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### Symposium: Constitutional Interpretation

<table>
<thead>
<tr>
<th>Essay Title</th>
<th>Author(s)</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Federalist and the Anomalies of New Right Constitutionalism</td>
<td>Sotirios A. Barber</td>
<td>437</td>
</tr>
<tr>
<td>A Preface to Constitutional Theory</td>
<td>David Lyons</td>
<td>459</td>
</tr>
<tr>
<td>A Hermeneutical Critique of the Originalism/Nonoriginalism Distinction</td>
<td>David Couzens Hoy</td>
<td>479</td>
</tr>
<tr>
<td>The Varieties of Constitutional Theory: A Comment on Perry &amp; Hoy</td>
<td>John T. Valauri</td>
<td>499</td>
</tr>
<tr>
<td>Enough About Originalism</td>
<td>Richard B. Saphire</td>
<td>513</td>
</tr>
</tbody>
</table>

### Comments

<table>
<thead>
<tr>
<th>Comment Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Evolution of Dram Shop Law: Is Kentucky Keeping Up with the Nation?</td>
<td>539</td>
</tr>
<tr>
<td>The Feres Doctrine: Should It Bar Claims by Military Personnel Against Civilian Federal Employees?</td>
<td>559</td>
</tr>
<tr>
<td>For Better or for Worse: Marital Rape</td>
<td>611</td>
</tr>
</tbody>
</table>

### Notes

<table>
<thead>
<tr>
<th>Note Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Facing the Economic Challenges of the Eighties—The Kentucky Constitution and Hayes v. The State Property and Buildings of Kentucky</td>
<td>645</td>
</tr>
<tr>
<td>The Seat Belt Defense in Kentucky: Wemyss v. Coleman</td>
<td>657</td>
</tr>
</tbody>
</table>
I. INTRODUCTION

This Essay concerns the New Right, judicial review, and *The Federalist*. By the "New Right" I mean elements of the Reagan right; I shall name names below. By "judicial review" I mean the institution originally defended in *The Federalist*, the source of the classical and still official theory of judicial review. According to this theory judges are supposed to apply the rules and principles of the Constitution in resolving concrete constitutional questions. The classical theory denies that judges should decide constitutional questions in a manner that defers to the constitutional opinions of elected officials. Yet the classical theory is fully aware that constitutional questions are often controversial and that judges can confuse the Constitution's meaning with their partisan preferences. I submit a two-part argument here. First, I discuss some anomalies of New Right constitutionalism, then I try to show that *The Federalist* supports judicial activism, warts and all.

The New Right has made remarkable headway in its longstanding crusade against an active and independent judiciary. We can attribute at least part of this success to the New Right's appropriation of certain symbols. New Right spokespersons have invoked such values and sources of authority as the Founding Fathers, tradition, morality, and democracy. The fact that the public associates New Right constitutionalism with these values is a fact with unflattering implications about our system's capacity to perpetuate an appreciation of its foundations. If the public knew more about these foundations, more people would know that New Right constitutionalism falsely appropriates and even-

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* Professor of Government, University of Notre Dame. The author is grateful to Sue Hemberger for her criticism and assistance. This article is based on a paper delivered to the Salmon P. Chase College of Law, Northern Kentucky University, September 18, 1987.
tually subverts its leading symbols: *viz.*, the Framers, tradition, morality, and democracy. This, at any rate, is my contention here.

II. NEW RIGHT CONSTITUTIONALISM

A. Why the New Right is a Special Problem for American Constitutionalism

Let me submit an apology before I begin in earnest. My comments are unfortunately one-sided. I shall criticize the New Right here without responding to its legitimate call for effective limitations on the judiciary, its fear of elitism, and its concerns for diversity and the prospects for meaningful citizenship. I cannot say everything at once, however. For now, let me say that I believe a version of the classical theory of judicial review is the only theory that comports with the presuppositions of common sense, presuppositions I believe to be ineluctable. Because I believe the classical theory is the only successful theory of judicial review, I have criticized not only the majoritarian willfulness of the New Right,¹ but also the majoritarian proceduralism, historicism, and moral conventionalism of establishment liberals.² I am one of those who denies that it is the function of the Supreme Court or anyone else to keep the Constitution in step with the times. I think we may have a good constitution, and if it is a good one we ought to follow it, not have it follow us. We ought to, in other words, take the Constitution seriously as law. Some liberals would disagree, if they would bother to respond at all, for many consider this position hopeless.³ Perhaps my quarrel is with them.

Yet it is precisely my favorable assessment of the classical theory that compels a special attack on New Right constitutionalism. For the New Right pretends to represent the classical theory at the same time that it misrepresents the character of

². S. BARBER, ON WHAT THE CONSTITUTION MEANS 1337 (1986). [hereinafter BARBER, WHAT THE CONSTITUTION MEANS]. (Much modern legal theory mistakenly denies that the Constitution's general provisions have meaning independent of what judges and other interpreters might want them to meet.)
³. See especially, Brest, The Fundamental Rights Controversy: The Essential Contradic-
the classical theory in the most fundamental way. Because many Americans accept the New Right as the representative of traditional constitutionalism, the New Right strengthens the association of the classical theory with historical injustices stemming from racism, bigotry, and greed. The New Right not only degrades the classical theory, it presents itself as the modern authority for the meaning of the classical theory. And the New Right’s relative success in this artful misrepresentation obstructs the nation’s understanding of the original theory. To my way of thinking, true friends of the tradition will therefore look upon the New Right as a more serious threat than the establishment left.

I need not say more about the classical theory at this point beyond noting that as that theory appears in The Federalist it is part of a general theory of governmental responsibility whose leading object is to reconcile popular government to what it properly conceives as higher standards of political morality. This theory opens the positive law of the Constitution to higher standards. It recognizes that aspects of the positive law may appear to conflict with higher standards. But it would have judges and others look to higher standards in construing the positive law. Thus, Lincoln could have been right in believing that, fugitive slave clause and Supreme Court doctrine notwithstanding, the Constitution placed slavery on the path of “ultimate extinction.” The essential distinction between what I am calling the New Right and an older American conservatism centers on this very question of “higher standards.” Lincoln and the authors of The Federalist believed democratic majorities answerable to standards higher than the will of popular majorities. New Right constitutionalists, with one major exception to be discussed below, tend either to depreciate or reject outright any notion of higher standards. These writers do not agree in all respects. Yet I shall deemphasize their differences here because I believe that they converge toward the one result of giving elected

officials a virtual free hand in defining constitutional rights. I can show this convergence through a rough sketch of two New Right theorists, Robert Bork and Walter Berns, who seem far apart on philosophic fundamentals.

B. The Leading Strands of New Right Constitutionalism

Judge Bork is the leading New Right theorist, though hardly because of the quality of his thinking. Mitigating inconsistencies in his thought, not to mention his recent testimony before the Senate,\textsuperscript{6} make summarizing Bork's position a matter of some risk. If we can still take him at his published word, Bork holds that, in principle, majoritarian government is, and should be, free to decide most issues of political and private morality.\textsuperscript{7} For him, constitutional rights and other constitutional limitations may not be real limitations on majoritarian government, for the normative status of constitutional limitations appears to rest solely on the fact of their enactment by majoritarian forces.\textsuperscript{8}

Bork's majoritarianism flows from his morally skeptical view that values of all sorts are mere "gratifications" and that, in reality, all gratifications are morally equal. To use one of his own examples, the desire to see speech and inquiry flourish is morally equal to the desire to repress them.\textsuperscript{9} Yet there is no logical connection between Bork's philosophic skepticism and Bork's majoritarianism. There is no real possibility of defending majoritarianism or anything else on skeptical grounds. This applies even to avowals of skepticism itself. For a thoroughgoing skeptic can hardly contend that we ought to conform either our public statements or our private beliefs to what he or she sees as a truth about the world, \textit{viz.}, skepticism. This notwithstanding, Bork chooses to accompany his skepticism with majoritarianism. He holds that our "major freedom" is the right of majorities to

\textsuperscript{6} Nomination of Robert H. Bork To Be An Associate Justice of The United States Supreme Court: Report of the Committee of the Judiciary, United States Senate, S. Exec. Rept. 100-7, 100th Cong., 1st Sess. 93-95 (1987). (Summarizing Bork's so-called "confirmation conversion").


\textsuperscript{8} See Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 2-3, 10 (1971) [hereinafter Bork, Neutral Principles]. For a defense of this interpretation of Bork, see Barber, New Right Assault, supra note 1, at 256-58.

\textsuperscript{9} Bork, Neutral Principles, supra note 8, at 2-3, 10, 25.
enact their moral preferences into law, including preferences relating to what many now regard as matters of private morality. As far as I know, he cites no constitutional text or historical authority for this controversial view. If consistently applied, his skepticism would defeat any claim that reason proves one freedom more important than another. He might appeal to the authority of some social convention, but if he did, he would only infect that convention with the completely arbitrary quality that would otherwise attach to the initial statement. For his skepticism—again, if consistently applied—would leave us with no real reason for preferring any one convention to another or the status quo to social change. So Bork's majoritarianism seems morally arbitrary on Bork's own reasoning.

Bork thinks he has discovered and elaborated an important implication of his conventionalism: the threats that moral and political philosophy pose to moral and political life as Bork conceives it. If philosophy is the quest for the real or simple truth, philosophy cannot settle for conventionalist answers to the most important social questions. But for Bork, there can be no answers other than conventional ones. Bork cautions that the quest for more than the establishment's truth undermines the established order and risks social turmoil in the process.

Bork thus takes the current revival of constitutional theory as a sign of social sickness. "Healthy institutions do not require so much talking about," he says. Add this statement to his view that truth is as the establishment defines it, and one can have no real moral or scientific basis—no real reason—for opposing governmental suppression of what we now call moral and scientific inquiry. The same applies to constitutional interpretation. Rather than fruitless quests for the morally best interpretations that constitutional language and tradition can bear, Bork says that it is necessary to establish that the Framers' intentions

10. See Bork, Tradition and Morality, supra note 7, at 9. "[T]he major freedom, of our kind of society is the freedom to choose to have a public morality." For an analysis of this statement, see Barber, New Right Assault, supra note 1, at 258-60.
constitute the sole legitimate basis from which constitutional analysis may proceed.\(^{15}\)

If Judge Bork is the leading New Right theorist, that does not mean that he is the best. I consider Walter Berns the best New Right theorist. Let me explain. Walter Berns correctly sees the paradox in defending the Framers' intentions from skeptical premises, for the Founding Fathers were not themselves moral skeptics.\(^{16}\) Like Bork, Berns also wants to defend Framers' intention as the governing consideration in constitutional interpretation. But unlike Bork, Berns avoids open professions of moral skepticism.

Initially, Berns' view seems far removed from Bork's. He contends that a correct understanding of the Constitution begins with an appreciation of the Framers' commitment to natural rights.\(^{17}\) However, Berns also believes that the Framers were equally committed to a particular method for securing natural rights. As his argument progresses, a strange thing happens. The constitutional method or means for securing natural rights obfuscates the very existence of natural rights by orienting all governmental action, including judicial decision making, away from foundational principles of political morality toward private interests, especially private economic interests. As Berns sees it, the Framers intended to secure natural rights by channeling society's energies from divisive preoccupations with religion and ideology and into the pursuit of property. This scheme would create a public and private psychology wherein principles are reduced to interests, interests that are best left to legislative checks and balances, not courts. Berns opposes public concern for matters of principle. So thorough is his opposition to a politics of principle that he opposes judicial enforcement of what he himself says is the central principle behind the Constitution itself, a principle he calls "liberty ... as privacy."\(^{18}\)


So, despite important differences between Berns, the moral realist, and Bork, the moral skeptic, Berns is with Bork in greatly expanding the power of elected officials to define standards of political and private morality. Two of Berns' more specific suggestions bear this out. He exhibits *Griswold v. Connecticut* as an example of how judicial insistence on constitutional principle can only make things worse. Connecticut's virtual failure to enforce the anti-contraceptive law, though unprincipled, says Berns, had the effect of placating both sides. *Griswold* may have vindicated the principle of liberty as privacy, but it also turned out to be the first step toward *The Abortion Decision* and the potential violence of uncompromisable moral commitments.

To reverse such results and foreclose their return, Berns proposes a theory of the fourteenth amendment that would effectively displace much judicial power and give Congress and the states power to define the great bulk of substantive constitutional rights in this country. Berns thus signals agreement with Bork's claim that domestic peace is best served by legislative domination of constitutional opinion. He echoes Bork's criticism of political and moral philosophy as corrosive of tradition, conventional morality, and other authority on which peace depends. There may be a world of difference between the background theories of Bork and Berns, but the good citizen of Berns' regime will, in Borkean manner, reduce principles to interests or gratifications subject to legislative bargaining and compromise. Moral skeptics like Bork will be the popular philosophers of Berns' regime.

21. Berns argues that the privileges and immunities clause is the only proper source of substantive fourteenth amendment guarantees. To avoid judicial "policy making," the court should abandon its current notions of "substantive due process" and "substantive equal protection," and Congress should exercise exclusive power to define the substantive "privileges and immunities" to be enforced against the states. For the clearest statement of this proposal, see Berns, *Bill of Rights*, supra note 18, at 67-69.
22. See Berns, *Taking Rights Frivolously*, supra note 18, at 64 and Berns, *Bill of Rights*, supra note 18, at 69-70. Bern's opposition to philosophy as an activity is grounded in a particular philosophic teaching, the modern natural rights philosophy of Thomas Hobbes and his successors; see Berns, *Judicial Review*, supra note 17, at 58-66. Bern's understanding of this teaching leads him to a conclusion reminiscent of Bork: "[T]o persuade a majority, or demonstrate a willingness to join one, is the constitutionally prescribed way of exercising the most basic of human rights, the right to consent to government, or the right to govern oneself." Berns, *Taking the Constitution Seriously* 224 (1987).
23. The affinity of Bern's approach to Bork's is developed further in Barber, *New Right Assault*, supra note 1, at 272-75.
This is why I consider Bork the leading New Right constitutional theorist, and in what follows I shall treat his theory as the most representative New Right position.

C. The New Right's War with its Own Symbols

One way of exposing the problems of New Right constitutionalism is to show how it effects the very values and symbols it purports to serve. These are four in number: (1) the authority of the Framers; (2) constitutional tradition; (3) domestic peace grounded in community morality; and (4) democracy.

New Right theorists tout the intentions of the Framers as the leading consideration in constitutional decisions. By the "Framers' intentions," New Right theorists once seemed to mean the specific definitions and examples that the Framers allegedly had concretely in mind. Thus, Raoul Berger once suggested that we should construe the fourteenth amendment in a manner consistent with the fact that those who wrote the amendment were racists. 24 An obvious implication of this counsel has meant trouble for the New Right, and it now appears that they seek a new conception of original intent, 25 though I am not sure what it is. What is clear is that they refuse to admit that when the Framers talked about ideas like justice and fairness, they meant not this or that historical understanding of justice or fairness, but the real things. The New Right excludes from the Framers' intent the objective relationships and objectively worthy ends to which the words of the Founding Fathers are taken to refer by the ordinary men and women who take those words seriously. Ordinary people know that their views about justice and fairness can be wrong—they know, in other words, that historical conceptions of justice and fairness can be unjust and unfair. We cannot get at the real meanings of notions like justice and fairness by consulting his-

25. Bork proposes a shift of attention away from "the specifics they [the Framers] had in mind" and toward, first, "a principle" derived from "the applications the Framers thought of," and, finally, the application of "that principle to circumstances they did not foresee." Bork recognizes that since this leaves much room for judicial manipulation, "there are no safeguards . . . except the intellectual honesty of the judge and the scrutiny of an informed profession that accepts the premises of interpretivism." Interpretivism in turn is defined as the view that the Constitution is "to be construed so as to give effect, as nearly as possible, to the intentions of those who made it." Bork, Foreword, supra note 14, at x-xi.
historical opinions. We can pursue them only through self-critical and public-spirited attempts to improve our opinions about them, to get closer to the truth about them. Political philosophy is the most refined form of this striving, and by philosophy I mean here the activity of philosophy, philosophy as a method of inquiry, not as a body of doctrine. As the New Right conceives it, historical research is the basic method of constitutional interpretation. The New Right insists that constitutional interpretation should exclude philosophic inquiry.

