtual exclusion of other candidates. First amendment values of competition in ideas and governmental policies outweigh the state's interest in protecting the Republicans and the Democrats.

The Court distinguished Ohio's interest in political stability from a recent case, *Storer v. Brown.* The Court in *Storer,* recognized a legitimate state interest in preventing splintered parties as the restriction was used as a means to discourage candidacies prompted by short-range political goals or personal quarrel. The *Anderson* Court said California's restrictions were substantially different from Ohio's, especially as Ohio regulated a nationwide Presidential election and California sought to regulate only within its own boundaries. The Court concluded its analysis of the state's interest in political stability and determined the statute did not justify Ohio's goals.

D. Dissenting Opinion

Justice Rehnquist, dissenting, employed a rational basis approach which avoided strict scrutiny analysis. A rational basis approach requires only that legislation be rationally related to a legitimate state interest rather than a compelling state interest. The dissent based the application of the rational basis standard upon the express plenary power granted to the states by the Constitution in regulating elections.
Rehnquist argued that so long as Ohio ballot access laws are rational and allow nonparty candidates reasonable access to the ballots, the courts should not interfere.\textsuperscript{96} The dissent noted that in 1980 five independent candidates had been successful in meeting the March deadline.\textsuperscript{97} The deadline prevented a candidate from doing exactly what Anderson had done. Initially Anderson had sought a Republican party nomination.\textsuperscript{98} Realizing he had no chance, he then bolted to launch an independent candidacy.\textsuperscript{99}

The dissent accepted Ohio's interest in political stability as a legitimate justification for its restriction.\textsuperscript{100} Relying on \textit{Storer v. Brown}, which the majority had distinguished as inapplicable, the dissent argued that in the interest of the stability of the political system, Ohio must be free to assure itself that non-party candidates are serious contenders with a satisfactory level of community support.\textsuperscript{101}

Furthermore, the dissent disagreed that the early filing deadline reflected a lack of faith in the electorate to educate itself about prospective candidates.\textsuperscript{102} Crucial to a meaningful vote is the electorate's ability to evaluate candidates over a period of time.\textsuperscript{103}

The most glaring difference between the majority and the dissent in \textit{Anderson} is not the conclusion reached but the standard of scrutiny applied to reach that conclusion. While a rational basis approach has yet to be followed by a majority of justices in the ballot access cases, the five-four decision in \textit{Anderson} indicates that a rational basis approach may be forthcoming.

\section*{IV. Analysis}

\subsection*{A. Standard of Scrutiny}

Perhaps the dissenting opinion in \textit{Anderson v. Celebrezze} evidences an eroding standard of scrutiny in the ballot access cases.

\begin{itemize}
\item \textsuperscript{96} \textit{Anderson}, 460 U.S. at 808.
\item \textsuperscript{97} \textit{Id}.
\item \textsuperscript{98} 460 U.S. at 811.
\item \textsuperscript{99} \textit{Id}.
\item \textsuperscript{100} \textit{Id.} at 813.
\item \textsuperscript{101} \textit{Id.} at 818.
\item \textsuperscript{102} \textit{Id}.
\item \textsuperscript{103} \textit{Id.} at 819.
\end{itemize}
Several of Anderson’s predecessors reflected a modified form of the strict scrutiny approach used in Williams v. Rhodes.

A watered-down strict scrutiny first appeared in Bullock v. Carter, where the Court invalidated Texas’ primary election filing fee system. The Court stated that “the laws must be closely scrutinized” indicating strict scrutiny. But rather than calling for a compelling state interest, the Court said the laws need only be “reasonably necessary to the accomplishment of legitimate state objectives.” While the Court in Bullock did not expressly state it applied a middle-level standard of scrutiny, the language of the Court in using the word “legitimate” rather than “compelling” coupled with the Court’s desire to closely scrutinize implied an intermediate standard.

A diluted application of the strict scrutiny approach was also employed in Storer v. Brown.

There, aspiring candidates challenged provisions of the California Elections Code forbidding a ballot position to an independent candidate if he voted in the preceding primary, had a registered affiliation with a qualified political party within one year prior to the last primary, or did not meet a five-percent petition requirement. Although the decision purported to subject the access restrictions to strict scrutiny by requiring a compelling state interest, the Court actually “assayed the requirements by a far less demanding standard.”

Justice Brennan, dissenting in Storer, objected to the disparity between the Court’s language and its actual reasoning. Justice Brennan argued that the Court diluted the compelling state interest test by making no determination of whether the statutes were the least restrictive alternative available. Thus in Storer v. Brown,

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105. Id. at 149.
106. Id. at 144.
107. Id.
111. Id. at 726.
112. Id. at 736.
113. L. Tribe, supra note 31, at 783.
114. Storer, 415 U.S. at 760.
115. Id. at 760-61.
unlike *Bullock v. Carter*, confusion did not center around the language of the test but in the Court's reasoning in finding the interests compelling.

However, in a more recent case, *Illinois Board of Elections v. Socialist Workers Party,* the Court reversed field once again and relied on the traditional strict scrutiny approach. In analyzing relevant precedent the Court did not find inconsistencies in the standard of review applied. This case gives the impression that the standard of scrutiny to be used in ballot access cases is not a diluted standard, but the strict scrutiny approach pronounced in *Williams v. Rhodes*.

*Anderson v. Celebrezze* reopened the door for further uncertainty as to the standard of scrutiny to be applied in the ballot access cases. Unlike *Illinois Board*, nowhere in the *Anderson* opinion did the Court expressly state that it employed a strict standard of scrutiny. Nor did the Court expressly require Ohio to demonstrate a compelling state interest. Rather, in determining the legitimacy of Ohio's interest, the Court employed a balancing test. In this process, the Court considered the character and magnitude of the injury as opposed to the rights protected by the Constitution. It then identified and evaluated the precise interests of the state, but did not evaluate those interests in light of a compelling state interest model. Instead the Court made a conclusory statement that Ohio's minimal interests were outweighed by the voters' freedom of choice and association.

Perhaps in employing a balancing test, the *Anderson* Court avoided the difficulty of drawing a line at the point a state interest becomes compelling. As pointed out by Justice Blackmun in his concurrence in *Illinois Board*,

*[There] seems to be a continuing tendency in this Court to use as tests such easy phrases as "compelling state interest" and "least drastic means." I have never been able to fully appreciate just what a compelling state interest is. . . . And for me, "least drastic means"

117. *Id.* at 184. Under the Illinois Election Code, new political parties and independent candidates were required to obtain 25,000 signatures of qualified voters in order to appear on the ballot.
119. *Id.*
120. 460 U.S. at 796-806.
121. *Id.* at 806.
is a slippery slope and also signals of the result the Court has chosen to reach.\textsuperscript{122}

Thus a balancing test requires the Court to analyze rather than label. The balancing test results in explicit decisions. On the other hand, the advantages of a balancing process reveal its weaknesses. “Since the weighing of factors in any controversy is often unique and not susceptible of generalization, an increased case by case review by the high court would become inevitable.”\textsuperscript{123} A case by case analysis offers no specific guidelines through the use of bright line tests such as “strict scrutiny” or “least drastic means.” However, given the sundry types of restrictions from state to state, even with clearly defined tests the Court will still be confronted with a case by case examination.

\section*{B. First Amendment Rights}

Traditionally, ballot access adjudication has involved the protection of fundamental first amendment rights through the use of the equal protection clause of the fourteenth amendment. \textit{Anderson v. Celebrezze} also relied on the first and fourteenth amendments in vindicating the petitioners’ rights but in a notably different way than former cases.

The \textit{Anderson} Court appeared to rely on a first amendment argument much like that proffered by Justice Harlan in his concurrence in \textit{Williams v. Rhodes}.\textsuperscript{124} This type of analysis sidesteps invocation of the equal protection clause, relying solely on the merits of the first amendment itself as incorporated by the due process clause.\textsuperscript{125} The Court quoted Justice Harlan, “it is beyond debate that freedom to engage in association for the advancement of political beliefs and ideas is an inseparable aspect of the liberty assured by the due process clause of the fourteenth amendment.”\textsuperscript{126} But as if afraid to rest its decision on this ground, the Court clings to the trunk of precedents in a footnote saying,

In this case we base our conclusion directly on the First and Fourteenth amendments and do not engage in a separate Equal Protection Clause analysis. We rely, however, on the analysis in a number

\begin{itemize}
\item \textsuperscript{123} Jardine, \textit{supra} note 57, at 313.
\item \textsuperscript{124} Williams v. Rhodes, 393 U.S. 23, 41 (1968).
\item \textsuperscript{125} \textit{Id}.
\item \textsuperscript{126} \textit{Anderson}, 460 U.S. at 787 quoting \textit{NAACP v. Alabama}, 357 U.S. 449 (1958).
\end{itemize}
of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment.\footnote{127. Anderson, 460 U.S. at 786-87, n.7.}

Such language by the Court is clearly double talk. The Court bases its decision on the first and fourteenth amendments but fails to distinguish whether it relies on the first amendment as incorporated by the due process clause or on the first amendment as protected by the equal protection clause. Aside from this footnote, the remainder of the opinion does not refer to the equal protection clause. A great portion of the opinion is couched in terms of the first amendment but the Court remains reluctant to entirely dispense with the equal protection clause.

One observer has noted, "It seems peculiar to speak of equal protection of a fundamental interest (freedom of association by candidate supporters) that is already constitutionally protected under the First Amendment itself. It would be far less convoluted to rely on the First Amendment directly."\footnote{128. Elder, supra note 21, at 403.} Being able to vote for the candidate of one's choice is the most common means of political expression, and is constitutionally protected under the first amendment. Similarly, when a candidate is denied a ballot position, he is denied an effective mechanism for the expression of his views\footnote{129. Id. at 402.} and thereby denied first amendment protection.

The history concerning the adoption of the first amendment is sparse.\footnote{130. P. Brest and S. Levinson, Process of Constitutional Decision Making 1097 (1983).} Doubtless the Framers' focus was on political speech, which had been suppressed in a variety of ways in England and the Colonies. As Justice Black wrote in\textit{ Mills v. Alabama},\footnote{131. Mills v. Alabama, 384 U.S. 214 (1966).} "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."\footnote{132. Id. at 218.} This includes "discussions of candidates, structures and forms of government..." and all such matters relating to political processes.\footnote{133. Id.} Clearly the continuing availability of political opportunity and the right to associate for the advancement of political beliefs are those types of rights advocated by the Framers in drafting the
first amendment. The first amendment principle of "equal liberty of expression" underlies the rights of those seeking a place on the election ballot. The first amendment should "guarantee a place on the ballot to anyone who meets the qualifications of the office in question, unless the exclusion of that person is necessary to achieve a compelling state interest." 134

The first amendment was recently relied on by the Supreme Court in Buckley v. Valeo 135 to invalidate the expenditure limitations of the Campaign Finance Act. 136 The Court found that limitations on expenditures on behalf of a candidate placed substantial restrictions on the ability of individuals to engage in protected political expression. 137 By comparison, restrictions on access to the ballot are yet more effective in denying candidates a means by which to engage in political expression. "If a political candidate's expenditure of personal funds for campaigning is protected under the first amendment as instrumental to his political expression, then surely the right of a serious, qualified candidate to appear on the ballot should also be encompassed." 138

In 1973, the court of appeals for the First Circuit invalidated a city ordinance that prohibited a public employee from becoming a candidate for public office. 139 The court reasoned that the interest in an individual in running for office is an interest protected by the first amendment because it touches on the individual's freedom of association. As such, the court held that the restriction imposed a severe hurdle to the candidate's exercise of his first amendment rights. 140

Such arguments seem persuasive especially since the Supreme Court has failed to recognize candidacy as a fundamental right. To rely on the first amendment directly would avoid focusing on the rights of voters and require the individual candidate's rights to be examined. However, the Supreme Court has recently rejected

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138. Elder, supra note 21, at 402. It is interesting to note that the original focus on the Equal Protection Clause may have been due to the fact that the pleadings in Williams v. Rhodes characterized the case as involving equal protection. See Elder, supra note 21, at 402, n.66.
140. Id. at 195, n.11.
a candidate's argument that his first amendment interests were violated by a statute denying him access to the ballot. In *Clements v. Fashing*, a Texas statute barred a Justice of the Peace from running for the legislature while in office. The Court held that the state's interests were sufficient to warrant the *de minimus* interference with appellee's interest in candidacy in response to appellee's first amendment claims. Only if the challenged provision significantly impaired first amendment interests would the state be constitutionally limited.

Hence, the *Anderson* Court's strong reliance on the first amendment might only reflect that the equal protection clause in ballot access cases is so deeply embedded that further equal protection analysis was unnecessary. On the other hand, it could possibly indicate that the Court is shifting toward a first amendment basis of review.

C. The Right to Vote and The Right to Candidacy

Had the Supreme Court in *Anderson* relied solely upon the first amendment as incorporated by the due process clause, it could have avoided the struggle in distinguishing the right to vote and the right to candidacy. The Court has often noted that the two rights are incapable of neat separation. Despite their similarities, the right to vote has long been labelled as fundamental, while the right to be a candidate has never been directly held by the Supreme Court to be a fundamental right. In terms of an equal protection analysis, this means that before a restriction denying a candidate access to the ballot will be subjected to strict scrutiny, it must first be shown to burden the fundamental right to vote, as it is a violation of a fundamental right that triggers strict scrutiny.

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142. Id.
143. 102 S.Ct. at 2848.
144. Id.
147. See supra note 58 and accompanying text.
148. See *Adams v. Askew*, 511 F.2d 700 (1975) (where the court refused to equate the right to candidacy with the right to vote).
149. See *Bullock v. Carter*, 405 U.S. at 142-143 (noting that the Court has never found candidacy to be so fundamental as to trigger strict scrutiny); *Clements v. Fashing*, 102 S.Ct. 2836 (1982) (where the Court again rejected the right to candidacy as fundamental).
For example, suppose John Anderson had brought suit in his own behalf without any joinder of voters and claimed the restrictions violated his rights under the equal protection clause. As candidates have not been deemed a suspect class and the right to be a candidate has not been deemed fundamental, minimum scrutiny would be applied. The dissent in *Anderson* used this "rational basis" minimum scrutiny standard. Such a scheme would more than likely tend to exclude minority parties from participation in the political process at the discretion of the states as courts may postulate any conceivable state interest to justify the legislation.\textsuperscript{150}

Thus, in almost all ballot access cases voters are joined as plaintiffs to maximize the constitutional claim and to ensure a strict scrutiny review. A first amendment claim by candidates could possibly avoid this roundabout process. The impingement on a fundamental freedom such as political expression would still require the state to demonstrate a compelling interest. Furthermore, the showing of a dual burden would no longer be necessary. However, it is not clear whether the Court would recognize a burden on first amendment rights of candidates alone to be sufficient to require strict scrutiny. While *Anderson* indicates the Supreme Court may be willing to accept this argument, such a claim without more may result in the rational basis approach.