Now, the New Right's understanding of Framers' intention and constitutional interpretation is not, itself, the result of historical research. Jefferson Powell has recently argued that no segment of opinion at the founding supported the New Right view of constitutional interpretation. Raoul Berger disputes Powell's findings. But we need not follow this debate among historians. For whether we should follow original intent or what it should mean to follow the Framers' intent cannot be determined by Framers' intent. The New Right position results, rather, from the skeptical philosophic teaching that general normative ideas like equality and fairness have no meaning beyond historical definitions, examples, and practices. According to the New Right, and the establishment left as well, there is no such thing as simple justice or an objectively better understanding of equality and the like, there is only this or that historical view.

The moment one grants that there is such a thing as simple or natural justice along with better understandings thereof, historical conceptions become mere versions of the real thing. It then becomes unjust to oppose the quest for better understandings, for such a quest is the leading way in which one can honor

30. For an extensive elaboration of the proposition that complex metainterpretive theories are necessary to justify particular approaches to Framers' intent, see R. Dworkin, A Matter of Principle 38-55 (1985).
the real thing. We honor simple justice, signal our concern for it, by allowing challenges to our conceptions of justice. It is only through these challenges that we can hope to get closer to the real thing.31

Whatever their actual intentions, those who profess devotion to general normative ideas like justice, as the Framers certainly did, cannot consciously intend less than the best interpretations of these ideas without condemning themselves as willful hypocrites. The New Right conception of the Framers' intentions has the Framers intending less than the best, less than what their public speeches commit them to, which is simple justice or justice itself, not this or that version of justice. The New Right thus implicitly accuses the Framers either of simpleness for believing in simple justice, or fraud for pretending to believe in justice when all that they wanted to do was to impose their own arbitrary view of justice—arbitrary because skepticism holds all views of justice arbitrary. Insulting the Framers in this way is in no way to preserve the Framers' authority.

Let us now go briefly through the rest of the New Right's symbols. Let morality be the next item on our list. There can be no clearer victim of New Right doctrine.

Bork says legislative majorities have a right to enact into law the moral preferences of popular majorities. He contends that social peace and good order depend on such impositions. He suggests that there is no morality beyond whatever succeeds in establishing itself as moral.32 Berns calls for subordinating and reducing what he himself considers valid principles of political morality to mere interests of the kind that legislatures can compromise.33 He would deny courts the power to enforce what he regards as true principles of political morality on the argument that, as he puts it, the business of America is business.34 He means business per se, not the vindication of principles that justify America's business, for to justify is in some measure to subordinate. I do not think it too unfair to say that Berns projects a message of "money talks" and Bork suggests a morality of "might makes right." In fairness, these Machiavellian messages

32. See Bork, Neutral Principles, supra note 8, at 23, 10, 25, 30-31.
33. See Berns, Taking Rights Frivolously, supra note 18, at 51-55, 61-64.
34. Berns, Bill of Rights, supra note 18, at 64.
once contributed to a peace of sorts, but they hardly sound like moral truths to ordinary men and women, assuming that what sounds moral is a part of the test. So it seems clear that to avoid subverting good order, Berns and Bork would have to keep their sophisticated academic insights from the general public. They have to dissemble, in other words. And that is not moral either, at least not in a democracy, which is also supposed to be part of the test.

Tradition is next on the list of New Right symbols. The New Right degrades tradition as a value, too. When the New Right condemns the longstanding practice of judicial activism in the name of tradition, it properly treats tradition not simply as history, but as that part of the nation's history that reflects what the nation stands for. Thus, judicial activism could be as old as the republic and still be contrary to our tradition because it could be contrary to what we stand for.

But since there is much disagreement over what the nation stands for, talk of tradition invariably draws upon a theory of what the nation ought to stand for. And the principles of that theory must be conceived to enjoy more than merely historical status if the theory is to enable us to make selections among conflicting historical views. The New Right's own use of tradition thus implies claims of moral truth that presuppose the activity of philosophy and that have traditionally been the task of philosophy to explicate and test. Dismiss political and moral philosophy, as New Right theorists typically do, and you expose all normative reference to tradition as arbitrary.

Finally, we come to the New Right view that judicial activism is undemocratic. Much has been written about this problem. I shall add two rather abstract observations.

"Democracy" is a capacious term. Versions vary notoriously. To supporters of any one version, there is much in other versions to despise and fear. So, from the perspective of any one version, democracy is a degraded form if it can properly include all practices called "democratic." Think about our reaction to, say, Pol Pot's version of democracy. The Federalist was prepared to

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36. Barber, WHAT THE CONSTITUTION MEANS, supra note 2, at 83-85.
abandon democracy as some conceived it,\textsuperscript{38} and so are we, no matter who "we" might be.

Yet Bork insists that there are no "immanent ideals of democracy."\textsuperscript{39} Bork says this in the course of criticizing the reapportionment decisions and judicial activism in behalf of better views of democratic processes. Bork's statement about no immanent ideals is tantamount to denying that there are objectively better or worse versions of democracy. This is, of course, in keeping with his opposition to philosophy, and it enables him to oppose judicial insistence on more democracy than the positive law clearly requires or, as he puts it, more democracy than the people want—as if we could possibly recognize what counts as an expression of what the people want without some prior sense of the "immanent ideals" whose existence Bork professes to deny. What is it, for example, that enables us to distinguish a precipitous from a thoughtful expression of public sentiments, or a coerced from a voluntary one, or a representative from an unrepresentative one? The common-sense upshot of Bork's position can only be that democracy shall mean whatever those with sufficient power want it to mean, whoever they happen to be and whatever they might want. From any given conception of democracy, Bork thus guarantees the degradation of that notion.\textsuperscript{40}

It should be clear from this discussion that those who would defend democracy need the activity of moral-political philosophy. They must seek real reasons for preferring one form of democracy over others and democracy itself to other forms. Yet it may not be as clear that philosophy has an affinity with what we look upon as democratic relationships. We can begin to see this affinity by distinguishing democratic relationships—which may obtain within a very small circle of individuals—from democracy as a political regime. The latter requires more than democratic relationships; it requires a pervasive societal commitment to democratic relationships and a very wide circle of persons who enjoy them. Keeping this in mind, we might go on to recognize that

\textsuperscript{38} The Federalist No. 9, at 50-51; No. 10, at 57, 60-61 (J. Cooke ed. 1961). [All subsequent references to The Federalist are to this edition. At the author's request references to individual numbers of The Federalist will not include the original authors' name.]

\textsuperscript{39} Bork, The Struggle over the Role of the Court, Nat'l Rev., Sept. 17, 1982, at 1138.

\textsuperscript{40} For additional discussion of this point see Barber, New Right Assault, supra note 1, at 259-62.
general ideas like equality and justice subsume contested conceptions. We seem to react to this fact in one of two basic ways. We can view these conflicting conceptions as contending versions of the general ideas to which our language indicates they refer, hoping as we do so that these contests take the form of a self-critical and public-spirited quest for better theories of the general ideas. Or we can view the content and status of contending conceptions as resting solely on convention or the fact of their acceptance. Assuming what we ordinarily do about the quest for truth, the first view favors activities and conditions like reflection, deliberation, and dialogue, along with conditions like diversity, freedom of inquiry and expression, personal choice on the basis of good arguments among persons who are moral equals, the material independence, space, and intellectual equipment that we need if we are to assess these arguments for ourselves, and so forth.

As for the second view, if we assume that conventions can change, and change by human agency, and if there are no truths beyond convention, then methods of proof are themselves merely conventional, and there is no compelling reason to reject new methods pressing for acceptance. This would apply even to those methods we may now look upon as immoral, like torture. Perhaps nothing succeeds like success. I do not think that there is any way for a conventionalist to disclaim that proposition except by schizophrenically suspending his or her conventionalist beliefs.41

Thus, the philosophic quest for truth is linked with democratic relationships and activities, if not always with the pervasive social distribution of those relationships which we now associate with democratic societies. By contrast, the second view sees

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41. Consider Ronald Dworkin's attempt to reconcile his skeptical metaphysics with his conviction that there are right answers to controversial moral questions. "[I]n a calm philosophical moment, away from the moral or interpretive wars," Dworkin will say that he cannot prove that slavery is simply wrong, or wrong in that every reasonable person in a position to reason correctly would have to agree. Nevertheless, he says he can say slavery is objectively wrong when he returns to the moral sphere. The reason his metaphysical skepticism will permit him to say slavery is objectively wrong is that the metaphysical skeptic can have no reason to "challenge any particular moral or interpretive claim." Slavery can be right or wrong only on the basis of convictions we hold within the moral sphere. R. DWORKIN, LAW'S EMPIRE, 82-84 (1986). For an argument that Dworkin's metaphysical skepticism about moral propositions is at war with the belief in right answers to moral questions, see Moore, Metaphysics, Epistemology and Legal Theory, 60 S. CAL. L. REV. 453, esp. 482, 503-06 (1987).
philosophy as mere ideology. It can recognize no real reasons for preferring either democratic relationships or democratic regimes. To conclude this part of my argument, I repeat my main point: the teaching that allows no independent standards of political morality for judges to consult in constitutional interpretation is a teaching that degrades all authority, including Framers' intentions, morality, tradition, and democracy.

III. THE CONSTITUTIONALISM OF THE FEDERALIST

A. A Thought on How to Read The Federalist

With all these problems of New Right constitutional doctrine, those who are serious about preserving the Constitution should look for a better theory of constitutional decision. I think the theory of The Federalist is good enough. But a disclaimer or two before I turn to The Federalist, all having to do with the notorious difficulties attending any talk about Framers' intent. These difficulties include deciding who the Framers are, what it means to impute an intention to them as a group, the best evidence for their intentions, and, most important, which aspect of their intentions should count. We cannot answer these questions adequately without interlocking answers to very formidable philosophic difficulties. Since I am not a professional philosopher, I will not be able to stray too far from common sense in my answers to those few philosophic questions that I do confront. I shall try to appeal to opinions that I think we all share or with which we would agree, eventually, at any rate.

One of these opinions is that whoever the Framers are, the authors of The Federalist are prominent among them. The Federalist is at least a candidate for a leading voice of the American founding. Secondly, we have to assume that there are contradictions in a work as complex as The Federalist. Any normative theory of that work would have to resolve those contradictions in behalf of a persuasive view of its best argument. Perhaps one can report a contradiction in a detached way, but one cannot conform one's behavior to a contradiction. Writing history differs from using history for normative purposes. Since I am writing about The Federalist in a normative context, I have no choice but to construe it therapeutically—that is, in a manner that
shapes it for normative use by resolving possible conflicts in light of a fair account of its principal purposes. To symbolize the fact that my interpretation is and can be nothing more than a unifying construction, defensible ultimately on grounds that are as much moral as historical, I shall refer not to Hamilton, Madison, and Jay, but to "Publius," the pseudonymous spokesperson for Hamilton, Madison, and Jay.

Scholars often assume that the essential statements of Publius' conception of judicial power are that the judiciary is the branch least dangerous to our rights, that it is the weakest branch, and that judges are to exercise judgment, not will. These statements occur in the famous number 78, where Publius defends judicial review by insisting that judicial review insures not the supremacy of judges, as Antifederalist critics charge, but the supremacy of the Constitution. Now, when Publius says judges should exercise judgment, not will, modern academics tend to construe him in a certain way. They seem to think Publius is promising that judges will behave in a manner free of significant discretion, and perhaps that when indeterminate laws make relatively uncontroversial decision impossible, judges will defer to elected officials. But those who impute this view to Publius do so because of their beliefs, not his. Most modern academics are moral skeptics, more or less like Robert Bork. They know that answers in hard cases at law depend on answers to open questions of political morality behind the law. They deny that judgment is active in the latter because they believe that reason is impotent when it comes to controversial moral questions. Will alone can answer open moral questions—will as opposed to reason and, therefore, judgment. So Publius cannot keep his promise about judgment in hard cases. If judges must stick to judgment and avoid willfulness, they have to defer in hard cases. This is how most modern academics read number 78, and this is why they believe that judicial activism is inconsistent with the promise of The Federalist, and therewith the intentions of the Framers.

The central problem with this modernist reading of Publius is that Publius is not a moral skeptic. Only a moral skeptic would

42. Scholars who make this error include J. Ely, supra note 37, at 45; M. Perry, The Constitution, the Courts, and Human Right (1982); C. Wolfe, supra note 27, at 4, 9, 75-79.
43. The Federalist No. 78 esp. pp. 522-23, 526
44. For a statement of this orthodox view, see Ely, supra note 37, at 44-54, 56-60.
conclude that where there is political controversy over the import of general ideas like "due process" or "equal protection," that one answer can be no better than the next. There is no evidence that Publius believed this, and much good evidence that he did not. Because Publius was not a moral skeptic, we should not construe his statements as if he were.

B. Publius and the Judiciary

Since Publius' theory of judicial review is part of his general theory of the Constitution, we cannot capture his theory from isolated statements toward the end of number 78 about a "least dangerous branch," and the distinction between "judgment" and "will." We must begin at least as far back as his criticism of government under the Articles of Confederation in numbers 15 through 22. That criticism displays a practical concern for ameliorating social and economic problems and a disdain for those tenets of popular government (like minimal government, small republican units, and voluntarism) that prevent good government, good government being the effective protection of individual and minority rights and the energetic pursuit of safety, prosperity, economic and scientific progress, and other ends. Publius does not rely on majoritarian processes to tell him what good government is. His famous argument in number 10 not only presupposes standards of rights and the common good beyond majority will, it names majority faction as the great problem that must be solved by those who would justly recommend popular government to humankind. Because he believes democracy defensible on no other grounds, Publius proposes a plan that seeks above all else to reconcile democracy to higher standards of political morality.

We learn in numbers 63 and 71 that the proposed government would be initially less responsive to public opinion so that it can

45. This point and other arguments in this section are developed at greater length in Barber, Judicial Review and the Federalist, U. CHI. L. REV. (forthcoming 1988) [hereinafter Barber, Judicial Review]; see infra text accompanying notes 49-51.
46. See The Federalist Nos. 6-8, esp. pp. 34-36
47. See The Federalist Nos. 15 and 16, esp. pp. 93-98; No. 45, esp. pp. 308-09.
48. See The Federalist No. 10.
50. See The Federalist No. 9, esp. pp. 50-51; No. 10, esp. pp. 57-58, 60-61.
be more responsible in the long run—that is, so that it can achieve objectives that the public ought to approve and will eventually approve as consistent with its true interests.\textsuperscript{51} Crucial to Publius' hopes for a responsible government is a scheme that will deliberately weaken the legislature and strengthen the executive's power and propensity to oppose transient public demands.\textsuperscript{52} Responsible government seems to perform an educational function, for it reconciles public opinion to the public's objective interests by making the public sensible of the difference between its objective interests and its initial inclinations.\textsuperscript{53} Because Publius will not defend popular government unless it can be reconciled to higher standards, it appears that his case for popular government depends on the successful performance of the educational function of a responsible government. Publius' general theory of responsible government is important to us because judicial activism plays a part in that theory.

Publius' first extended reference to judicial power occurs in number 22, which concludes a series of seven papers critical of the Articles of Confederation. The old confederation lacked an independent judiciary, and Publius defends the need for a supreme court to ascertain the "true import" of treaties and "all other laws."\textsuperscript{54} In a statement totally free of formalist illusion, Publius also says a Supreme Court is necessary because of the "endless" disagreements over the meaning of laws and the tendency of judges in a federal system to be biased toward their own governments.\textsuperscript{55} If we combine these two statements, it is fair to say that Publius believes: (1) that a law may have a true meaning notwithstanding disagreement—even endless disagreement—over what the meaning is; and (2) that a nationalist bias points toward true meaning. That he would support the idea of true meaning or right answers in moral-legal controversies is further indicated wherever he himself takes a position on a matter of controversy, by his distinction between the public's interest and the public's inclinations,\textsuperscript{56} and by his theory of

\textsuperscript{51} \textit{The Federalist} No. 63, at 423-25; No. 71, at 481-83. \\
\textsuperscript{52} \textit{The Federalist} No. 51, at 350; No. 70, at 411-12; No. 71, at 481-83. \\
\textsuperscript{53} \textit{Id.} \\
\textsuperscript{54} \textit{The Federalist} No. 22, at 143. \\
\textsuperscript{55} \textit{Id.} \\
\textsuperscript{56} \textit{The Federalist} No. 71, at 482-83.
responsible government generally. That he believes a nationalist bias productive of good government is indicated by his plan in numbers 47 through 51 for maintaining constitutional structures less through the dutiful or patriotic attitudes of officials and the electorate and more through a scheme of checks and balances that would harness personal ambition to the duties of national office.

Publius will not rely on a virtuous electorate to maintain the constitutional arrangement of offices and powers, for responsible government honors the dictates of reason over passion (or acts as if it does) and it is passion, not reason, that normally governs public opinion. Number 49 says that, in constitutional conflicts among the branches, the public would normally favor its elected representatives. The public would not favor a judiciary whose appointment, functions, and tenure render it "too far removed from the public's prepossessions." This argument comes just before Publius announces checks and balances as the primary method of constitutional maintenance in number 51. Number 49 associates the judiciary with values of reason and fidelity to the Constitution, and it anticipates the argument of number 78 for judicial review as either a part of the system of checks and balances or as an auxiliary instrument of constitutional maintenance.

Essential to Publius's scheme of checks and balances as expressly set forth in numbers 51 and 70 through 72 are provisions for weakening the legislature and strengthening the executive, a branch whose tenure and constituency are supposed to incline the government against the more transient of the public's impulses. Strong and perhaps somewhat glory-seeking presidents are necessary to a plan that would teach the public not to trust its initial inclinations. Publius states candidly that no fixed presidential tenure could serve this purpose completely; but, he says, a term of four years is better than a shorter term.

Publius's papers on the judiciary come immediately after his discussion of the presidency; they carry forward his theory of

57. See The Federalist No. 63, at 423-25; No. 71, at 481-83.
58. The Federalist No. 51, esp. 349.
59. The Federalist No. 49, at 342-43.
60. See id. at 341.
61. See The Federalist No. 70, at 482-83; No. 72, at 488-89.
62. The Federalist No. 71, at 484.
responsible government. Here, as with the presidency, Publius aims at strengthening what would otherwise be a weak institution in a democracy. Number 78 begins by defending a life tenure for judges on the same proposition as the tenure proposed for senators in number 63 and presidents in numbers 71 and 72: duration in office enhances independence and firmness. As with the senate and the presidency, Publius sees judicial firmness as an instrument for combating precipitous public sentiment and an auxiliary means to improving the quality of public opinion. Publius defends judicial review and calls the firmness and independence of judges essential to a limited constitution, which he defines here as one that honors constitutional rights or "specified exemptions to the legislative authority." Though he treats the Constitution as the immediate source of principles for judicial application, he also envisions a style of legal interpretation that mitigates injustices that may lie beyond successful constitutional challenge. In this way Publius suggests that the positive law of the Constitution is open to higher standards with which it and lesser laws may in some ways appear to conflict and toward which judges should aim in construing the positive law—a pregnant suggestion indeed.

Yet Publius denies that these higher standards are of the judges' own making. Although the meaning of these higher standards may be controversial and it is possible for judges to usurp legislative power, the duty of judges, says number 78, is to exercise judgment, not will. The power of judicial review, Publius insists, does not amount to judicial supremacy; it seeks to insure the Constitution's supremacy, and therewith the supremacy of the people over their government. Because these assurances coexist with Publius's recognition in number 22 that the law is often controversial, that judges can err, and that they can be expected to be biased toward their own governments, we cannot construe Publius to suggest that judicial decision is a matter of uncontroversial or mechanical application. Thus, one

63. THE FEDERALIST No. 78, at 527-28; cf. No. 63, at 424-25 and No. 71, at 481-82.
64. THE FEDERALIST No. 78, at 524-26.
65. Id. at 528.
67. THE FEDERALIST No. 78, at 526.
68. Id. at 525.
69. THE FEDERALIST No. 22, at 143-44.
passage in number 78 refers favorably to the "exercise of judicial discretion in determining between two contradictory laws."70 Number 78 also speaks of reconciling conflicts by "fair construction,"71 and Publius continues to expect disagreement over the meaning of laws when he insists later that federal courts should have jurisdiction over federal questions.72

Finally, Publius can support judicial power and still agree that the effective enjoyment of rights ultimately will depend on public opinion. His statement in number 49 that the judiciary will not share the public's prepossessions as much as the other branches73 does not mean that judges will be completely insulated. Numbers 84 and 71 acknowledge the vulnerability of all parts of the system to a sustained public sentiment.74 Yet the potential influence of public opinion says nothing about the proper interpretation of constitutional standards, nor does it preclude a judicial role in educating the public to the responsibilities and benefits of striving for better interpretations. Far from an argument against judicial power, the fact that public opinion can corrupt the judiciary is an argument for strengthening judicial power and other instruments of responsible government.

III. Conclusion

Such is the major thrust of what The Federalist says about judicial power and judicial review. If we are to make sense of it, we need a theory of judicial decision that will enable us to collect Publius' beliefs into a coherent whole. In outline, that theory views conflicting conceptions of general constitutional ideas as contestable versions of real things and relationships, conceptions to be treated as hypotheses and tested through a self-critical and public-spirited quest for moral and political truth.75 In this theory the judiciary would not stand alone. It could even be considered an institution that is auxiliary to the system of legislative checks

70. The Federalist No. 78, at 525.
71. Id.
72. The Federalist No. 80, at 534-35.
73. The Federalist No. 49, at 341.
74. The Federalist No. 84, at 580; No. 71 at 482.
75. For the leading contemporary elaborations of this view of judicial responsibilities, See Dworkin, supra note 66, at 31-39, 136-37; Moore, supra note 26, at 288-337, 371, 379-81, 393-96.
and balances, the latter being the principal safeguard against majoritarian excess. Nevertheless, an independent judiciary would manifest a large part of our collective aspiration to self improvement, and self improvement in accordance with objective standards of self improvement—not just change or growth toward whatever the future might bring. Publius does not define standards like the common good or the permanent and aggregate interests of the community. Precise specifications and operational definitions of justice are not as good as a devotion to the real thing, for that devotion makes us continually ask whether our definitions are as good as they can be. The judiciary is an essential part of the Constitution's scheme for conducting this quest—central to national identity because central to what the nation has told a candid world it really is. This general theory of the judiciary's relationship to constitutional aspirations fits Publius well.

I conclude with a last look at number 78. Publius recognizes at one point that judicial review does present the risk that judges will abuse their authority. If the observation proves anything, he says, it proves we should not have an independent judiciary. And he goes on to stress the need for an independent judiciary, leaving impeachment as the only proper way to correct judicial usurpations. This response to the danger of judicial usurpation will fail to satisfy many of us. But it underscores a fact of Publius' thinking. He is committed to popular government. But popular government is not his primary commitment, and he is ready to abandon democracy if it cannot live up to what it should be. Publius is a constitutionalist, not a majoritarian democrat. This is why Publius, unlike the New Right, is willing to err on the side of an institution like judicial review.

77. See The Federalist No. 1, at 3-6; No. 9, at 50-51; No. 10, at 57, 63-64; No. 14, at 88-89; No. 51, at 349-53; No. 63, at 422-25; No. 71, at 482-83; No. 78, at 528.
78. For a discussion of those parts of The Federalist that may deviate from Publius' general thrust as here described see Barber, Judicial Review, supra note 45, text at nn.121-49.
79. See The Federalist No. 78, at 526-30; No. 79, at 532-33; No. 81, at 545-46.
We have a plethora of theories about judicial review, including theories about theories, but their foundations require stricter scrutiny. This Essay presents some aspects of the problem through an examination of two important and familiar ideas about judicial review.

The controversy over “noninterpretive” review concerns the propriety of courts’ deciding constitutional cases by using extra-constitutional norms. But the theoretical framework has not been well developed and appears to raise the wrong questions about judicial review. Thayer’s doctrine of extreme judicial deference to the legislature has received much attention, but his reasoning has been given less careful notice. Thayer’s rule rests largely on doctrines of doubtful constitutional standing.

The purpose of this Essay is not so much to answer questions as to raise them—to enlarge the agenda of constitutional theory.

I. INTERPRETIVE REVIEW

Constitutional scholarship has recently employed a distinction between “interpretive” and “noninterpretive” review, which concerns the range of norms used by courts in deciding constitutional cases. As the term suggests, “interpretive review” is based on interpretation of the Constitution; “noninterpretive review” is not so limited, but uses other grounds as well. Thus the normative theory that is labelled “interpretivism” accepts only interpretive review, whereas “noninterpretivism” approves of noninterpretive review in some cases.

These differences concern the core responsibilities of courts engaged in judicial review. They are not limited, for example, to...
crisis conditions, when courts might be thought to have special reason for departing from their normal role. They apply primarily to review by the federal judiciary of decisions made by other branches of the federal government. The role of those courts relative to decisions made by state governments is often treated differently.

The distinction was introduced by Grey in the following terms:

In reviewing laws for constitutionality, should our judges confine themselves to determining whether those laws conflict with norms derived from the written Constitution? Or may they also enforce principles of liberty and justice when the normative content of those principles is not to be found within the four corners of our founding document?

How useful is the distinction? According to Grey, the “chief virtue” of “the pure interpretive model” is that

when a court strikes down a popular statute or practice as unconstitutional, it may always reply to the resulting public outcry: “We didn’t do it—you did.” The people have chosen the principle that the statute or practice violated, have designated it as fundamental, and have written it down in the text of the Constitution for the judges to interpret and apply.²

That seems false. Rarely could a court truly defend an unpopular decision by saying to a protesting population “We didn’t do it—you did.” Only small minorities of the population have been permitted to participate in the processes leading to ratification of the Constitution and most of its amendments. Most members of those privileged minorities are no longer alive when the provisions are enforced. Such a defense would rest on fictions.

But let us consider the theoretical framework on its merits. Grey argues that, when engaged in judicial review, “the courts do appropriately apply values not articulated in the constitutional text.”³ He might appear to win that argument too easily. For his initial definition of the distinction seems to limit interpretive review to norms that are explicitly given (“articulated”) in the constitutional text. That would make the “interpretivist” a straw man.

2. Id. at 705.
3. Id.
Scholars accept that constitutional norms need not be stated in the document, but can be attributable to the Constitution on the basis of sound interpretative argument. Relatively uncontroversial examples include checks and balances, the separation of powers, and representative government. While it seems plausible to hold that some such norms are "derived from the written Constitution," they are not treated as if they have been fully "articulated in the constitutional text." They themselves require interpretation.

Grey's initial definition of interpretive review is misleading, but its narrowness is relieved by his acknowledgment that "sophisticated" interpretivism "certainly contemplates that the courts may look through the sometimes opaque text to the purposes behind it in determining constitutional norms. Normative inferences may be drawn from silences and omissions, from structures and relationships, as well as from explicit commands."4 There is also evidence that Grey accepts "Framers' intent" as a criterion of constitutional meaning.5 He appears to regard the intentions of the Framers as implicit codicils to the constitutional text. This might expand its "normative content" considerably.

Constitutional lawyers seem to agree that Framers' intent helps determine constitutional meaning. This is, however, a blind spot of constitutional theory. The criterion of Framers' intent desperately requires clarification and justification. Its fundamental difficulties have largely been ignored.6

Its difficulties notwithstanding, if Framers' intent is assumed to be a determinant of constitutional meaning, then that affects the interpretive-noninterpretive distinction. Interpretation, and

4. Id. at 706 n.9. Grey goes on, however, to say:
"What distinguishes the exponent of the pure interpretive model is his insistence that the only norms used in constitutional adjudication must be those inferable from the text."
The entire passage makes sense only if we suppose that "the purposes behind" an "opaque text" can be "inferable from the text." That may be true in some cases.
5. See, e.g., id. at 710.
6. The central problems do not concern mere practical difficulties in applying the criterion, such as limited evidence, but its inherent ambiguity and arbitrariness. See, e.g., Dworkin, The Forum of Principle, 56 N.Y.U. L. REV. 469 (1981), and Lyons, Constitutional Interpretation and Original Meaning, 4 SOC. PHIL. & POL'y 75 (1986). It may be too early to say that these criticisms of the criterion have been ignored, for they have appeared only recently. Nevertheless, some of the central difficulties were in effect indicated by MacCallum, Legislative Intent, 75 YALE L.J. 754 (1966).
therefore interpretive review, is then taken to encompass norms that can be inferred from the text of the Constitution or from the intentions of its Framers. Noninterpretive review includes norms with no such connections to the Constitution.

To understand the distinction better, we have to consider Grey's application of it. He appears mainly concerned with defending decisions based on "those large conceptions of governmental structure and individual rights that are at best referred to, and whose content is scarcely at all specified, in the written Constitution." These are especially important and interesting norms; but it is misleading to regard their use as noninterpretive review.

Consider the fifth amendment's requirement of "just compensation" for private property that is taken for public use.8 As the Constitution explicitly requires compensatory justice but provides no criteria of just compensation, it is most natural to understand the clause as requiring compensation that is truly just. If it does, then the Constitution presupposes that there is a real distinction between just and unjust compensation, one that people can employ.

On this reading, compensatory justice is a constitutional norm. But it is only named; its content is not given. What are we to say, then, about the appropriate criteria of compensatory justice and their use by courts? The question is forced on us by Grey's framework, which is intended to put such provisions in proper perspective. Should the criteria of compensatory justice be classified as extraconstitutional norms and their use regarded as noninterpretive because they are given neither by the constitutional text nor by Framers' intent? That would be misleading, because appropriate criteria are needed by courts in applying the constitutional norm of compensatory justice. That fact provides a powerful reason for regarding the identification of appropriate criteria as an element of constitutional interpretation.

Courts cannot identify appropriate criteria of compensatory justice without answering this question: "What does justice require by way of compensation when private property is taken

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7. Id. at 708.
8. The occasion for compensation (public takings of private property) will be assumed hereafter.
A justified answer would seem to require a systematic inquiry into the principles of compensatory justice. Criteria that are appropriate for constitutional purposes might depend not only on abstract justice but also social conditions, historical traditions, established economic practice, and prior constitutional interpretation. It is commonplace for courts to make such judgments.