Recognition of the right to candidacy as fundamental would also obviate a determination of whether the legislation impinges upon the right to vote. It has been argued that the right to vote and the right to be a candidate are analogous and interdependent.\textsuperscript{151}

Candidacy without voters would be worthless, and the right to vote would be meaningless were there no parties or candidates from which to choose. Consequently, the right to vote entails more than the ability to cast a vote for a candidate; rather, the right to vote is the right to cast one’s vote in a meaningful way—to have a choice of a candidate who represents the voter’s views.\textsuperscript{152}

If the two rights are analogous, it follows that both are fundamental. "Because of their parallel structure and common importance, they ought to receive identical protection."\textsuperscript{153} It seems contrived that the Court continually recognizes the correlation of these two

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\textsuperscript{151} Note, *supra* note 145, at 254, 256.
\textsuperscript{152} Id. at 252-53.
\textsuperscript{153} Jardine, *supra* note 57, at 303.
rights yet refuses to recognize the right to candidacy as fundamental. However, Anderson does not indicate a shift in that direction for the Court stated in its conclusion, “We began our inquiry by noting that our primary concern is not the interest of the candidate Anderson, but rather, the interests of the voters. . . .”\(^{154}\)

V. CONCLUSION

The decision in Anderson v. Celebrezze demonstrates the Court’s inability to produce consistent decisions in the ballot access area. Moreover the 5-4 split decision offers little guidance as to whether the Court will continue to apply the balancing test utilized by the majority or the rational basis approach of the dissent.

If the Court follows the rational basis standard of the dissent, this could result in greater exclusion of minority party and independent candidates from the political process. The balancing approach would lead to a greater sensitivity to the rights of candidates and voters but would also continue the ongoing confusion over the standard of review to apply in the ballot access cases.

The Supreme Court left unanswered the important question of whether the equal protection clause will continue to be used to vindicate candidate’s first amendment rights. In addition, given the great disparity in the types of restrictions state by state, the inconsistencies of the ballot access cases themselves, and the Court’s own inability to reach a consensus, what future litigation will entail is difficult to predict with any great assurance.

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\(^{154}\) Anderson, 460 U.S. at 806.
SONY CORPORATION OF AMERICA V. UNIVERSAL CITY STUDIOS, INC., 104 S.CT. 774 (1984): IS COPYRIGHT LAW IN NEED OF CONGRESSIONAL ACTION?

INTRODUCTION

New technology continually challenges the courts with novel and unprecedented issues for resolution. Copyright law is particularly challenging today with so many technological advancements in video tapes and computer programs. The Supreme Court recently decided the much-publicized case of Sony Corp. of America v. Universal City Studios, Inc. or as it is commonly known, the Betamax case. The Court held that "[t]he sale of the VTR's to the general public does not constitute contributory infringement of respondents' copyrights." The Court also discussed the doctrine of "fair use" and found that owners of VTR's who tape programs from the television sets in their homes for noncommercial use are not guilty of violating copyright law.

This Note begins with a brief history of the case and the issues in the district court, the Court of Appeals for the Ninth Circuit and the Supreme Court. Next it gives an overview of the development of copyright law, examines the basis for the Supreme Court's decision, and discusses the Court's analysis of the issues along with the complex question of adequate relief with which the Court was faced. Finally, this Note investigates the need for congressional, rather than, judicial relief.

2. Motion pictures, sound recordings, radio and television, photocopying, cable television, microfilm, video tapes and computer programs are the major technological innovations that have affected copyright law. Judicial attempts at reconciling these new innovations have usually been followed by legislative action. CRC Systems Incorporated, Impact of Information Technology on Copyright Law in the Use of Computerized, Scientific and Technological Information Systems, in TECH. & COPYRIGHT 137 (G. Bush & R. Dreyfuss ed. 1979); Note, The Threatened Future of Home Video Recorders, Universal City Studios, Inc. v. Sony Corp. of Am., 31 DE PAUL L. REV. 643 n.1 (1982).
6. Id. at 777.
7. Id. at 777, 795.
I. THE DEVELOPMENT OF THE "BETAMAX" CASE

A. District Court and Court of Appeals

In November of 1975, the Sony Corporation began marketing the Betamax, a videotape recorder that enables private television owners to record broadcasts and replay them on their own television sets. In November of 1975, the Sony Corporation began marketing the Betamax, a videotape recorder that enables private television owners to record broadcasts and replay them on their own television sets. Universal City Studios and Walt Disney Productions, two owners and producers of copyrighted audiovisual works, initially filed suit in 1976 seeking an injunction to halt consumer use of the Betamax. Sony Corporation (the manufacturer of Betamax recorders and tapes), Sony Corporation of America (Sonam, the distributor of the Betamax), four retail stores that sold the Betamax, Sonam’s national advertising agency for Betamax, and a representative individual owner and user of a Betamax were named as defendants in the complaint.

Universal and Disney alleged that home recording of their copyrighted programs by individual Betamax owners constituted copyright infringement and that the corporate defendants were either directly or contributorily liable for such infringement. Sony asserted that home use recording with VTR’s by individual Betamax owners did not amount to copyright infringement and even if it did, defendants could not be held responsible under any theory of infringement or vicarious liability.

After a lengthy trial, the district court entered judgment for the defendants finding: one) an implied exemption for home video recording in the legislative history of the copyright law; and two) even if it were an infringement, home recording was protected by

10. The plaintiffs at the district court level were Universal City Studios, Inc. [hereinafter cited as Universal], and Walt Disney Productions [hereinafter cited as Disney]. Defendants were Sony Corporation of America (the distributor of Betamax) and Sony Corporation (the manufacturer of Betamax recorders and tapes) [hereinafter cited as Sony]; Carter Hawley Hale Stores, Inc.; Associated Dry Goods Corporation; Federated Department Stores; Henry’s Camera Corporation; Doyle Dane Bernbach, Inc.; and William Griffiths. Plaintiffs did not seek relief from William Griffiths, the individual owner of a Betamax. Id. at 432-33.
11. Id.
12. Id.
13. The Court of Appeals for the 9th Circuit paraphrased the district court’s holding as follows:

(1) that copyright holders of audiovisual materials, some of which are sold for telecast over public airwaves, did not have monopoly power over off-the-air copying of those materials by owners of a videotape recorder in their homes for private, non-commercial use;
the “fair use” doctrine. The district court also found that Sony was not a contributor infringer because it did not know that home video recording was an infringement at the time it manufactured and sold its machines.

Universal and Disney appealed the decision to the United States Court of Appeals for the Ninth Circuit. The court of appeals reversed, holding that home video recording of copyrighted materials was an infringement and was not protected by the “fair use” doctrine. The Ninth Circuit also held that Sony was contributorily liable for infringement because it knew that the videotape recorders would be used to reproduce copyrighted materials. In addition, the court of appeals examined the Sound Recording Amendment of 1971 and the Copyright Act of 1976 and found neither the wording nor the legislative history of the statutes suggestive of a home use video exemption. The case was then remanded to the district court for a consideration of the appropriate relief to be granted.

(3) even if home use copying constituted an infringement, neither manufacturers, [nor] distributors . . . were liable under theories of direct or contributory infringement, or vicarious liability.

Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963-64 (9th Cir. 1981), rev’d, 104 S. Ct. 774 (1984). The issue of an implied exemption for home videorecording in the legislative history of copyright law was not brought before the Supreme Court. Brief for respondents at Note 20, Sony Corp. of Am. v. Universal City Studios, Inc., 104 S. Ct. 774 (1984) [hereinafter Brief for Respondents].