Constitutional scholarship often describes such a process as judges imposing their own values on the nation. This assumes either that there cannot be justified answers to moral questions or else that judges are incapable of honest inquiry. But either form of skepticism is incompatible with our subject, the rational appraisal of normative theories about judicial review.

We are properly skeptical about criteria that are proposed without clear justification. There can also be room for doubting the results of an inquiry. But I see no reason to deny that courts might sometimes have adequate reason to regard certain criteria of compensatory justice as appropriate. A court's deciding a case on that basis could not be regarded as unfaithful to the Constitution. Quite the contrary.

Working out such aspects of the Constitution surely counts as interpretation. The interpretive-noninterpretive distinction obscures this point and directs us to the wrong questions. We need a better understanding of constitutional interpretation. We need to explore the variety of ways in which a norm can legitimately be attributed to the Constitution.

To suggest otherwise is to invite misguided criticism. When constitutional interpretation is so narrowly understood, the idea of noninterpretive review does not distinguish between norms that lack any connection with the Constitution and norms that are firmly anchored in it, though they require interpretation. Then critics can fail to appreciate the distinction. Plausible objections to the former can mistakenly appear to discredit the latter as well.

Let us now consider briefly another prominent account of the distinction between interpretive and noninterpretive review. According to Ely, interpretivism holds

9. A sound answer might differentiate among takings.
that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution [whereas noninterpretivism maintains] that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document.\(^\text{11}\)

Ely attacks this "clause-bound"\(^\text{12}\) interpretivism, using arguments like those already suggested. It treats "constitutional clauses as self-contained units"\(^\text{13}\) and does not envisage interpretive claims based on several provisions or the Constitution as a whole. "On candid analysis," he says, "the Constitution turns out to contain provisions instructing us to look beyond their four corners."\(^\text{14}\) He finds these instructions in "provisions that are difficult to read responsibly as anything other than quite broad invitations to import into the constitutional decision process considerations that will not be found in the language of the amendment or the debates that led up to it."\(^\text{15}\) Unlike Grey, Ely does not endorse noninterpretive review. But he avoids it only by renouncing his own definitions.

Interpretive and noninterpretive review are defined by both Grey and Ely so as to encompass the possible varieties of judicial review. Ely's attack on noninterpretivism is directed, however, against theories that do not exhaust the possible varieties of that type. He attacks what one might call purely noninterpretive review, which seeks "the principal stuff of constitutional judgment in one's rendition of society's fundamental values."\(^\text{16}\) This leaves unscathed those versions of noninterpretivism that base judicial review on interpretations of "the document's broader themes," including Ely's theory. Ely defends a "participation-oriented, representation-reinforcing approach to judicial review."\(^\text{17}\) According to his own definitions, that theory recommends noninterpretive review. In nevertheless calling his theory "the ultimate interpretivism,"\(^\text{18}\) Ely acknowledges that the interpre-

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12. Id. at 11.
13. Id. at 88, note *.
14. Id. at 38.
15. Id. at 14.
16. Id. at 88 note *.
17. Id. at 87.
18. Id. at 88.
The interpretive-noninterpretive distinction incorporates an inadequate conception of interpretation.

Ely's analytic framework is misleading, and his method of interpretation is impressionistic. He claims, for example, that the Constitution overwhelmingly endorses representative democracy and that its unclear elements should be interpreted so as to promote that value. He recognizes that aspects of the Constitution cannot be encompassed by this interpretation, but he fails to explain the impact of the recalcitrant evidence on his interpretative claims or its consequences for judicial review. Should we regard the Constitution as committed also to principles that are independent of representative democracy? If so, how are unclear aspects of the Constitution to be understood when the two sets of principles conflict? Alternatively, should the Constitution be regarded as committed to some more complex set of principles, which coherently account for all of its provisions? Ely rejects the narrow conception of interpretation that is assumed by the standard idea of interpretive review, but he never clarifies his own conception of interpretation, and so neglects these issues.

In sum, the interpretive-noninterpretive distinction has been unhelpful. It begs the central question of judicial review, namely, the character of interpretative claims and the range of sound supporting arguments.

There is a genuine problem about whether and, if so, when and how extraconstitutional norms may properly be used within judicial review. But that problem can hardly be addressed before we achieve an understanding of interpretative claims that are based on what Ely calls "the broader themes" of the Constitution.


20. Another problem is to clarify the subject of interpretation. The standard formulations quite naturally imply that it is a document. (A rare exception is Llewellyn, The Constitution as an Institution, 34 Colum. L. Rev. 1 (1934).) But interpretative arguments routinely consider not only "Framers' intent" but also the requirements of institutions that accord with the structural norms of the Constitution (see, e.g., C. Black, Structure and Relationship in Constitutional Law (1969), which is frequently cited but whose intriguing theoretical claims about interpretation have never been carefully analyzed or clearly explained) and interpretative judicial precedent. Grey defends "noninterpretivism" by relying heavily on established lines of precedent. Like judicial review itself, Ely's own theory starts from an interpretative precedent and relies on precedents throughout. Dworkin maintains that constitutional interpretation concerns not just the constitutional
II. THAYER'S RULE

According to Thayer's famous "rule of administration" for judicial review, federal courts should nullify federal legislation only when one cannot reasonably doubt that it is unconstitutional.21

This extreme doctrine of judicial deference does not seem to be motivated by skepticism about the constitutional basis for judicial review. Thayer appears to believe that judicial review is justified on the ground that Congress has "only a delegated and limited authority under the [Constitution, and] that these restraints, in order to be operative, must be regarded as so much law; and, as being law, that they must be interpreted and applied by the court."22 Thayer emphasizes that judicial review concerns the constitutional boundaries of legislative authority rather than the wisdom of the legislature's exercise of its authority and that, as a judicial power, it may be exercised only within the context of litigation in which constitutional questions arise.23

Against that background, one might expect Thayer to reason that courts should approach the task of reviewing legislation for its constitutionality by seeking a well-grounded understanding of the relationship between the Constitution and the legislation under review. This would require a court to base its decision on interpretations of legislative authority and its limits under the Constitution as well as of the challenged statute.

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21. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129 (1893) [hereinafter Thayer, Origin]. The rule is formulated in a variety of ways, but the variations make no difference here. As explained below, the rule applies to relations between the judiciary and the legislature at the federal level.

22. Id. at 138; see also id. at 129-130 (on the supremacy clause).

23. Thayer contrasts the limited range of cases in which the courts are authorized to "review" legislation for constitutionality with the unlimited scope for review by the legislature. He claims that the legislature cannot act without making such a judgment, and that its judgment may be final, as many of its acts cannot be reviewed by courts. He reasons that, by placing limits on the scope of judicial review, the system implies that the legislature is primarily to be relied upon to review legislation for constitutionality, and that the legislative judgment is entitled to respect. Id. at 134-136. This "may help us to understand why the extent of [the judiciary's] control, when they do have the opportunity, should be narrow." Id. at 137. But the same might be said about state legislatures and legislation, so Thayer's reasoning does not seem to square with the different treatments he accords federal and state legislation.
Thayer does, in fact, insist upon that straightforward approach to judicial review, but only when federal courts review legislative enactments by state governments. In those cases, Thayer says, courts should be guided by "nothing less than" the "just and true interpretation"\(^{24}\) of the federal Constitution. But Thayer insists that the same does not hold when courts review federal legislation; courts should approach those cases very differently.\(^{25}\)

Thayer observes, in effect, that two questions must be distinguished. One is whether legislation comports with the Constitution. Another is how courts should deal with challenges to the constitutionality of legislation. These might be assumed to run together. Indeed, there would seem to be a very strong presumption that an answer to the former question (Is this statute constitutional?) determines the appropriate answer to the latter (Should this statute be upheld as constitutional?). But Thayer holds, in effect, that federal courts should not be guided by any such presumption in dealing with federal legislation. In those cases, courts should not be guided by their best interpretation of the statutes and the Constitution. They should not ask whether the legislation is constitutional, but whether the courts should sustain it as constitutional. Courts should answer that question by determining whether someone might reasonably believe that the legislation is constitutional. If so, the constitutional challenge should be denied and the legislation upheld. If not—if "it is not open to rational question"\(^{26}\) whether the act is unconstitutional—then, but only then, should the courts nullify it.

Courts following Thayer's rule might never have occasion to declare unconstitutional legislation unconstitutional. Judges might confidently believe, on excellent grounds, that an enactment exceeds Congress' legislative authority and is therefore unconstitutional, but they might simultaneously believe that their excellent reasons for regarding the enactment as unconstitutional leave room for reasonable doubt. Thayer understands, of course, that the rule requires greater deference to congressional deci-

\(^{24}\) Id. at 155.

\(^{25}\) Thayer does not adequately explain why different treatment is to be accorded state and federal legislation. He asserts that the courts have a duty to maintain the "paramount authority" of the national over the state governments (Id. at 154), but all he adds is that the federal legislature is, whereas state legislatures are not, "co-ordinate" with the federal courts. Id. at 155.

\(^{26}\) Id. at 144.
sions than would otherwise be warranted. But that is not my present concern.

My point is that the rule requires justification. Judicial review (as Thayer himself appreciates) is grounded upon the idea that the Constitution is law that courts are bound to apply and enforce. This implies a very strong presumption that courts should nullify legislation that they regard as unconstitutional. Thayer would seem to be claiming that in some, but not all, cases federal courts should not straightforwardly apply and enforce the federal Constitution, and thus that in those cases this presumption is rebutted. His conception of a federal court's responsibility when reviewing legislation from one of the state legislatures shows that he understands what it means for the courts to apply and enforce the Constitution. He accordingly owes us an explanation of how the presumption in question is rebutted—how courts can legitimately refrain from applying and enforcing the Constitution generally, with regard to congressional as well as state legislation.

An answer might make either of two possible claims. It might claim that there are constitutional grounds for judicial deference to the legislature in such cases, or it might invoke extracconstitutional grounds. The difference is significant. Whereas an answer of the first type would raise issues of constitutional interpretation, an answer of the second type would raise issues of principle regarding judicial fidelity to the Constitution.

Thayer appears to recognize that the burden of proof lies on his shoulders, and he attempts to sustain it both by offering evidence that his rule reflects the standard view27 and by suggesting substantive grounds for the rule. The latter arguments, citing the rule's merits, are presented in quotations from others' writings. But Thayer appears to endorse their points, so I shall proceed as if they represent his considered judgement. The main issue for constitutional theory is not what Thayer himself believed but the character of such reasoning.

I shall now review the suggested arguments in the order in which they are suggested in Thayer's paper:

27. Thayer's claim that his rule was firmly established is systematically appraised and rejected in C. Black, The People and the Court 195-203 (1960).
A. Utilitarianism

Thayer submits that unless the courts limit nullification to violations of the Constitution that are "plain and clear,... there might be danger of the judiciary preventing the operation of laws which might produce much public good." 28

This argument is offered tentatively, perhaps because it is incomplete. After all, courts nullifying federal legislation may prevent public harm as well as public good. A complete argument of this type would need to show that following his rule would do more good than harm, perhaps even that it would do more good, on the whole, than any feasible alternative, including less deferential rules.

But the argument might be bolstered. To avoid circularity and vacuity, let us interpret "public good" as general welfare. It might be held that a reasonably accurate measure of the general welfare is provided by an indirect majoritarian decision process such as that provided by a popularly elected legislature. If so, it might be held that a policy of judicial deference to a popularly elected legislature would promote the general welfare. 29

Let us then suppose that Thayer's rule can be supported by utilitarian reasoning. This does not appear to count as a legal, or specifically a constitutional, argument. How can it legitimately guide a court's approach to judicial review? How can it legitimately limit a court's application and enforcement of the Constitution? An answer might be based on constitutional or extraconstitutional considerations. After all, either the Constitution implies that utilitarian reasoning may permissibly guide a court's approach to judicial review or it does not.

There is a clear textual basis for claiming that the Constitution acknowledges the validity of utilitarian reasoning, though not to the exclusion of all potentially competing considerations. The preamble says that the Constitution is meant to "promote the general Welfare," 30 among other things. The values cited in the

28. Thayer, Origin, supra note 21, at 140 (quoting Kemper v. Hawkins, Va. Cas. p. 60 (1793)).
29. The argument provides no apparent basis for deferentially reviewing federal legislation while rigorously reviewing legislation of the several states. The same is true of other arguments considered here, but I shall ignore them hereafter.
30. I ignore here the differences and possible conflict between promotion of the general welfare when that is limited to the population of the United States and promotion of welfare more generally.
preamble might be understood to have a bearing upon constitutional interpretation. It might be held, for example, that the Constitution as a whole should be interpreted so as to promote those values. This reasoning would not justify the promotion of the general welfare without regard to the other values cited, but it would legitimize the use of utilitarian arguments, among others, in large scale constitutional interpretation.

But this would not tend to show that the utilitarian argument for Thayer's rule has a constitutional foundation. From the assumption that the Constitution as a whole is supposed to promote a certain value, and that the Constitution as a whole may be interpreted accordingly, we cannot reasonably infer that the same is true of specific aspects of the Constitution. That would amount to what logicians call "the fallacy of division." Besides, institutions do not work that way. Law, in particular, promotes various values indirectly.

If a utilitarian argument for Thayer's rule is to be regarded as constitutional, what needs to be shown is that the Constitution implies a utilitarian condition on the exercise of the judicial power. Consider the parallel case for legislation. Suppose we ask whether the failure of a statute to promote the general welfare is a constitutional ground for nullification of the statute. Thayer's answer would be no: the Constitution provides no utilitarian condition on the exercise of the legislative power. But the same applies to adjudication: we have no reason to believe that the Constitution implies a utilitarian condition on the exercise of the judicial power. If that is true, then a utilitarian argument for Thayer's rule cannot be regarded as based on the Constitution.

If the first suggested argument for Thayer's rule has no foundation in the Constitution, then the argument is extraconstitutional.31 We return to our original question: How can such reasoning legitimately guide a court's approach to judicial review?

The general problem is this. Legitimate legal arguments vary among jurisdictions, but are usually thought to be limited. Judicial review itself assumes that there are limits to the judicial power to nullify legislation. Some reasons are relevant (the statute is unconstitutional); others are not (the statute is unwise).

31. It is then an argument that a self-styled "interpretivist" should reject. If "judicial activism" in this area involves the use of extraconstitutional norms, then this is an activist argument for judicial deference.
But if some arguments with no foundation in the Constitution are to be regarded as a sound basis for some judicial decisions (such as whether a court should adopt Thayer's rule), then those limits on legal arguments are threatened. Must courts then be guided by other extraconstitutional and even extralegal arguments—without restriction, in all judicial contexts? If not, then what is the basis for selecting some and rejecting others?

The first argument for Thayer's rule does not begin to answer such questions, but perhaps we have delved deeply enough to suggest some conditions on, and thus some obstacles to, its successful completion. Let us turn, then, to another suggested argument for Thayer's rule.

B. Respect for the Law

Thayer next posits that the courts should insure "due obedience" to the federal legislature's authority. If its authority is "frequently questioned, it must tend to diminish the reverence for the laws which is essential to the public safety and happiness."32

This suggests that, by rigorously enforcing the Constitution, courts might undermine respect for federal legislation, which in turn might undermine public safety and happiness. The argument assumes both that federal rule is essential to public welfare and that it is quite fragile. Thayer seems to assume that extreme judicial deference can not only bolster federal authority but is an essential means to that end.