14. “Fair use” is a privilege “in others than the owner of a copyright to use copyrighted material in a reasonable manner without his consent . . . .” H. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944).

15. 480 F. Supp. at 460.

16. Contributory infringement is a concept borrowed from patent law. The court in Stamicarbon, N.V. v. McNally-Pittsburgh Mfg. Corp., 302 F. Supp. 325 (D. Kan. 1969), defined contributory infringement as the intentional aiding of one person by another in the unlawful making, selling or using of a patented invention. A contributory infringer is a person who induces, aids or contributes to the wrongful acts of another that constitute infringement. Id. at 531. Contributory infringement thus results from the furnishing of plans of an infringing device or from designing and helping to build an infringing machine. Id.

17. 659 F.2d at 965-69. In reaching this conclusion, the court found the following language contained in the House Report to the 1971 Sound Recording Amendment to be especially significant:

In excluding the ‘sounds accompanying a motion picture’ from the scope of this legislation the Committee does not intend to limit or otherwise alter the rights that exist currently in such works. The exclusion reflects the Committee’s opinion that soundtracks or audio tracks are an integral part of the ‘motion pictures’ already accorded protection under subsections (l) and (m) of Section 1 of title 17, and that the reproduction of the sound accompanying a copyrighted motion picture is an infringement of copyright in the motion picture. . . .


18. 659. F.2d at 976.
The court of appeals did agree with the district court on two points. Both courts agreed that: one) the retailers were not liable as copyright infringers when they showed small portions of copyrighted works in order to sell the Betamax machines;19 and two) Sony was not guilty of direct infringement of Universal and Disney's copyrights.20

B. Supreme Court

The Supreme Court reversed the court of appeal's decision by a vote of 5-4. The Court held the sale of VTR's "to the general public does not constitute contributory infringement of respondent's copyrights."21 The Court went on to say that individuals who tape programs from the television set with their VTR's in their homes for noncommercial use are making a "fair use" of the copyrighted materials.22

The Court also did not accept "respondents' novel theory" that "supplying the 'means' to accomplish an侵权行 activity and encouraging that activity through advertisement are sufficient to establish liability for copyright infringement."23 The Court found that if a product is widely used for legitimate, unobjectionable purposes, or is merely capable of substantial noninfringing uses,24 the sale of that product or copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement. Relying heavily on the findings of the district court, the Court found that there is a significant likelihood that some copyright holders would not object to having their broadcast time-shifted by private viewers and that time-shifting would cause nominal harm to the potential market for, or the value of, the copyrighted work.25

19. The court of appeals found no error in the district court's decision regarding the retail defendants and thus affirmed that part of the district court's decision. (Id. at 963, 976.) Any further reference in this article to corporate petitioners will not include a discussion of retail petitioners.
20. 104 S. Ct. at 798.
21. Id. at 796. The case was argued in front of the Supreme Court on January 18, 1983, and held over until the next term for reargument on October 3, 1983. On January 17, 1984, the Supreme Court decided the case in favor of Sony.
22. Id. at 777, 795.
23. Id. at 776, 785-87, Universal and Disney attempted to find support for this argument in Kalem Co. v. Harper Brothers, 222 U.S. 55 (1911), but the Supreme Court did not agree.
24. Id. at 777, 789.
25. Id. at 777, 794-95. Time-shifting occurs when a viewer tapes a program with a VTR for viewing at a later time.
The Court summed up by asking for congressional action and stating that in a case such as this, in which the course to be followed by the judiciary is not plainly marked, the Court must be careful in construing the rights created by the statute. 26

II. THE EVOLUTION OF COPYRIGHT LAW

A. Copyright Law

The copyright clause of the United States Constitution provides, in pertinent part, that Congress has the power to enact laws "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." 27 Thus, Congress can protect the interests of authors and inventors and make sure they receive just compensation for their works. 28 However, despite the fact that Congress may authorize monopoly privileges, those privileges are neither unlimited nor designed to provide a special private benefit. 29 "[T]he primary object in conferring the monopoly lies[ ]in the general benefits derived by the public from the labors of authors." 30

Even though the Copyright Act grants the author or inventor exclusive rights regarding control of the copyrighted work, various permissible uses or ways in which the work may be utilized by the public without infringing upon the owner’s exclusive control are listed in the Act. 31 These permissible uses try to balance encourage-

26. Id. at 783.
28. The encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors. Mazer v. Stein, 347 U.S. 201, 219 (1954), 104 S. Ct. at 782.
29. 104 S. Ct. at 782.
30. Id. (quoting United States v. Paramount Pictures, 334 U.S. 131, 158 (1948), quoting from Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)).
31. Note, The Threatened Future of Home Video Recorders, 31 De Paul L. Rev. 643, 646-47 (1982); see 17 U.S.C. § 106 (1982): Subject to Sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
   (1) to reproduce the copyrighted work in copies or phonorecords;
   (2) to prepare derivative works based upon the copyrighted work;
   (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
   (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
   (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes,
ment and reward to the author with the public benefit that is derived from accessibility of ideas and information. Thus the purpose of copyright law is to serve the public. Financial reward to the author or inventor is only a secondary consideration.

Congress has been expanding and revising the copyright law since 1790. The Copyright Act of 1909 became obsolete as a result of numerous and rapid technological changes and was replaced by the Copyright Act of 1976. This new Act incorporated the Sound Recording Amendment of 1971 which gave the holders of sound

and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly. 17 U.S.C. § 102 (1982) defines the types of work that are eligible for copyright protection:

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works; and
(7) sound recordings.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

32. See Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) (the primary objective and sole interest in granting the copyright monopoly lie in the benefits derived by the public). For additional authorities articulating that reward to the owner is subordinate to the public welfare, see Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Mazer v. Stein, 347 U.S. 201, 219 (1954); United States v. Paramount Pictures, 334 U.S. 131, 158 (1948); Berlin v. E.C. Publications, Inc., 329 F.2d 541, 544 (2d Cir. 1964), cert. denied, 379 U.S. 822 (1984); Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1352 (Ct. Cl. 1973), aff'd, 420 U.S. 376 (1975).


recording rights only limited protection. At this writing, various bills have been introduced to once again amend the Copyright Act.


Note, supra note 33, at 987 n.15.

37. S. 33, 98th Cong. 1st Sess. (1983) provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

Sec. 1. This Act may be cited as the “Consumer Video Sales/Rental Amendment of 1983”.

Sec. 2. Section 109(a) of chapter 1 of title 17 of the United States Code is amended by replacing the period at the end thereof with a colon and inserting thereafter the following:

“Provided, however, That, unless authorized by the copyright owner, the owner of a particular copy of a motion picture or other audiovisual work may not, for purposes of direct or indirect commercial advantage, dispose of the possession of that copy by rental, lease, or lending, or by any other activity or practice in the nature of rental, lease, or lending.”

Sec. 3. This Amendment becomes effective upon its enactment.

S. 175, 98th Cong. 1st Sess. (1983) and H.R. 175, 98th Cong. 1st Sess. (1983) both provide an exemption from copyright infringement for home video recording:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 1 of title 17 of the United States Code is amended by inserting at the end thereof the following new section:

“5119. Limitation on exclusive rights: Exemption for certain video recordings

“Notwithstanding the provisions of section 106, it is not an infringement of copyright for an individual to record copyrighted works on a video recorder if—

“(1) the recording is made for a private use, and

“(2) the recording is not used in a commercial nature.”