It may be difficult for us to regard the federal government as fragile, but the idea might have seemed more plausible when Thayer wrote, not very long after the Civil War.

In any event, the argument may be understood in either of two ways. We might emphasize its reference to "public safety and happiness" and read it along utilitarian lines. This would introduce nothing new into our deliberations, so I turn instead to an alternative reading. The argument might be understood to presuppose a principle that seems plausible, if somewhat vague: the judiciary shares responsibility to make the system work.

32. Thayer, Origin, supra note 21, at 142 (quoting Adm'rs of Byrne v. Adm'rs of Stewart, 3 S.C. Eq 466, 476 (S.C. 1812)).
The principle is implausible unless the judiciary's share of the responsibility is limited, for example, to "judicial" functions. Even if our conception of the judicial role is flexible, it is not coextensive with our conceptions of the other governmental branches. Questions that then arise are whether the adoption of such a rule is in fact compatible with the judicial role and, if so, whether its adoption is in fact necessary to make the system work.

For our purposes, however, the most important question is whether the principle that is presupposed by the argument (e.g., that the judiciary shares responsibility to make the system work) has any foundation in the Constitution. It is tempting to suppose so, but I see no clear argument to that effect. Another possibility is that the principle expresses a conception of civic responsibility, which might be classified as moral rather than legal. Implementing the notion of civic responsibility in this way seems less threatening to the idea of limits on law than does similar use of utilitarian reasoning. Whereas application of the notion of civic responsibility is limited to political or similar contexts, utilitarian reasoning is not.

C. Independence of the Judiciary

Thayer fears that "[t]he interference of the judiciary with legislative Acts, if frequent or on dubious grounds, might occasion so great a jealousy of this power and so general a prejudice against it as to lead to measures ending in the total overthrow of the independence of the judges, and so of the best preservative of the constitution."33

This argument is likewise premised on the judiciary's responsibility to help make the system work, as well as on fears that ill-considered or even "frequent" judicial nullification of legislation might provoke Congress to use its considerable power to control the federal courts. There is of course some irony in an argument that seems to counsel sacrificing the Constitution in order to save it. Put more sympathetically, however, the claim is that rigorous enforcement of the Constitution might be self-defeating.

This argument may be contrasted with Learned Hand's later justification for judicial review. Both writers emphasize the im-

33. Id.
portance of preserving the constitutional scheme that separates powers and allows one branch of government to limit the effective discretion of another. Both urge judicial deference to the federal legislature. Beyond that, however, they differ profoundly. Thayer appears reasonably confident of the constitutional basis for judicial review, but is concerned that vigorous exercise of the judicial power might be self-defeating. Hand seems deeply skeptical of judicial review's grounding in the Constitution, and argues that it was necessary for the judiciary to assume the power in order to "keep the states, Congress, and the President within their prescribed powers."

D. Representative Government

Finally, in a passage whose principal point is to emphasize the degree of judicial deference that is due the federal legislature, Thayer suggests a further argument:

It must indeed be studiously remembered, in judicially applying such a test as this of what a legislature may reasonably think, that virtue, sense, and competent knowledge are always to be attributed to that body. The conduct of public affairs must always go forward upon conventions and assumptions of that sort. "It is a postulate," said Mr. Justice Gibson, "in the theory of our government... that the people are wise, virtuous, and competent to manage their own affairs...." And so in a court's revision of legislative acts... it will always assume a duly instructed body; and the question is not merely what persons may rationally do who are such as we often see, in point of fact, in our legislative bodies, persons untaught it may be, indocile, thoughtless, reckless, incompetent,—but what those other persons, competent, well-instructed, sagacious, attentive, intent only on public ends, fit to represent a self-governing people, such as our theory of government assumes to be carrying on our public affairs,—what such persons may reasonably think or do, what is the permissible view for them.... The reasonable doubt [of unconstitutionality]... is that reasonable doubt which lingers in the mind of a competent and duly instructed person who has carefully applied his faculties to the question. The rationally permissible opinion of which we have been talking is the opinion reasonably allowable to such a person as this. 35

35. Thayer, Origin, supra note 21, at 149 (emphasis in original).
This passage can be understood to serve two functions. On the one hand, it is designed to clarify the rule of judicial deference to the federal legislature. According to the clarified rule, congressional acts may be nullified when, and only when, they are unconstitutional beyond "that reasonable doubt which lingers in the mind of a competent and duly instructed person who has carefully applied his faculties to the question."

On the other hand, it suggests a further ground for the rule. Thayer suggests that the Constitution embodies "a theory of government." He does not state the theory, but it appears to include the following elements: the theory assumes (1) "that the people are wise, virtuous, and competent to manage their own affairs," and (2) that they do so through representatives who are "competent, well-instructed, sagacious, attentive, [and] intent only on public ends." This appears to anticipate the notion that our government embodies or is committed to political principles which, because they favor "self-government"—or the closest practical approximation, government by elected representatives—argue against interference by an unelected federal judiciary. Although the point is not clearly made, it is nonetheless worth pursuing for its continuing importance.

This fourth suggested argument for Thayer's rule is similar to Alexander Bickel's contention that judicial review is "counter-majoritarian" and "undemocratic." Bickel puts the point by saying that, because judicial review "thwarts the will of the representatives of the actual people of the here and now," it is "a deviant institution in the American democracy." These points are understood to provide reasons against judicial nullification of legislative decisions. As judicial review is established in the system, those points are understood to provide reasons for limiting such interference with the operations of representative government.

37. BICKEL, supra note 36, at 18.
38. Thayer's reference to "the theory of our government" is problematic. The quoted passage implies that he treats essential elements of the theory as fictions. He does not believe that the elected legislators are generally "fit to represent a self-governing people," and one suspects that, for similar reasons, he does not believe that the people are fit to govern themselves.
But what kinds of reasons are they supposed to be? Are they provided by the Constitution? If not, we might ask, once again, why we should suppose that they should be taken into account in the deliberations of courts that are charged with the application and enforcement of constitutional law.

Consider the following facts: First, Thayer suggests that the power of judicial review can be inferred from the Constitution; Bickel claims that judicial review is neither implicit in nor contrary to the Constitution. As both writers appreciate, the practice is well entrenched within the system. So, neither writer claims that judicial review is excluded by the Constitution and both acknowledge that it is established practice. Second, both writers understand that the Constitution neither prescribes nor permits pure popular government or even unrestricted representative government. The Constitution prohibits a variety of decisions that might be made by elected representatives. The constitutional system has various counter-majoritarian features. As both writers recognize, the constitutional system is not unqualifiedly committed to representative democracy. In sum, even if judicial review clashes with principles of representative democracy, that would not show that it clashes with the principles of the system that we have.

Perhaps the idea is that the Constitution is somehow committed to an ideal of representative democracy, despite its counter-majoritarian features. This raises a question that is rarely addressed in the literature of constitutional theory: What kind of reasoning is capable of justifying the attribution of normative political principles, including political ideals, to the Constitution? What would make a theory of that kind true? Political principles are often attributed to the Constitution, but on what basis is never made clear. For that reason, it is unclear what inferences might be drawn from, or what applications might be made of, those principles within the context of constitutional interpretation.

Compare Bork's conception of the Constitution. Although Bork refers to "the seeming anomaly of judicial supremacy in a democratic society," he says that the anomaly is "dissipated . . . by

39. It is unclear whether Bickel means that the Constitution is indeterminate on this issue, and also whether he believes that judicial precedent nonetheless imposes an obligation to engage in judicial review.
the model of government embodied in the structure of the Constitution."^40 That model is "Madisonian," and "one essential premise of the Madisonian model is majoritarianism. The model has also a counter-majoritarian premise, however, for it assumes there are some areas of life a majority should not control."^41 Bork claims that both "constitutional theory" and "popular understanding"^42 provide an adequate basis for judicial review by giving courts the task of clarifying the boundary between majority power and minority freedom.

Because it acknowledges that the system limits representative government, Bork's "Madisonian model" seems descriptively more accurate than Bickel's "majoritarian" model. This might lead one to infer that Bork's model is superior. But these "models" are not purely descriptive. They are meant in part to show why the constitutional system merits respect. And such a model's descriptive accuracy need not improve its qualifications as an ideal. Even if the majoritarian model is descriptively less accurate than the Madisonian model, some might think that it nevertheless embodies a superior ideal. They might argue that pure representative government is better than a Madisonian system because it is inherently fairer or better serves the general welfare.^43

III. Conclusion

The relatively brief career of the "interpretive model" for judicial review suggests the difficulty of containing the practice of constitutional interpretation within the narrow confines of textual glosses and psychohistory. Legal theory resists the notion that interpretation might be both controversial and sound, for its ideal of law is black letter. Anything short of certainty is dubious law. But interpretive practice in law, as elsewhere, seeks both hidden and wider meanings. A good deal of "noninterpretive" review turns out to be interpretational after all.

There are limits to the range of legal and specifically constitutional meanings, and so the imaginative practice of constitutional interpretation obliges us to consider the various grounds

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41. Id. at 3.
42. Id.
43. This might be Bickel's view.
upon which norms can properly be attributed to the Constitution. But the reasoning behind doctrines like Thayer's rule, which aspire to regulate constitutional adjudication, appears not to respect those boundaries. Is that a sign that civic responsibilities lie just beyond the law? Or does it reflect undisciplined theory-mongering, constitutional infidelity masquerading as "judicial restraint"?

We end, as promised, with questions.
A Hermeneutical Critique of the Originalism/Nonoriginalism Distinction

David Couzens Hoy*

I. INTRODUCTION

Was the defeat of Judge Bork's nomination to the Supreme Court also the defeat of the general theory of constitutional interpretation he advocates? Commenting on Bork's defeat, Ronald Dworkin infers that "[t]he standard of 'original intention,' as a strict and exclusive limit on the grounds of legitimate Supreme Court decisions, is probably dead." The tasks of theorists are not settled so easily, however, and the question remains whether the theory of original intent has been formulated clearly enough to know whether it has suffered more than a temporary political setback. Certainly some practicing lawyers, who may not have held explicit views about Bork's theory of constitutional interpretation, found themselves opposed to the legal results that seemed to follow from his originalism, and they may have, therefore, rejected originalism in general. However, the legal decisions these lawyers did not like may not have been the best way to interpret or apply originalism. So the task still remains for legal theorists to articulate and argue the best version of originalism, since the results obtained so far from the decisions of some originalists may not be the ones that would have followed from a more precise formulation of originalism.

Legal theorists, thus, have a different task from that of practitioners of the law (even if the same person is often both a theorist and a practitioner). Even when theorists are opposed to originalism, they should try to formulate it as precisely and plausibly as they can. Hence, I am not surprised to find that in the literature today the best theoretical articulation of originalism can be found in the writings of the staunchest advocate of nonoriginalism, Michael Perry. Dworkin's prediction of the death

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of originalism is, thus, gainsaid by the imminent publication of a new book in which Perry argues that originalism is a coherent and viable legal theory. Of course, as a longstanding advocate of nonoriginalist judicial decision, Perry also believes that nonoriginalism is equally coherent. The choice between them, thus, will depend on other criteria than coherence. He argues that sometimes there are better reasons to prefer nonoriginalism.

Perry can be praised in many ways for his fairness to the theory he contests. His sense of justice is shown in his desire to give originalism its due and to admit its strengths. His lawyerly pride may also be behind his thought that if he is to defeat originalism, he wants to do so only if he is up against originalism in its strongest version. Since he does not find particularly good statements of originalism in the writings of its principal defenders, he does his best to construct one himself. His success in doing so attests to his intellectual powers and his ability to see a case from both sides.

While admirable, his strategy is not the only one open to theorists. Given the long tradition of at least tacit acceptance of originalism, and given that desire for continuation of the political tradition is not only reasonable but also deeply entrenched, to grant that originalism is as viable theoretically as nonoriginalism may already allow originalism to triumph. My strategy in this Essay will therefore be different from Perry's. I will accept his formulation of originalism and then, after showing that it leads to other formulations, I shall argue that no single formulation could be accepted in conjunction with nonoriginalism and still satisfy originalists. I shall then sketch hermeneutical reasons for rejecting originalism as an exclusive theory of interpretation. I must make clear, however, that I am not attacking Perry's own preferred position, since he is an avowed nonoriginalist. Admittedly, then, we are disagreeing more about strategy than substance. However, in my attack on originalism I would not want to be classified as a nonoriginalist in Perry's sense. If originalism

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2. M. Perry, Morality, Politics, and Law: A Bicentennial Essay (forthcoming in 1989). My essay deals with chapter six of this book, entitled Interpreting Law: The Problem of Constitutional Adjudication, and all further quotations from Perry will be from a manuscript version of that chapter. This chapter was presented at a conference at the Salmon P. Chase College of Law, and my Essay spells out my contributions to the active discussions that went on over an intense, two-day period.
cannot be stated acceptably, then the need to formulate an explicitly anti-originalist theory disappears.

While this Essay is mostly critical and negative, its positive commitment to an alternative theory should, I hope, be clear. The hermeneutical theory that I will be indirectly arguing for (and that I have discussed in more detail in other places) cannot be classified as either originalist or anti-originalist. For one thing, it has a different view about the role of intention in interpretation from that implicit in either of these theories. For another, it has a different view about the relation of theory and practice than these theories. I started this Essay as if I thought that theory was an entirely separate matter from practice. But I shall argue that even if theory and practice sometimes have different tasks set for them, they are never entirely separate—either in theory or in practice.

II. FORMULATING ORIGINALISM

Perry's version of originalism avoids that doctrine's more common criticisms. To summarize his reconstruction of originalism, let me distinguish between what I will call intentionalistic originalism and normative originalism. Intentionalistic originalism emphasizes the historical facts about what the Framers and ratifiers of the relevant constitutional statements believed. Such originalism will reason from psychological generalizations on these facts to conclusions about how the Framers would have understood these textual phrases in present contexts. Normative originalism, in contrast, does not limit itself to the particular opinions these historical personages held, but, in Bork's words, "attempts to discern the principles the Framers enacted, the values they sought to protect." Perry expresses Bork's emphasis on the Framers' principles and values by construing originalism as requiring the Court to strike down a law (for instance, in a fourteenth amendment case) if the Court decides that the law discriminates because of race with respect to what Perry calls a "fundamental human interest" recognized at the time of ratification.

I am calling the originalism that appeals to principles or "fundamental human interests" normative because its reasoning will be different from intentionalistic originalism. The latter depends on psychological generalizations as well as on legal history to exhume facts about what beliefs were held at the time of writing. Normative originalism relies more significantly on moral reasoning than on psychological generalization or even on historiographical research. Bork himself says that the originalist "can manipulate the levels of generality at which he states the Framers' principles." His choice of the word "manipulate" brings out a difficulty, since it suggests that originalist decisions may be no less "inventive" than nonoriginalist decisions are accused of being. The advantage of this stress on the levels of generality is, however, that the later judge is not confined to the particular opinions of the earlier Framers. The judge is not obligated to reinforce the social practices and beliefs contemporary with the Framers if the judge thinks that some of these practices were inconsistent with principles the Framers constitutionalized. Taking levels of generality into account in the process of moral reasoning thus enables originalism to become a form of "critical theory" both for previous times as well as for its own time.

I call this form of originalism normative because it does not require any reasoning about how the Framers themselves would have interpreted cases and situations they could not have foreseen. A major reason Bork formulates his position by appealing to the Framers' principles and values is to avoid the objection that originalism is irrelevant because society has changed so significantly. Bork charges in turn that this objection is irrelevant: "The objection that we can never know what the Framers would have done about specific modern situations is entirely beside the point." 5

To many, Bork's version of originalism may seem curiously unhistorical in its "manipulation" of "levels of generality." Furthermore, a normative originalism of principles and values starts sounding curiously similar to nonoriginalism. But Perry agrees with Bork that, in point of fact, it is impossible to know how the Framers or ratifiers would have reacted to present situations if they were still alive. He, therefore, rejects what I have called

5. Bork, supra note 3, at 22, 26; op. cit cited by Perry, chapter 6.
intentionalistic originalism, and searches for a definition of normative originalism that would not require the judge to go through elaborate, counterfactual thought experiments about what the Framers' or ratifiers' mental processes would have been in the face of present issues. Under Perry's definition, "a judicial decision that a law or other governmental action is unconstitutional, is legitimate, according to originalism, only if the original belief(s) signified by the relevant constitutional provision (in conjunction with whatever beliefs are supplemental to the original belief) entails the conclusion that government has done something it may not do or failed to do something it must do." By "original beliefs" he means norms that have become authoritative because they were ratified, and by "supplemental beliefs" he means those beliefs or norms that would be required by reliance on original beliefs. If I read him right, such "beliefs" would finally be about the "fundamental human interests" that the ratifiers wanted to protect, even if they never said so explicitly.

An important aspect of this definition is that, under it, originalism establishes a necessary but not a sufficient condition for judicial decisions, since, as Perry emphasizes, the definition uses the logical term "only if." To illustrate Perry's position, let me give some simpler examples of the distinction between necessary and sufficient conditions. One says that there is fire only if there is oxygen to state that the presence of oxygen is a necessary condition of fire. So we know that if there is a fire, there must be oxygen present, but we do not normally identify the presence of the oxygen as the sufficient condition of the fire's starting. Similarly, we might say that students can pass the course only if they complete all the work. So it follows that if they passed the course, this means that they completed all the work. But it does not follow that completing all the work means that they will pass the course (since the work must meet certain standards). So completing the work is a necessary but not a sufficient condition for passing the course.

According to Perry, that the ratifiers' original beliefs entail the impropriety of the governmental action is a necessary condition for a correct decision of the action's unconstitutionality, but not a sufficient condition. Perry defines originalism this way, I believe, mainly because he thinks originalists should want to say that a judge who determines what the original beliefs entail would not automatically have to rule the way the original beliefs point. Judges sometimes need to limit themselves, and Perry
proffers a theory of judicial self-limitation, which he believes to be a separate issue from the theory of whether the judicial role should be an originalist or a nonoriginalist one.

I think, however, that many originalists would find Perry's formulation of their position in this way too weak. I assume that Perry weakens originalism intentionally, because he wants to make it more plausible. He thinks some versions, such as the intentionalistic originalism I described above, are overstated, and he wants to avoid making originalism a straw man that can be easily attacked. The danger of making originalism more plausible, however, especially to his own, nonoriginalist way of seeing things, is that the theory becomes either less plausible to originalists themselves, or worse, uninteresting to anybody. So defined, it might no longer serve as a strategy a judge could follow, or it might not really be what is at issue in the debate with nonoriginalists. The claim might amount merely to insisting that anyone who believes a judicial decision of unconstitutionality to be correct would have to believe that ratifiers' intent entailed the impropriety of the governmental action (even if one did not know what that intent was). However, for the originalist simply to assert this to a nonoriginalist would merely beg the question. So the originalist must mean something more interesting by the claim. But on this definition it is hard to see whether there is a genuine difference between originalism and nonoriginalism in judicial practice. While the definition shows how a judge could rule some action unconstitutional, it also suggests that the judge does not have to so rule. In fact, the judge could still rule that the action was not unconstitutional, i.e., that it was constitutional. Since Perry's requirement is not a sufficient condition for something to be unconstitutional, the judge could say an action was constitutional even if original beliefs entailed that the government was wrong. Perry's definition has the consequence that anything (and its opposite) could be declared constitutional—whatever the original intent or belief entailed.

Originalists might try two different tactics if they found this formulation too weak. They could make the strong claim that ratifiers' intent was both necessary and sufficient, or they could

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6. My colleague Ric Otte helped me think through the logical consequences of Perry's definition, and I am grateful to him for his time, as well as to Richard Wasserstrom and Jerome Neu for theirs.
make the claim that it was sufficient, but not necessary. Let me call the first alternative strong originalism, in contrast to the weak originalism Perry defined above. To continue Perry's style of definition, a judicial decision that some law or government action was unconstitutional is correct if and only if, according to strong originalism, original beliefs entailed that the government has erred. Under this view, knowing that government action was inconsistent with original beliefs would require the judge to invalidate it.

To Perry, this position would be too strong, because he believes judges can and should limit themselves. An originalist who agreed with Perry that this claim was too strong, but who thought Perry's version was too weak, could propose instead that if the original beliefs entail the conclusion that the government erred, then the judicial decision of unconstitutionality is correct. This latter claim amounts to claiming that ratifiers' intent is sufficient. I will call this position moderate originalism, since it leaves open the possibility that reasons other than ratifiers' intent could legitimate judicial decisions. Of course, many may find that it does not capture the desire of originalists to combat judicial activism, since it does not deny that there are correct judicial decisions of unconstitutionality that do not draw on ratifiers' intent. All it claims is that establishing that the original beliefs entailed that the government erred would be a sufficient condition for invalidating a law, but the law could also be validated or invalidated by other means in the absence of evidence about original beliefs.

III. FORMULATING NONORIGINALISM

Originalists may differ about which of these positions they want to hold, and why. For now, however, I want to raise the question about how nonoriginalism could stand in relation to these different formulations, and how nonoriginalism should formulate its own position. Perry-qua-nonoriginalist thinks that what I have called "weak originalism" is viable. Whether he can so maintain depends on how nonoriginalism is formulated. Again I shall have to go beyond his own formulation and explore the other possibilities. Doing so will allow me to show why his conciliatory approach to originalism creates problems for his own nonoriginalism.
Presumably, strong originalism could not be accepted by a nonoriginalist, since the nonoriginalist thinks that judges are not compelled to adhere to original beliefs. For the sake of symmetry with Perry’s definition, let me call the norms that the nonoriginalist takes to be authoritative “present belief” in contrast to Perry’s term “original belief.” Perry himself as a nonoriginalist speaks of the “present meaning,” or the “aspirations,” or the “present ideals” symbolized in the Constitution.

Let me also assume for the sake of argument that it could be possible that a real opposition would obtain here, such that the relevant present belief could even be incompatible with the relevant original belief to the point where these became genuinely inconsistent. Now Perry might resist adding this point, as he suggests that the nonoriginalist aspirations have evolved from the earlier, original beliefs. He sees them on a continuum, so that the earlier, original beliefs are narrower, or limited to a smaller range of cases, than the more generalized aspirations that form our present ideals as a constitutional community. With good hermeneutical optimism, then, Perry thinks of the Framers and the present as forming a single community, instead of two opposed communities. While this optimism can be applauded, it does not address the possibility that some present beliefs have developed to such an extent that they are significantly different from their corresponding original beliefs, and perhaps even have come to conflict with earlier beliefs. Certainly our present beliefs about the acceptability of separating races seem opposed to those of the Revolutionary or the Civil War-era Framers.

Given these qualifications, a strong nonoriginalist would hold that a judicial determination that some law or government action was unconstitutional is correct if and only if present (and not original) belief entails that the government has erred. I should say immediately that this position may appear too strong to be a plausible candidate. I find that it obviates many hermeneutical features of current judicial practice, such as the connection to the tradition of constitutional interpretation. Thus, not only would reasoning from original belief be precluded, but stare decisis might become irrelevant as well. However, the soundness of the doctrine is not what currently interests me, since I set it up mainly as a contrast to strong originalism. When so defined, both could not be true simultaneously, since given a true conflict, a law that an originalist judge declared unconstitutional could not
be so ruled by a nonoriginalist judge. These versions are probably
the ones that fuel the more heated debates among opposing
constitutional theorists.

Since I am testing Perry's claim that he can be both an
originalist and a nonoriginalist, I am more interested in how the
two other variants of nonoriginalism relate to originalism. To
preserve parallels, let me call moderate nonoriginalism the posi-
tion holding that a judicial determination that a law or other
governmental action was unconstitutional is correct if present
belief entails that the government has erred. In other words,
moderate nonoriginalism holds that present belief is a sufficient,
but not a necessary condition for a legitimate decision of uncon-
stitutionality.

What would follow for this form of nonoriginalism about the
status of original belief? Since present belief's entailing the law's
impropriety is sufficient but not necessary for a judgment of
unconstitutionality, original belief's entailing the law's impro pri-
ety could also suffice to reach the same decision. So moderate
nonoriginalism is not really incompatible with moderate origin-
alism. While holding these views would, therefore, be one way
in which one person could be both an originalist and a nonorigin-
alist, I think that from a theoretical point of view ascribing to
both of these formulations would be unsatisfactory. For theorists
seeking clearly defined alternatives, or for judges searching for
viable interpretive strategies, saying only this much is either
uninteresting or nebulous. There would certainly no longer be
any point to speaking about a debate between originalists and
nonoriginalists. (Of course, cynics looking at the controversy from
the outside could say that they suspected that this was the case
all along.) Furthermore, although compatible, these positions are
not compatible in the way Perry specifies (as I will show), so let
me state the other variant of nonoriginalism to see if we obtain
a better result.

This variant, which I shall call weak nonoriginalism, sees pres-
ent belief much as weak originalism sees original belief, namely,
as a necessary but not a sufficient condition. So a judicial deter-
mination that a law or other governmental action is unconconsti-
tutional is correct, according to weak nonoriginalism, only if present
belief entails that the government has erred. Let us leave aside
that nothing follows from present belief about what can be
declared constitutional, and focus only on what is implied in
declaring an action unconstitutional. Weak nonoriginalism seems, by nature, incompatible with weak originalism—just as the presence of oxygen and the absence of oxygen cannot both be necessary conditions for fire. Theory would, thus, be in a less nebulous state than if the contrast were as I described it between moderate originalism and moderate nonoriginalism. We would, now, seem to be confronted with two competing claims, which compel us to supply reasons for choosing one over the other.

But, on closer inspection, these might not be truly competing views. They could be held simultaneously, but doing so would amount to the claim that ruling a law unconstitutional would mean that both original belief and present belief entailed that the law was in error. Of course, a problem could result for such a ruling if present belief had evolved into the contradictory of original belief, as I suggested above.

Perry does not explore such problems, perhaps because he thinks that they could not genuinely arise. But he does explicitly avow this version of nonoriginalism in addition to the corresponding version of originalism. He writes:

According to the nonoriginalist theory I'm presenting, a necessary condition of legitimate judicial invalidation of a policy choice is that the choice be ruled out by the relevant aspiration.

A necessary condition, but not a sufficient one. I haven't argued that if a judge believes a choice to be ruled out, she should invalidate it. (I have said that if a judge does not believe a choice to be ruled out, but believes merely that the choice is not preferable, she should not invalidate it.) There are other conditions that must be satisfied, according to my nonoriginalist theory, before a judge may invalidate a policy choice.

Although according to Perry originalism is an acceptable view, mainly because it keeps faith with "the tradition's aspiration to electorally accountable government," he argues that nonoriginalism should be even more acceptable to the tradition since what the tradition is likely to lose in accountability is "more than offset" by what it is likely to gain in justice.

This consideration of gain and loss suggests to me, however, that there is trade-off between the two views, and, thus, some competition between them. So the nonoriginalist cannot be holding that the relation between originalism and nonoriginalism is of a "both/and" kind, such that their conjunction is unproblematic and, indeed, the correct result for constitutional theory. Instead,
CRITIQUE OF THE DISTINCTION

the nonoriginalist must still believe that sometimes there is an "either/or" relation, such that judges base their reasoning on either originalist or nonoriginalist readings, but not necessarily on both at once. So the nonoriginalist who has an interesting position that significantly contests originalism would not seem content with the result that whenever a legitimate invalidation has occurred, nonoriginalism is vindicated only if originalism is as well. I doubt that it would be a wise strategy for a nonoriginalist who is conciliatory to originalism to require a strong conjunction whereby judgments of unconstitutionality mean that both original belief and nonoriginal ideals entail the impropriety of an action. Of course, Perry does want both originalism and nonoriginalism to apply in some form to various cases. But even he does not want one to apply only when the other does.

What he says is that some cases can be decided with originalist reasoning and others with nonoriginalist reasoning:

On what moral beliefs ought a person to rely, in her capacity as judge, in deciding whether public policy regarding some matter is constitutionally valid? The originalist answer, as we've seen, is: original beliefs (in conjunction with whatever beliefs are supplemental to them). The nonoriginalist answer is: with respect to certain provisions of the constitutional text, original beliefs, and with respect to certain other provisions, the fundamental beliefs of the American political tradition signified by the provisions—beliefs or aspirations as to how the community's life, the life in common, should be lived.

If I read Perry correctly, the nonoriginalist answer is that provisions can be decided by relying on either original belief or nonoriginal belief. For provisions not decided by original belief the nonoriginalist answer is: "with respect to nonoriginal belief only," and not, "with respect to both original belief and nonoriginal belief."

Perry seems to be moving away from his strict definitions in the above passage. Notice that he is, here, talking about judgments, not of unconstitutionality, but rather of constitutionality, and remember that what followed for constitutionality from his originalist definition of unconstitutionality was a weaker result than any originalist would probably accept. Notice also that he is asking about what moral beliefs a judge ought to rely on, which suggests he is now talking about sufficient and not simply necessary conditions. I think that this slide is bound to happen...
in the real discussion with the originalist since the natural way to think about the debate is in terms of at least sufficient conditions. In conceding that originalist reasoning is sometimes correct, but in also insisting that at other times nonoriginalist reasoning is correct instead (and not simply as well), the nonoriginalist no longer seems to be thinking of either original or nonoriginal meaning as necessary conditions only, but as sufficient conditions.

For the nonoriginalist then to concede that originalism was true, and argue only that nonoriginalism was true as well, already seems to lose the debate. To see this, let us, first, ask how the originalist would view the debate in practice. The originalist might not care whether nonoriginal belief was also satisfied so long as the decision remained faithful to original belief. However, the originalist would probably not accept the failure of a judge to decide in a way that was consistent with original belief just because it was not consistent with nonoriginal belief as well. But as Perry has structured the debate, originalism is itself no longer the issue, since both the originalist and the nonoriginalist accept it. So the nonoriginalist theorist is now in a weaker strategic position in the debate, since the full burden of proof is on nonoriginalism.