S. 31, 98th Cong., 1st Sess. (1983) and H.R. 1030, 98th Cong. 1st Sess (1983) would require manufacturers to pay a royalty to the movie industry for every video recorder and tape they make. H.R. 1030 provides in pertinent part:

§119. Limitation on liability: Video recording

(a) Home Video Recording. — Notwithstanding the provisions of section 106(1), an individual who makes a single video recording of a motion picture or other audiovisual work in his or her private home is exempt from any liability for infringement of copyright if the video recording is for the private use of that individual or members of his or her immediate household.

(b) Compulsory License for Video Recording Devices and Media.—

(1) Availability of Compulsory License. — Notwithstanding the provisions of section 106(1), the importation into and distribution in the United States, and the manufacture and distribution in the United States, of any video recording device or video recor-
B. The "Fair Use" Doctrine

"Fair use" is the judicially created doctrine\textsuperscript{38} that allows flexibility when examining a copyright question.\textsuperscript{39} The Copyright Act of 1909 did not contain an express recognition of "fair use." Therefore, the courts developed "fair use" as a balancing factor between "the public's interest in the development of art, science and history" and the absolute statutory grant of exclusivity to the copyright owner.\textsuperscript{40} This doctrine allows the courts to examine copyright questions on a case-by-case basis.\textsuperscript{41}

Congress did make "fair use" a part of the Copyright Act of 1976.\textsuperscript{42} This statute provides:

Notwithstanding the provisions of section 106,\textsuperscript{43} the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

\begin{itemize}
\item[Ding medium shall be subject to compulsory licensing if the importer or manufacturer of the device or medium records the notice, and deposits the statement of account and total royalty fees, specified by this clause.
\item See 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05 (1983).
\item The courts have been flexible in their interpretation of copyright law. In Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975), the Court recognized that ambiguities might arise in the copyright law because of technological changes. The Court had to decide whether a loud speaker system, which transmitted radio broadcasts to restaurant patrons, constituted an unlawful performance of copyrighted works. The Court allowed for flexibility in the copyright statute and found that no copyright infringement had occurred. In addition, in Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968), the Court observed that the Copyright Act should not be so narrowly interpreted that new discoveries and inventions would necessarily be precluded.
\item See also Teleprompter Corp. v. Columbia Broadcasting Sys., 415 U.S. 394 (1974)(the importation of distant television signals does not constitute performance).
\item See, e.g., Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1350 (Ct. Cl. 1973), aff'd, 420 U.S. 376 (1975)(flexibility was required where wording of Copyright Act rendered literal application ambiguous).
\item See M. NIMMER, supra note 38.
\item See supra note 31.
\end{itemize}
the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

The four "fair use" criteria listed above are not determinative nor exclusive. They are suggestive of relevant inquiries that the courts can make. The purpose and character of the use is the first inquiry. Usually, if the unauthorized use of the copyrighted material is for criticism, research or other independent work, it is more likely that the courts will find that a fair use has been made of the copyrighted material. Courts often look at this first criterion and ask whether there has been a productive or nonproductive use. However, courts have recently focused on the commercial or nonprofit educational purpose of the copyrighted material, although once again, neither is determinative.

The nature of the copyrighted material is the next criterion. Material of scientific, historical or legal merit lends itself to a find-
ing of “fair use.” Courts are flexible in their approach to this factor, however. For instance, in Triangle Publications v. Knight-Ridder Newspaper, the court found that the commercial nature of the copyrighted work neither advanced nor hindered the “fair use” defense. Courts have considered such things as whether the nature of the work would serve the public's interest in accessibility to information. Courts have also implied that a finding of “fair use” is less likely if the nature of the work was purely for entertainment.

The amount and substantiality of the copyrighted work used is the next criterion. Generally, the greater the amount of the copyrighted material used, the less likely it is that a “fair use” would be found. However, in Williams & Wilkins Co. v. United States, the Court of Claims found a fair use even though a substantial amount of the copyrighted work had been copied. In Williams, copyrighted medical journal articles were copied for researchers. Nevertheless, a divided Supreme Court confirmed the Court of Claims' decision that copyright laws had not been violated. The Court of Claims did, however, consider four other factors besides those listed in the “fair use” statute.

The final criterion listed in the statute is the effect of the allegedly infringing use upon the potential market value of the copyrighted work. If the use of the copyrighted material causes a significant

49. Under this factor, courts have examined varying aspects of the nature of the work other than the traditional fair use indicators. M. Nimmer, supra note 38.
50. 626 F.2d 1171, 1176 (5th Cir. 1980).
53. See Walt Disney Prods. v. Air Pirates, 581 F. 2d 751, 756-57 (9th Cir. 1978) (verbatim copying not defensible as fair use), cert. denied, 439 U.S. 1132 (1979); Rosemont Enter., Inc. v. Random House, Inc., 366 F.2d 303, 310 (2d Cir. 1966) (extensive verbatim copying could not meet the reasonableness standard of fair use), cert. denied, 385 U.S. 1009 (1967).
55. Id. at 1348.
56. Id. at 1354-61. The other four factors were: the nonprofit status of the defendants; the copies were used only for research purposes; the practice had been going on, unrestrained for many years; medical science would be impaired if such copying were discontinued.
adverse economic impact on the copyright holder, this weighs against
a finding of fair use. 57

C. Contributory Infringement

In Sony, the Supreme Court stated that "[t]he Copyright Act does
not expressly render anyone liable for infringement committed by
another." 58 However, the tort of contributory infringement has found
its way into copyright judicial decision. 59 The concept of contributory
infringement is borrowed from the Patent Act which provides that
anyone who "actively induces infringement of a patent" is an
infringer. 60 The Patent Act also imposes liability on "contributory"
infringers. 61 "A contributory infringer is a species of joint tort-feasor,
who is held liable because he has contributed with another to the
causing of a single harm to the plaintiff." 62

A leading case dealing with contributory infringement is Kalem
Co. v. Harper Brothers. 63 In Kalem, the Court held that the producer
of an unauthorized film dramatization of the copyrighted book Ben
Hur was liable for his sale of the motion picture to jobbers, who in
turn arranged for the commercial exhibition of the film. 64 Justice
Holmes, writing for the Court, explained:

The defendant not only expected but invoked by advertisement the
use of its films for dramatic reproduction of the story. That was the
most conspicuous purpose for which they could be used, and the one
for which especially they were made. If the defendant did not con-
tribute to the infringement it is impossible to do so except by taking
part in the final act. It is liable on principles recognized in every part
of the law. 65

57. As one author points out, this is often viewed as the most important factor. The issue
of harm to plaintiff's copyright interest must be examined along with all the other "fair use"
factors because it is relevant to more than just the extent of damages caused by the alleged
mining fair use, the court looked to the tendency to interfere with the market for the
copyrighted work).
58. 104. S. Ct. at 785.
59. Brief for Petitioner at 41.
60. 35 U.S.C. § 271(b) (1982).
61. Id. at § 271(c).
62. Brief for Petitioner at 41.
63. 222. U.S. 55 (1911).
64. Id. at 61-63.
65. Id. at 62-63.
The idea of a "staple item of commerce" is also borrowed from patent law. "A finding that a product is a staple item of commerce provides a defense to contributory infringement in a patent context if the item in question, e.g., a typewriter or camera, has a substantial noninfringing use in addition to its infringing use." Unless an item is unsuited for any commercial noninfringing use, there will be no finding of contributory infringement. The Court in Henry v. A. B. Dick Co., noted that to hold otherwise would "block the wheels of commerce."