Furthermore, I think that the nonoriginalist could be pushed to concede that in a case where a nonoriginalist reading was inconsistent with an originalist one, the latter would prevail. The court might limit itself and not invalidate an action that it thought was unconstitutional as originally understood, but as Perry has defined the possibilities, the judge could not rule for a nonoriginalist conclusion about unconstitutionality that was in any way inconsistent with the original meaning. I would think that the nonoriginalist would want a case where original belief was no longer compatible with present justice to be decidable with nonoriginalist reasoning. But for nonoriginalists to grant that originalist reasoning is valid would seem to give originalist interpretation a lexical priority over the nonoriginalist interpretation, if justifying decisions on their faithfulness to original meaning is a deeply entrenched judicial practice. That is, if under both an originalist and a nonoriginalist reading, a law could be declared unconstitutional, and if the nonoriginalist reading were in any way inconsistent with the originalist one, the originalist interpretation would seem to prevail.
IV. BEYOND THE ORIGINALISM/NONORIGINALISM DICHOTOMY

While each of the above positions could be discussed in more detail, what I have said so far leads me to assess the debate as follows. If originalism and nonoriginalism are genuinely incompatible positions, then the issue is between the strong versions of each. If both are thought to be viable strategies of interpretation, then what is at stake is whether either original meaning or present meaning is, by itself, a sufficient condition for an interpretation and decision. But if the issue is about sufficient conditions only (and not about both necessary and sufficient conditions), then originalism and nonoriginalism are not genuine contradictories, since both could be true. They would also not be true in the competitive way that Perry sometimes suggests. Instead, all that would be at stake would be which practical interpretive strategy judges found most useful in particular cases. There would not be a theoretical issue interesting enough to spark a genuine debate or conflict of theories.

But I wish to unsettle not only the strong distinction between originalism and nonoriginalism, but also any suggestion that originalism or nonoriginalism are exclusive of each other as practical, interpretive strategies. If I can cast doubt on the practical distinction between original meaning and present meaning, doing so will undermine the contrast between the strong theoretical versions as well. My view is that there is no genuine theoretical conflict since the strong versions are also not contradictories if neither is true.

The idea that there is a sharp distinction between original meaning and present meaning arises, I believe, from believing that there is also a distinction between understanding the meaning of a text, and applying that meaning in a present context. This distinction between understanding and application was standard in an older hermeneutical tradition—one that grew out of a concern principally with Biblical interpretation, but that was influenced by more Cartesian assumptions about knowledge, mind, and language. A major move by twentieth-century hermeneutical philosophers like Heidegger and Gadamer (as well as by Anglo-American philosophers influenced by the later Wittgenstein or by Quine) was to challenge the conception of meaning presupposed by this distinction.

The older tradition is still influential, however, even if present-day theorists are unaware that they are buying into it. Perry,
for instance, claims that to interpret a text is in essence to make it more familiar. He believes this process consists of two distinct moments. The first moment of interpretation is to ascertain the meaning of the text. The second, separate moment is then to ascertain its significance. The meaning of the text is what we grasp in the moment of understanding the text, and the text’s significance is generated in the second, separate moment of applying that initial understanding to the present situation. This distinction leads to Perry’s further separation of the theory of judicial role (in which originalism and nonoriginalism are the main contenders) from the theory of judicial self-limitation.

Perry’s various distinctions here will not all be accepted by hermeneutical philosophers, despite Perry’s desire to make his theory as hermeneutical as possible. Gadamer, for one, denies that the understanding of the meaning of a text is determined prior to and independently of the application of that text to the present situation. I should, therefore, like to explain the implications of Gadamer’s point and then show how it both challenges originalism (whether strong, moderate, or weak) and obviates the need for a nonoriginalist definition.

Let me begin with Perry’s general claim that to interpret is to make the text more familiar. While this may be one effect of interpretation, it need not be the only effect, or the final goal, of a given interpretation. Certainly, one purpose an interpretation may have is to take a part of the text that seems strange and make it more understandable by showing that it really expresses a point that we already understand and with which we are already in some sense familiar. But this characterization is deficient if it suggests that texts never teach us anything new or that we know everything already. Gadamer takes pains to show that we have to remain open to the difference between the text’s

7. Perry does not explain exactly what he means by meaning and by significance. The basic idea is that significance involves what else the text could mean in contexts other than its original one. Sometimes theorists present the meaning-significance distinction as a variant on the denotation-connotation distinction, and also the sense-reference distinction. I have argued against some such construals of the distinction in Chapter One of my book, THE CRITICAL CIRCLE: LITERATURE, HISTORY, AND PHILOSOPHICAL HERMENEUTICS (1978) [hereinafter Hoy, THE CRITICAL CIRCLE].

8. David Lyons may have a similar distinction in mind when he suggests that a “theory of adjudication would seem to presuppose an independently determined interpretation of the Constitution, to fix whatever is (or is not) to be applied.” Lyons, Constitutional Interpretation and Original Meaning, Soc. Phil. & Pol’y, Autumn 1986, at 75, 78 n.34.
understanding of the subject matter and our own, and he has even been criticized (by Jürgen Habermas) for privileging the text's understanding over our own. If Gadamer's emphasis that we should not collapse the text into our own perception of the familiar was not strong enough, moreover, we have learned from recent French post-structuralism that interpretation can also involve showing that what seems familiar in the text is really strange. Perhaps at least one lesson to learn from the interchange between Gadamer, Habermas, and post-structuralism is that interpretation can include both the attempt to make the strange familiar, and that of making the familiar strange. The latter is a necessary precaution against our tendency to read the text in the way that seems most natural to us and to fail to notice other elements of the text that would disrupt this reading. In any case, making the strange familiar cannot be all there is to interpretation.

To speak of making the strange familiar suggests that the task of applying the text to the present situation is to make the text "relevant." In hermeneutics this task is sometimes called "appropriation." But appropriation (in German, Aneignung) is not the same as what Gadamer means when he writes about application (Anwendung, applicatio). To appropriate a text for present purposes that are recognizably different is a willful, self-conscious act. Some judges may find that this describes what they find themselves forced to do on some occasions. But Gadamer's notion of application describes a prior cognitive operation where we first find the text to be saying something to us. In finding that the text is at all intelligible, the moment of application, as Gadamer understands it, has already taken place for us. A text only makes sense insofar as it inheres in a context, and for us even to be able to understand the text at all, we must presuppose an understanding of that context. So I construe the point about "application" as the general claim that a text is never apprehended independently of a context, but that any understanding of the text has already found that the text applies in a shared context.

One reason Gadamer takes the law (rather than, for example, literature) as the paradigm case for hermeneutics is that, in

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9. See my discussion of Paul Ricoeur on appropriation in Hoy, THE CRITICAL CIRCLE, supra note 7, at 85.
interpreting the law, we are interpreting texts that have force for us. His theory starts from laws that are "live" for us, and not from cases where researchers confront arcane, "dead" texts that no longer seem to present us with live options. Starting from the arcane cases might lead to a theory that presupposed a sharp separation between understanding those texts in their own contexts and then applying them to ours. But Gadamer starts from an analysis of law precisely because he wants to challenge this traditional way of thinking about interpretation.

Gadamer's hermeneutics does leave room for the effort to distinguish an original understanding from a present understanding, but this effort is not where understanding starts. There may be practical reasons that will generate the need to project an original understanding, but such a projection will only ever be partial. We may find that elements of our understanding were not elements of the original understanding—at least not explicitly. But I think that Gadamer's theory suggests that we can never characterize the original understanding completely, just as we can never characterize our own understanding completely. So we need not assume that the original understanding is completely foreign to us, and therefore do not need to think that when we find the text intelligible, we are merely making it mean what we want it to mean.

Gadamer's theory is designed to avoid the Cartesian assumptions built into the standard tendency to assume that, first, we figure out what the text means, and then we figure out how to apply it in the present context. This latter description suggests a subjective appropriation of the text after a prior construal of its objective meaning. Hermeneutics insists instead that understanding a text always requires interpreting against a shared background or a preunderstood context. What the boundaries are between one context and another, or what makes one context more correct or appropriate than another, are themselves questions of interpretation. If it seems misguided to think that these questions have single, ascertainable, objective answers, it also seems misguided to say that any answer is always subjective. Questions about when contexts are stretched too far or construed inappropriately certainly seem to require determinate answers, even if there may be other grounds for further dispute.

I make these points to suggest that application, as the necessary inherence of a text in some context, is not a second, sub-
jective moment in coming to understand the text. There may be a further operation where the interpreter has the option of making the text explicitly relevant. If we call this appropriation rather than application, we can, then, see that there may be times when interpreters may have to try to avoid making the text seem relevant, perhaps because they want to let less well understood features of the text become more problematic for us than they have been. Thus, on Gadamer's theory, application is not an option and is not subjective. But appropriation (e.g., making the text seem more rather than less relevant) is an optional strategy, such that it can be used or avoided.

Given this account of application, three conclusions about the originalism debate follow.

A. Application

First, the contrast between originalism and nonoriginalism appears less sustainable in theory, and more indeterminate in practice. If originalism and nonoriginalism involve the goal of completely recreating the original context in contrast to a complete recreation of the present context, this goal begins to seem impossible, both in practice and theory. At best, particular elements may be different in the original and the present understandings, but how crucial these differences are depends on further questions of interpretation about how central or peripheral they are. The originalism/nonoriginalism contrast is often presented as if discrete, separate, and competing meanings could be identified. Thus, Perry suggests that in the first moment of interpretation (where we simply try to understand the text, before applying it to the present case), the objective for the originalist is the original meaning whereas the objective for the nonoriginalist is the present or symbolic meaning. Here, meaning is construed more or less as an independent object, and the question is which object the interpreter may legitimately grasp. But if Gadamer is right that a text's intelligibility results from its being already embedded in a context, then these "meanings" will seem less like objects and more like directions in which the context can be expanded.

Perry himself expresses this sense in which originalism and nonoriginalism represent different directions when he says that for the originalist the referent is "behind" the text whereas for the nonoriginalist the referent is "in front of" the text. So the
contrast is between interpretations that are more backward-looking and those that are more forward-looking. But the backward-looking desire to preserve continuity with the past and the forward-looking interest in improving society are both legitimate concerns. Indeed, any given interpretation should probably do its best to accommodate both. The hermeneutical lesson I propose that we learn from this description is that there is no reason to think that the forward-looking process is separable from the backward-looking one to such an extent that we can think of the latter as the paradigm case of understanding the text and the former as a separate operation in which we apply that understanding. I would suggest, instead, that to the extent that we do not see how the text applies to the present case, we do not yet understand the text itself.

B. Appropriation and Adjudication

However, even if legal theory could accept this hermeneutical point that understanding is always already application, the law has further features that must be recognized, and the second problem is how they can be reconciled with what I have said about application. Thus, Perry argues that the theory of judicial role is a separate issue from the theory of judicial self-limitation, and Lyons also thinks that questions about adjudication are separate and later than questions of interpretation. Perry suggests some reasons for which judges may restrain themselves from invalidating a policy choice, even when they are inclined to do so as a result of their understanding and interpretation of the law. Judges may decide that ruling in the way they are inclined to think that the law points would be unduly provocative, or that doing so is unimportant and not worth the institutional capital that would have to be expended.

I do not find, however, that these reasons for judicial self-restraint in practice warrant breaking interpretation up into two separate moments of understanding and application in theory. Instead, these considerations are more like those optional ones where the interpreter has the choice of showing an older text's relevance to present circumstances or of not doing so. This is an issue about what I have called appropriation (Aneignung), which is a question of interpretive strategy, in contrast to the applicatio, which features in all successful understanding.
If understanding always involves interpretation and application, then the originalist theory that we should ascertain the original meaning by itself before seeing how it pertains to our present cases is an artificial characterization of what understanding the law involves. As a third conclusion from this hermeneutical account, I suggest that both as defined and as practiced, originalism tends to ignore what Gadamer calls the Wirkungsgeschichte, which is the history of interpretations a text has had. This history is part of the context in which we will now be reading the legal text. Precedent is thus a crucial part of what the law means to us, and our understanding will be conditioned by the history of the reception of the legal text in the decisions of prior judges. The formulations of strong originalism and strong nonoriginalism implied that they would focus so strongly on either original meaning or on present meaning that they would be likely to ignore or minimize the role of precedent. However, the present context is not really separated from the original context. Both are joined by an intervening tradition.

The connectedness of tradition explains an important reason why we still find the original text authoritative in our present context, despite differences from the original context. That we feel that the constitutional provisions are still very much present law suggests that we understand ourselves as having a single tradition (however complex and polysemous), stretching back and including the context in which the provisions were first written down and ratified. In understanding the law we are really trying to understand ourselves, and the tradition of legal interpretation and judicial practice is an important part of what we have become.

So to ignore this intervening history of interpretation, and to construe the original meaning and the present meaning as independent and disconnected items, is to lack what Gadamer calls wirkungsgeschichtliches Bewußtsein, i.e., a hermeneutical self-awareness of how the interpreter's understanding is itself part of what is being interpreted.

Should interpreters therefore try to be completely self-conscious about the extent to which their own context conditions their reading? That this is not a viable hermeneutical ideal follows from my suggestion that we can never completely describe either the original context in which the text was generated or our own present context. This claim raises a problem in that it might
seem that we should not bother to try to be self-conscious at all about how the intervening history conditions our understanding. My attack on the thought that we do not understand at all until we understand completely does not have the consequence, however, that there is no such thing as correct or valid understanding. I mean to call the concept of completeness into question, not the concept of understanding. Since understanding always involves understanding ourselves as well as the text, we can genuinely illuminate aspects of ourselves or commitments we were not fully aware that we had when hard legal cases force us to reflect on ourselves. We can claim this even in the inevitable absence of a total self-understanding.

These general philosophical considerations may seem far removed from the specific details that lawyers have in mind when they worry about originalist versus nonoriginalist approaches to the law. But the hermeneutical alternative is often thought to lead to relativism, skepticism, and even nihilism. These concluding reflections sketch some reasons for thinking that abandoning the search for original meaning does not entail that what goes on in the courts is simply interpretive nihilism.10

10. For more discussion of the relation of hermeneutics and nihilism in the law, see Hoy, Dworkin's Constructive Optimism v. Deconstructive Legal Nihilism, LAW & PHI. (vol. VI, no. 3). For further explanation of hermeneutics and legal interpretation see Hoy, Interpreting the Law: Hermeneutical and Poststructuralist Perspectives, 58 S. CAL. L. REV. 135 (1985). Research for the present paper was generously supported by a National Endowment for the Humanities Fellowship for College Teachers.
The Varieties of Constitutional Theory: A Comment on Perry and Hoy*

John T. Valauri**

This Comment on Perry and Hoy is part of a larger attempt to help get constitutional theory beyond the dichotomy between originalism and nonoriginalism.1 Professor Perry and, to a lesser extent, Professor Hoy dwell within rather than transcend this dichotomy. They do this mainly by accepting (even if tacitly) underlying assumptions supporting the originalism/ nonoriginalism distinction. My general strategy is to note and question some of these assumptions made by both sides in the Framers' intent debate, including both Perry and Hoy. I also examine how constitutional theory and inquiry is confused and complicated by the many varieties of constitutional theory—not merely the several forms of originalism and nonoriginalism, but also by alternative dichotomies of method.

In his forthcoming book,2 Professor Perry sets out to formulate the strongest version of originalism he can. He counters this with a variety of nonoriginalism he finds superior. His method assumes that there is one best version of originalism and one best version of nonoriginalism. It also implicitly accepts the assertion that the originalism/nonoriginalism dichotomy is the best or most fruitful way of bifurcating constitutional debate. This structure seems essential for his argument. Hoy partially undermines Perry's argument by questioning whether there is any acceptable originalist position.3 But he does not also perform the parallel critique of nonoriginalism. Such a critique is what I sketch here.