The district court in Universal City Studios v. Sony Corp. of America made the following observation:

Whether or not patent law has precedential value for copyright law and the Betamax is capable of "substantial" noninfringing use, the underlying rationale for the patent rule is significant. Commerce would indeed be hampered if manufacturers of staple items were held liable as contributory infringers whenever they "constructively" knew that some purchasers on some occasions would use their product for a purpose which a court later deemed, as a matter of first impression, to be an infringement.

III. THE COURT FINDS THAT TIME-SHIFTING IS A "FAIR USE"

The Supreme Court analyzed whether the sale of Sony copying equipment to the general public violated any of the rights conferred upon Disney and Universal by the Copyright Act. The Court placed considerable reliance on the findings of the district court regarding "time-shifting." Time-shifting occurs when a member of the public uses a VTR to record a program for later viewing because he is unable to watch the program at the time it is televised.

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66. Id. 480 F. Supp. at 461.
67. Note, Copyright: Off-the-Air Video Recording is an Infringement and Not Fair Use, 47 Mo. L. Rev. 849, 859 (1982).
69. 224 U.S. 1 (1912).
70. Id. at 48.
72. Id. at 461.
73. 104 S. Ct. at 777.
74. Id. The court of appeals did not set aside any of the district court's findings of fact. "[I]t concluded as a matter of law that the home use of a VTR was not a fair use because it was not a 'productive use.'" Id. at 781.
75. Id. at 778.

Both Sony and Universal had surveys done which showed that Betamax was being used primarily for time-shifting:
After reviewing the decision of the district court and the court of appeals, the Court reviewed the purpose of copyright. The Court found that the general benefit derived by the public from the labors of authors is the sole interest of the government and the primary object in conferring the copyright monopoly. The Court went on to state that by the Constitution, Congress has been “assigned the task of defining the scope of the limited monopoly that should be granted to authors or inventors in order to give the public access to their work product.” In addition, Justice Stevens noted that without legislative guidance the judiciary is reluctant to expand the rights protected by copyright law.

The Court reviewed §§ 102(a), 106 and 107 of the Copyright Act. Section 102(a) provides that copyright protection “subsists . . . in original works of authorship fixed in any tangible medium of expres-

(a) 55% of the owners used it mostly for time shift and another 21% used it half of the time for that purpose;
(b) 96% of the owners used Betamax to record programs they otherwise would have missed;
(c) 82% of all recordings are played back soon after being made;
(d) 90% of Betamax owners viewed most play-backs just within the family; only 9% of Betamax recordings are viewed by more than two persons in addition to the Betamax owner, less than 1% are viewed by more than five such persons;
(e) 70% of recorded programs were watched only once or not at all before being erased by another recording;
(f) A March 15, 1980 post-trial report prepared for the Corporation for Public Broadcasting showed home recording from Public Broadcasting Service (“PBS”) educational stations was highest during fringetime periods (the three hours before prime time) when MacNeil/Lehrer, Washington Week, Wall Street Week, etc. were broadcast. At least 68% of PBS recordings are played back within two days. (Respondents' programming does not appear on PBS.)
(g) A “Home Video” post-trial study prepared for the FCC dated 1 November 1979 synopsized “five major studies of VCR use,” finding “it is clear that the principle use of the VCR to date is for time-shift viewing.” Also, “Because rating services are prepared to report such time-shifting, broadcasters should actually be helped by this consumer convenience. An audience that was previously unavailable to them is now viewing, and the viewing is properly attributed in audience reports. . . . Most [play-back] occurs relatively quickly after the recording (almost all within a week). Most of such recordings are viewed only once (usually only by members of that household). . . .” (pp. 61-62).


76. 104 S. Ct. at 782 (quoting Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)).
77. 104 S. Ct. at 782.
78. Id. at 783; see also Teleprompter Corp. v. Columbia Broadcasting Sys., 415 U.S. 394 (1974) (importation of distant television signals does not constitute performance); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968) (operation of cable television master antenna system not public performance of copyrighted works).
79. 104 S. Ct. at 784.
sion...." However, as the Court pointed out, "this protection has never accorded the copyright owner complete control over all possible uses of his work." Section 106 grants the copyright holder "exclusive" rights to use and to authorize the use of his work in five qualified ways, including reproduction of the copyrighted work in copies. Section 107, the "fair use" doctrine, allows anyone to reproduce a copyrighted work for a "fair use"; all reproductions are not the exclusive domain of the copyright owner. The Court mentioned the "arsenal of remedies" that a copyright owner has against an infringer of his work. These range from an injunction restraining the infringer to statutory damages.

The Court then suggested that there had been no direct infringement of the statute cited by Sony because Universal and Disney did not seek relief against the individual Betamax users who had allegedly infringed their copyrights. In addition, the Court stated that respondents had not brought a class action and their total programs represented a small portion of the total use of VTR's. This left Universal and Disney with the burden of proving infringement. To prevail, the respondents had the burden of proving that the users of the Betamax had infringed their copyright and that Sony should be held responsible for that infringement.

The Court explained that although the Copyright Act does not provide for contributory infringement, it is still an applicable principle and this principle helps identify circumstances in which it is just to hold one individual accountable for the actions of another.

The Court struck down Universal's and Disney's reliance on Kalem Co. v. Harper Brothers and distinguished the case on its facts. "Respondents argue that Kalem stands for the proposition that supplying the 'means' to accomplish an infringing activity and encouraging that activity through advertisement are sufficient to establish liability for copyright infringement." The Court said that the pro-

81. 104 S. Ct. at 784.
82. See supra note 31 and accompanying text.
83. See supra note 42-47 and accompanying text.
84. 104 S. Ct. at 784.
86. 104 S. Ct. at 785.
87. Id.
88. Id.
89. Id.
90. 222 U.S. 55 (1911).
91. 104 S. Ct. at 786.
ducers in *Kalem* supplied the work itself—the movie that infringed on the copyright. Sony did not supply consumers with Universal’s and Disney’s work; the respondents did this themselves. 92 Sony supplied the VTR that is capable of a wide range of uses: “those [films] that are uncopyrighted, those that are copyrighted but may be copied without objection from the copyright holder, and those that the copyright holder would prefer not to have copied.” 93 The Court held that *Kalem* was inapplicable because a VTR has a much broader range of use than the particular infringing use in *Kalem* of the film *Ben Hur*. 94

The Court went on to discuss that the district court record showed the only contact between Sony and the users of the Betamax occurred at the moment of sale. 95 Usually, when vicarious liability is asserted, “the contributory infringer was in a position to control the use of the copyrighted works by others and had authorized the use without permission from the copyright owner.” 96 However, the *Sony* case did not fall into this category. 97

Next the Court again borrowed from patent law by referring to “the staple article of commerce” doctrine which provides that the sale of a staple article or commodity of commerce suitable for substantial noninfringing use is not contributory infringement. 98 If the product is merely capable of substantial noninfringing uses, then no contributory infringement can be found. 99 The Court found that one potential use of the Betamax is enough to satisfy this standard and that potential use is “private noncommercial time-shifting in the home.” 100

Time-shifting does not violate copyright law “(A) because respondents have no right to prevent other copyright holders from authorizing it for their programs, and (B) because the District Court’s

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92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 787.
96. *Id.* at 786.
97. *Id.* The so-called “dance hall cases” fall into this category. See *Famous Music Corp. v. Bay State Harness Horse Racing and Breeding Ass’n*, 554 F.2d 1213 (1st Cir. 1977) (racetrack retained infringer to supply music to paying customers); *KECA MUSIC, Inc. v. Dingus McGee’s Co.*, 432 F. Supp. 72 (W. D. Mo. 1977) (cocktail lounge hired musicians to supply music to paying customers); *Dreamland Ball Room v. Shapiro, Bernstein & Co.*, 36 F.2d 354 (7th Cir. 1929) (dance hall hired orchestra to supply music to paying customers); 104 S. Ct. at 786 n. 18.
99. 104 S. Ct. at 789.
100. *Id.*
factual findings reveal that even the unauthorized home time-shifting of respondents’ programs is legitimate fair use.”

The Court discussed how the record showed not all copyright holders object to time-shifting and that Universal’s and Disney’s share of the market was well below ten percent. If Universal and Disney prevailed, a significant impact would be felt by the other ninety percent of the market who may or may not feel as Universal and Disney do. In an action for contributory infringement against the seller of copying equipment, the copyright holder may not prevail unless the relief he seeks affects only his programs, or unless he speaks for virtually all copyright holders with an interest in the outcome. The Court found that the record in this case showed that many producers do not object to time-shifting and that respondents could not prevail on this point.

The Court next turned to unauthorized time-shifting and found that any unauthorized uses are not necessarily infringing if they comport with § 107 or the “fair use” doctrine. The Court found that the noncommercial, nonprofit nature of time-shifting, coupled with the consideration that time-shifting merely enables a viewer to see a work which he has been invited to witness free of charge, do not militate against a finding of “fair use” despite the fact that the entire work is reproduced. The Court also considered the fourth factor of § 107, the effect of the use upon the potential market for or value of the copyrighted work, and found that this did not militate against a finding of “fair use.” “The purpose of copyright is to create incentives for creative effort,” and a use that does not harm the potential market of the copyright, does not inhibit the creative juices.

The Court focused on the noncommercial nature of time-shifting and the need to show by a preponderance of the evidence that some likelihood of future harm exists. In the noncommercial context actual present harm need not be shown, but the copyright holder must prove that a particular use is harmful, or that if it should become widespread, it would adversely affect the potential market

101. Id.
102. Id.
103. Id. at 791.
104. Id. at 790-91.
106. 104 S. Ct. at 792-93.
107. Id. at 793.
108. Id.
109. Id.
for the copyrighted work. From the findings of the district court, the Supreme Court decided that respondents had not carried this burden of proof:

On the question of potential future harm from time-shifting, the District Court offered a more detailed analysis of the evidence. It rejected respondents' "fear that persons 'watching' the original telecast of a program will not be measured in the live audience and the ratings and revenues will decrease," by observing that current measurement technology allows the Betamax audience to be reflected. It rejected respondents' prediction "that live television or movie audiences will decrease as more people watch Betamax tapes as an alternative," with the observation that "[t]here is no factual basis for [the underlying] assumption." It rejected respondents' "fear that time-shifting will reduce audiences for telecast reruns," and concluded instead that "given current market practices, this should aid plaintiffs rather than harm them." And it declared that respondents' suggestion "that theater or film rental exhibition of a program will suffer because of time-shift recording of that program" "lacks merit." (citations omitted)."'

The Court found that to the extent that time-shifting expands public access to freely broadcast television programs, it yields societal benefits. These societal benefits require the copyright holder to demonstrate some harm before he may condemn a private act of time-shifting.

After all the equitable "fair use" factors were weighed, the Court found that the findings of the district court led it to two conclusions:

First, Sony demonstrated a significant likelihood that substantial numbers of copyright holders who license their works for broadcast on free television would not object to having their broadcasts time-shifted by private viewers. And second, respondents failed to

110. Every commercial use of copyrighted work is presumptively an unfair exploitation of the monopoly privilege. Id.
111. Id. at 794; 480 F. Supp. 466-67.
113. Sony asserted that this increased access is consistent with first amendment policy. Brief for Petitioners at 15. While not all activity is constitutionally protected by virtue of its occurrence in the home, the right of privacy requires that congressional efforts to legislate activity in the home be made with great caution. 480 F. Supp. at 446. When attempting to legislate such activity, Congress must carefully balance the possible erosion of fundamental rights against the operation of other valid governmental interests, such as copyright protection. See, e.g., Roth v. United States, 354 U.S. 476, 488 (1957).
114. 104 S. Ct. at 795 n.40 discusses the court of appeal's analysis of fair use.
demonstrate that time-shifting would cause any likelihood of non-minimal harm to the potential market for, or the value of, their copyrighted works. The Betamax is, therefore, capable of substantial noninfringing uses. Sony’s sale of such equipment to the general public does not constitute contributory infringement of respondent’s copyrights.\textsuperscript{115}

The Court summed things up by once again asking for Congress’ help and asking them to take a “fresh look at this new technology.”\textsuperscript{116} The Court said:

One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible.\textsuperscript{117}

IV. ANALYSIS—IS COPYRIGHT IN NEED OF CONGRESSIONAL ACTION?

As the narrow 5-4 vote\textsuperscript{118} of the \textit{Sony} decision shows, there is considerable room for disagreement in this hotly contested copyright case.\textsuperscript{119} The Supreme Court, however, made the correct decision when it ruled that the sale of petitioners’ copying equipment to the general public does not violate any of the rights conferred upon respondents by the Copyright Act.\textsuperscript{120} Because the case was brought in 1976, when few people owned VTR’s, several issues were not considered. “No issue concerning the transfer of tapes to other persons, the use of home-recorded tapes for public performances, or the copying of programs transmitted on pay or cable television system was raised.”\textsuperscript{121} These issues may yet become ripe for decision. The courts can decide them by the standards set in \textit{Sony} for contributory infringement and “fair use.” Or, perhaps, by then Congress will have acted.

One commentator felt that the decision that Sony was not a contributory infringer went far enough. There was no reason to go further and discuss whether time-shifting was a “fair-use.”\textsuperscript{122} Perhaps

\begin{itemize}
\item \textsuperscript{115} Id. at 796.
\item \textsuperscript{116} Id.
\item \textsuperscript{117} Id.
\item \textsuperscript{118} Id. at 774.
\item \textsuperscript{119} Id. at 796 (Blackmun, J., dissenting).
\item \textsuperscript{120} Id. at 777.
\item \textsuperscript{121} Id. at 780.
\item \textsuperscript{122} Freed, \textit{The Justices Went Too Far in the Betamax Case}, 6 NAT’L L. J. 22, at 13 (1984).
\end{itemize}
the writer felt that this case might be a springboard for carving too many niches into the copyright holders' rights as technology continues to expand. He gave one example of his fear:

[The supplier of network systems that consist of a central memory device and multiple microprocessors, frequently called 'smart terminals,' should not be able to furnish to its customers a single copy of a copyrighted magnetic diskette for a software program that will be copied repeatedly by them in the course of using the system, unless it secures permission from the copyright owner and pays an appropriate license fee.]

The writer ended by stating that rapidly evolving technology requires judicial restraint.

However, the Court did exercise judicial restraint. The fact that Sony sells VTR's to the public naturally leads to the next issue of whether the home users of VTR's are also violating copyright law. The Court weighed the four "fair use" criteria and found that the home use of VTR's by time-shifting does not violate copyright laws. "Fair use" is a flexible, equitable rule that allows for the growth of new technology. If Congress feels that the Court has been too flexible, it can always amend the Copyright Act. In addition, "fair use" calls for each case to be weighed upon its own merits.

Both the district court and the court of appeals considered whether the 1971 Sound Recording Amendment, as incorporated into the Copyright Act of 1976, gave an implied home-use exemption to VTR's. However, the majority opinion of the Supreme Court did

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123. Id.
124. 104 S. Ct. at 789-95.
125. Id. at 796.
126. The congressional intent is expressly found in the Copyright Act's legislative history:
General intention behind the provision. The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. . . . The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change.
127. See supra notes 41-43 and accompanying text.
129. Sony and the district court found support for the home use exemption in the following exchange between Representative Kazen and Representative Kastenmeier of the House Judiciary Committee:
MR. KAZEN: Am I correct in assuming that the bill protects copyrighted material that is duplicated for commercial purposes only?
not discuss the home-use exemption because this issue was not brought before them. Justice Blackmun's dissenting opinion did, however, consider the issue and found that no such home-use exemption applied to copyright law. Once again, there is considerable room for disagreement on this issue. The majority opinion did not need to consider it, however, because it was not brought before them and because the case could be decided on the issues of contributory infringement and "fair use."

It is true that the Court may have stretched the "fair use" doctrine, but it is supposed to be a flexible doctrine, capable of letting new technology flourish. The Court discussed productive versus nonproductive use of copyrighted material and said that productive and nonproductive uses may be helpful in calibrating a balance, but are not determinative. The Court seemed to imply that whether a use was productive or nonproductive was very much an individual case analysis with this example:

In a hospital setting, using a VTR to enable a patient to see programs

MR. KASTENMEIER: Yes.

MR. KAZEN: In other words, if your child were to record off a program which comes through the air on the radio or television, and then used it for her own personal pleasure, for listening pleasure, this would not be included under the penalties of this bill?

MR. KASTENMEIER: This is not included in the bill. I am glad the gentleman raises the point.

On page 7 of the report, under 'Home Recordings', Members will note that under the bill the same practice which prevails today is called for; namely, this is considered both presently and under the proposed law to be fair use. The child does not do this for commercial purposes. This is made clear in the report.


Universal, Disney and the court of appeals found support for their allegation that no home-use exemption existed in the following:

In approving the creating of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing Title 17. Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose or reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical, compositions over the past 20 years. [emphasis added].


130. 104 S. Ct. at 783 n.11; Brief for Respondents at 8 n.20.
131. 104 S. Ct. at 803 (Blackmun, J., dissenting).
132. 104 S. Ct. at 783 n.11.
133. See supra note 129.
134. 104 S. Ct. at 795 n.40.
135. See supra note 45 and accompanying text.
he would otherwise miss has no productive purpose other than contributing to the psychological well-being of the patient. Virtually any time-shifting that increases viewer access to television programming may result in a comparable benefit. The statutory language does not identify any dichotomy between productive and nonproductive time-shifting, but does require consideration of the economic consequences of copying.\(^\text{138}\)

In addition, generally in the past when the whole copyrighted work had been appropriated, this militated against a finding of "fair use," but the Court did not agree in this case.\(^\text{137}\) The Court found that the private noncommercial nature of home viewing outweighed this factor and found that time-shifting was a "fair use" even though the whole copyrighted work was copied.\(^\text{138}\)

The Court also correctly handled the issue of contributory infringement. The concept of "the staple article of commerce" that was borrowed from patent law is applicable to the VTR.\(^\text{139}\) The VTR is capable of substantial noninfringing uses. Many producers who have copyrights do not object to time-shifting and some television shows are not copyrighted.\(^\text{140}\) As to unauthorized time-shifting, the Court found this to be "fair use," a doctrine that allows for technological development.\(^\text{141}\)

The Court refused to find that any copyright laws had been violated and, therefore, did not fashion any remedy. Perhaps the fact that such a remedy would be difficult to fashion and much easier for Congress to put into effect and apply by statute had some influence upon the Court's finding that copyright laws had not been violated.\(^\text{142}\) As mentioned by the Court, there were many issues and interests that were not before it.\(^\text{143}\) Any remedy used would not only help Universal and Disney but would affect many other interested parties that may just as well have wished copyright law to remain as it was, rather than raise new issues.\(^\text{144}\)

The Court's arsenal of remedies included:

\(^{136}\) 104 S. Ct. at 795 n.40.
\(^{137}\) See also Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1350 (Ct. Cl. 1973), aff'd, 420 U.S. 376 (1975) (Court also found a "fair use" where whole copyrighted articles were copied).
\(^{138}\) 104 S. Ct. at 792-93.
\(^{139}\) 480 F. Supp. at 461.
\(^{140}\) 104 S. Ct. at 790-91. Brief for Petitioners at 9.
\(^{141}\) See supra note 126.
\(^{142}\) 104 S. Ct. at 796.
\(^{143}\) Id. at 780.
\(^{144}\) Id. at 790-91, 796.
1) an injunction to restrain the infringer from violating the copyright holder’s rights;
2) the impoundment and destruction of all reproductions of the copyright holder’s work made in violation of his rights;
3) a recovery of the copyright holder’s actual damages and any additional profits realized by the infringer; and
4) a recovery of statutory damages and attorney’s fees. 145

An injunction to restrain the infringer from violating the copyright holder’s rights would indeed be difficult. Should Sony simply be enjoined from selling its VTR’s? What about the other manufacturers of VTR’s? And what about the individual purchasers of VTR’s? The difficulty in imposing a remedy on individual purchasers of VTR’s is shown by Justice White’s question during oral argument, “Would a label that says, ‘Do not use this to tape TV programs’ be adequate?” 146

Impoundment and destruction of all reproductions of the copyrighted work would indeed be difficult as would a recovery of actual damages and profits. 147 Universal and Disney admitted they had not been harmed in the past and the district court found that any future harm was merely speculative. 148 In addition, rating services such as Nielsen and Arbitron can measure VTR recording and viewing so that Universal and Disney can be fully compensated in the usual manner in the marketplace. 149

The royalty schedule that was suggested by the court of appeals is not listed in the statute as a remedy that can be considered. 150 Clearly, if a special remedy, such as this royalty scheme, is to be imposed, Congress is in the best position to initiate it. 151

Both Universal and Disney had studies performed to asertain how VTR’s were used in the home. 152 Both studies found that time-shifting was the major use of the VTR’s. 153 A small percentage of the users blocked out commercials when viewing their tapes and only a small percentage of users were building libraries due to the prohibitive

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145. Id. at 784 (citing 17 U.S.C. §§ 502-05 (1982)).
148. 480 F. Supp. at 439-40, 467. Both Universal and Disney had experienced a record year of profit during the district court trial. Id.
151. 104 S. Ct. 782-83; see supra note 37.
152. See supra note 75.
costs of the tapes. The district court found that this time-shifting had little effect on the rerun market since a viewer typically taped a show to watch at a later date and then erased it. Again, Congress is in the best position to fashion a remedy if the future proves that advertisements are continually wiped out when the viewer pushes the fast-forward button on his machine or if the price of tapes goes down and the viewer begins to collect tapes in his "libraries."

CONCLUSION

As stated before, there is room for disagreement on the issues of "fair use" and contributory infringement and as the dissenting Supreme Court opinion shows, a powerful argument can be made either way. However, given the fact that "fair use" is a very flexible equitable doctrine used for accommodating technological development, that VTR's can be used in noninfringing ways in addition to the allegedly infringing uses and that Congress is in a much better position to fashion a remedy if one is necessitated, the Supreme Court made the correct decision.

As counsel for Sony said to the Supreme Court during rebuttal, "Why should the man who wants to see 'Monday Night Football' on Tuesday morning have to pay for it?"

MARGARET A. BURKS

154. Id. at 467-68.
155. Id. at 438.
156. See supra note 37; see also Ladd, Home Recording and Reproduction of Protected Works, 68 A.B.A.J. 42-45 (1982).
158. See supra note 126.
159. 104 S. Ct. 789-95.
160. See supra note 37.