I question these assumptions by Perry and other theorists. My main assertions, largely negative, can be briefly stated. There is

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1. I will present a more comprehensive examination of the Framers' intent debate in constitutional theory in a forthcoming article entitled Hermeneutics and Framers' Intent.
no single best version of originalism. Likewise, there is no ultimate version of nonoriginalism. And, more generally, neither is there one always preferable method of constitutional interpretation. The pure forms of originalism and nonoriginalism appeal to powerful but flawed intuitions in history and moral philosophy. The qualified forms of originalism and nonoriginalism are inconsistent halfway houses between these flawed pure forms and a more hermeneutic, pragmatic approach to constitutional interpretation. My larger aim, in this Comment and elsewhere, is to show the respective shortcomings of both the pure forms of originalism and nonoriginalism and their qualified forms, in order to foster a more hermeneutic, pragmatic constitutional theory. In doing this, I also emphasize the parallel structures and defects of both originalism and nonoriginalism. Most other writing on this topic, in contrast, focuses on the differences between originalism and nonoriginalism in order to argue for one over the other.

Originalism is the view that constitutional interpreters should be bound by the plain meaning of the text and by the intent of the Framers. Different forms of originalism give different accounts of what Framers' intent is or requires. Nonoriginalism, quite simply, is the view that constitutional interpreters are not so bound, but may also rely on other sources of meaning. In this general sense, even hermeneutic/pragmatic approaches to constitutional interpretation are nonoriginalist. But most other forms of nonoriginalism can be positively as well as negatively described. Most contemporary nonoriginalists (including Professor Perry) do not stop by merely denying the sole binding authority of Framers' intent. Instead, they typically also substitute the authority of moral philosophy for that of the Framers, thus creating parallel but conflicting alternatives to originalism. They do this to be able to point to an objective standard other than the text and Framers' intent limiting judicial discretion. Professor Hoy proffers the apt name, anti-originalism, for this sort of

theory. The nonoriginalist theories I critique below are all anti-originalist in Hoy's sense; the pragmatic/hermeneutic approach is not.

The originalist/nonoriginalist dichotomy is currently the most common way of dividing the two major contending schools of constitutional theory. This is due in large part to important, recent public events such as the Bork Supreme Court nomination hearings and the constitutional debate between Attorney General Meese and Justice Brennan. We should not forget, however, that there are also other related, but different, ways of splitting constitutional theory. Just a few years ago, for example, constitutional writers spoke more often of interpretive and noninterpretive constitutional theories. Interpretivism holds that interpretation of the written constitutional text is fundamental for constitutional adjudication. Noninterpretivism allows recourse to extratextual, unwritten moral norms in constitutional adjudication. This distinction is not the same as the originalism/nonoriginalism distinction. Because both originalism and nonoriginalism claim fidelity to the norms of the constitutional text, both are forms of interpretivism. Neither one would rest constitutional adjudication solely on unwritten norms. Older distinctions between strict and loose constructionism and between judicial restraint and activism are also related to the contemporary distinctions. Although the different dichotomies have somewhat different meanings, they all roughly pick out the same two opposing groups of constitutional thinkers.

Constitutional interpretation based on the plain meaning of the constitutional text is commonly called textualism or literalism. Constitutional interpretation based on the plain meaning of the constitutional text is commonly called textualism or literalism.

7. See Hoy, supra note 3, at 480-81.
8. Mr. Justice Brennan's main contribution to the debate was an address, "The Constitution of the United States: Contemporary Ratification," delivered at Georgetown University on October 12, 1985. Attorney General Meese's November 15, 1985 address to the Federalist Society Lawyers' Division was his most extensive presentation of the originalist position. Both addresses have been widely reprinted. See, e.g., Construing the Constitution, 19 U.C. DAVIS L. REV. 1 (1985).
9. John Ely defined interpretivism as the view that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution." J. ELY, DEMOCRACY AND DISTRUST 1 (1980).
10. Ely also defined noninterpretivism as the view that "courts should . . . enforce norms that cannot be discovered within the four corners of the document." Id. (citation omitted).
11. See, e.g., Brest, supra note 4, at 205-09.
tional interpretation; it may also be supplemented by other theories. Both originalism and nonoriginalism, for example, typically claim to supplement textualism in cases where constitutional meaning is not clear. Neither would claim to supersede textualism in easy cases.\textsuperscript{12} For this reason, both contrast with noninterpretivism, which would deny the relevance of the text in at least some situations. But it is not so clear, and needs further argument, that textualism may be so readily juxtaposed with either originalism or nonoriginalism. The compatibility of textualism with the underlying insights of originalism and nonoriginalism will be a recurring issue in this Comment.

My critique of Perry and expansion of Hoy's critique of Perry turns mainly on matters of background and definition, that is, on some of the underlying assumptions of the originalism/nonoriginalism dichotomy. The arguments and assertions that participants in this constitutional debate make become more questionable when seen in this larger context. For example, the fact that there are several varieties of both originalism and nonoriginalism, each with its own particular strengths and weaknesses, greatly complicates the inquiry here. The varieties which will most concern us here are the ones based on the distinctions between intentions and norms and between written and unwritten norms. I will draw on and draw out several distinctions Hoy makes.

Professor Hoy sets out a distinction between two forms of originalism—intentionalistic originalism and normative originalism.\textsuperscript{13} Intentionalistic originalism is constitutional interpretation based on the specific intent of the Constitution's Framers where that intent is conceived of as an historical, psychological, discoverable matter of fact. It is the pure form of the originalistic insight that constitutional meaning should be determined by the intent of the Framers. Its main danger is the reduction of constitutional interpretation to mere historical/psychological research. Professor Hoy does not give examples of those holding this view. However, from his description one can safely say that Raoul Berger is the foremost proponent of this type of originalism on the current scene.\textsuperscript{14}

\textsuperscript{12} The definition of originalism includes textualism as one of its components (intentionalism being the other component). Nonoriginalism presents itself as a supplement to, rather than as a substitute for, textualism.

\textsuperscript{13} See Hoy, supra note 3, at 481.

Normative originalism, in contrast, does not focus on the specific historical or psychological intent of the Framers. Instead, it looks to the general principles constitutionalized by the Framers in the text. This form of originalism dilutes the purity of the fundamental originalist insight of the importance of the actual intent of the Framers. In fact, a normative originalist may properly arrive at a constitutional conclusion in direct contradiction with the specific psychological intent of the Framers. Hoy calls this variety of originalism normative originalism because it deals with moral reasoning about constitutional norms. Robert Bork is probably the best known normative originalist on the contemporary constitutional scene.

In his forthcoming book, Professor Perry finds normative originalism of the type propounded by Robert Bork to be superior to the intentionalistic originalism of scholars such as Raoul Berger. For this reason he takes it as his main opponent in his argument for the superiority of nonoriginalism. Professor Hoy commends Perry's general strategy of refuting one's strongest opponent, while doubting that an acceptable version of originalism can be formulated. Now Perry's argument depends on his ability to demonstrate the clear superiority of one form of originalism to the others and then of nonoriginalism to the best form of originalism. It presumes the superior descriptive or heuristic value of the originalism/nonoriginalism distinction to alternative dichotomies in constitutional theory and, finally, the superiority of methodical constitutional interpretation to a more pragmatic approach. Each succeeding assumption here is increasingly basic and abstract. But before I can put these assumptions in question, I must draw one further parallel relation.

Just as there are several alternative varieties of originalism, there are several different types of nonoriginalism. Although neither Perry nor Hoy explore this question, it will be helpful for my argument here. The distinction I wish to draw parallels

15. Hoy writes, "The judge is not obligated to reinforce the social practices and beliefs contemporary with the Framers if the judge thinks that some of these practices were inconsistent with principles the Framers constitutionalized." Hoy, supra note 3, at 482. See also Bork, Foreword to G. McDowell, The Constitution and Contemporary Constitutional Theory x (1985).


17. He does not call their theories by these names. The distinction and terminology here are Hoy's. See Hoy, supra note 3.
the distinction between intentionalistic and normative originalism. The pure form of originalism, intentionalistic originalism, relies on the intuitive appeal of the specific psychological intent of the Framers to resolve ambiguities in constitutional meaning. Likewise, the pure form of nonoriginalism relies on the intuitive appeal of moral values or moral philosophy to resolve difficult constitutional questions. We already have the name for this type of nonoriginalist constitutional theory. Moral reasoning not specifically tied to the constitutional text in order to resolve constitutional questions is noninterpretivism.

Both originalism and nonoriginalism also exist in qualified forms which dilute their respective underlying appeals to history and morality by binding constitutional interpretation to textual constitutional norms. The qualified version of originalism Hoy has called normative originalism. The qualified form of nonoriginalism has most often been called just that, nonoriginalism. For the sake of uniformity with other discussions, then, I will continue to call it that here.

The success of Perry's argument depends not only on the demonstration of the superiority of normative originalism to intentionalistic originalism, but also on the demonstration of the superiority of nonoriginalism to both noninterpretivism and normative originalism, and the superiority of method in constitutional interpretation to method skepticism. The examination of these issues forms the bulk of the remainder of this Comment.

Which versions of originalism and nonoriginalism are the strongest? The resolution of this question depends in large part on what values constitutional theory is to serve. The common answers to this question are highly controversial and themselves rest on debatable premises. Perry's primary standard for measuring the value of constitutional theories is functional.\(^\text{18}\) He looks to see if the theory produces the results he seeks. As secondary values he also seeks conformity with precedent and democracy.

Given Perry's hierarchy of values, the superiority of nonoriginalism to noninterpretivism or any form of originalism follows inevitably. Perry prefers normative originalism to intentionalistic originalism because it is superior functionally. Two main argu-

ments are typically given in contemporary constitutional debate against intentionalistic originalism. The first is the difficulty in defining and determining the intent of the Framers. The second is the undesirable consequences of accepting intentionalistic originalism. These consequences would include the rejection of most twentieth century individual rights doctrine in constitutional law. Raoul Berger, for example, struggles with the apparent incompatibility of the Supreme Court's school desegregation holding in *Brown v. Board of Education* with the intentionalistic originalism he advocates. From Perry's functionalist perspective, the decisional consequences of holding intentionalistic originalism are a fatal strike against it.

In contrast, the more moderate form of originalism, normative originalism, largely escapes both these shortcomings. The difficulty in historically finding the psychological intent of the Framers is largely avoided by characterizing that intent, not as a matter of psychological/historical fact, but rather as a matter of moral reasoning about norms constitutionalized in the text by the Framers. The added flexibility given by seeing the Framers' intent as moral and normative also improves the functional evaluation of normative originalism. We have already noted that a normative originalist may reach decisions in particular cases contrary to the specific decisions the Framers would have reached in those or similar cases. Normative originalism thereby allows some room for moral growth so that, for example, constitutional interpretation is not forever mired in the racial and gender

19. There are two main problems here. The first is the historical and evidentiary incompleteness of the record left by the Framers. Originalists see this problem as in principle soluble. Monahan, for example, writes, "Although the difficulties of establishing original intent are formidable, they are by no means intractable." Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353, 377 (1981) (citation omitted). The second, deeper problem is the conceptual one of defining Framers' intent. See, e.g., Brest, supra note 4, at 209-25.


22. Ultimately unable to reconcile *Brown* with his version of originalism, Berger would sacrifice his theory rather than reverse *Brown*. He writes that it would be "utterly unrealistic and probably impossible to undo the past in the face of the expectations that the segregation decisions, for example, have aroused in our black citizenry. . . ." R. Berger, supra note 14, at 412-13.
attitudes of the eighteenth and nineteenth centuries. Unlike Raoul Berger, Robert Bork finds little difficulty in reconciling Brown with his originalism.23

But at what cost are these gains achieved? The normative Framers' intent used by the moderate originalist is not the actual historical intent of the Framers. It is rather an artificial construct of modern-day interpreters who quite candidly admit their own manipulation. Precious little is left of the initial rhetorical and political appeal of originalism in this qualified version. If one sees fidelity to the underlying intuition of originalism rather than contemporary case results as being the higher value, then normative originalism is not superior to intentionalistic originalism. Seen in this light, the fact that the normative originalist need not even reach the same decisions the Framers would have reached in a given case is a strong argument against, rather than for, normative originalism. Normative originalism seems but a halfway house on the road to nonoriginalism. It plays into the hands of nonoriginalism by accepting the agenda and terms of nonoriginalism—present-day values and moral principles and functionalistic justification.

David Lyons argues that normative originalism collapses into nonoriginalism because it cannot nonarbitrarily limit the degree of abstraction at which its moral norms are cast.24 So, for example, Ronald Dworkin contends that the abstract intent of the Framers authorizes a high degree of judicial activism.25 If these claims are true, normative originalism has given away the game. It cannot clearly and reasonably guarantee the stability of constitutional meaning and set limits to the exercise of judicial discretion in constitutional interpretation.

Parallel problems afflict the relationship between nonoriginalism and noninterpretivism. As with intentionalistic originalism, the shortcomings of noninterpretivism are clear. Noninterpretive interpretation is an oxymoron.26 It casts off any claim to connec-

24. He calls this sort of originalism “moderate” originalism. He writes that “‘moderate’ originalism’s approach to deciding cases under unclear aspects of the Constitution is equivalent to nonoriginalism.” Lyons, Constitutional Interpretation and Original Meaning, 4 Soc. Phil. Pol’y 75, 84 (1986) (emphasis in original).
tion with the constitutional text itself—something few practicing judges and interpreters would dare do. It blurs, if it does not obliterate, the separation of law and morality.\textsuperscript{27} Furthermore, it allows little role for tradition or precedent.

Nonoriginalism, at first glance, has few of these shortcomings. But there is a price to be paid here, too, for this domestication. For in finding a textual constitutional anchor, nonoriginalism must either fall short of the moral perfectionism of noninterpretivism or else reveal that the anchor provides no real drag on the unfettered exercise of judicial moralizing. The question to resolve is, in accepting the need for a textual connection, have nonoriginalists accepted some significant limitation on moral reasoning in constitutional adjudication?

From a strictly functional viewpoint, noninterpretivism would give Perry just the results he desires. In fact, Perry presented a noninterpretive constitutional theory in his last book.\textsuperscript{28} The reasons for his declension from noninterpretivism to nonoriginalism, then, must have to do not with his functional demands, but rather with secondary criteria such as democracy, stability, limitation on discretion, and precedent. Nonoriginalism's superior compatibility with democracy arises out of its connection with the text that was actually ratified. Its greater stability in constitutional meaning results from its restriction of adjudication to the norms constitutionalized by the Framers, not just any moral norms. Likewise, nonoriginalism's fetters on discretion and connection to precedent also depend on the textual tie.

But the textual tie creates a dilemma for a nonoriginalist like Perry. Either it limits interpretive discretion or it does not. If it does limit a judge's range of permitted results and justifications, then it will consequently sometimes fail short of the pure moral truth of noninterpretivism. If it does not, the textual tie is a sham. Nonoriginalism and noninterpretivism display the same sort of tension here that inclusive and pure integrity display in Dworkin's theory of law.\textsuperscript{29} This tension arises because of the

\textsuperscript{27} Dworkin notoriously once called for a "fusion of constitutional law and moral theory." R. DWORKIN, TAKING RIGHTS SERIOUSLY 149 (1977). But see Bork, supra note 15, at ix.

\textsuperscript{28} See M. PERRY, supra note 18.

\textsuperscript{29} According to Dworkin, inclusive integrity requires the judge to consider procedural fairness, existing statutes and precedent as well as substantive justice. Pure integrity, in contrast, abstracts from fairness and process and allows the judge to consider substantive justice alone. See R. DWORKIN, LAW'S EMPIRE 405-07 (1986).
conflicting pulls of positive text and precedent on one hand and of normative morality on the other. In situations where these factors oppose each other, some way to overcome this conflict is needed to provide interpretive answers. But nonoriginalism does not resolve this tension; in fact, it does not even recognize it. If morality is given priority to textual norms, then there will be an inevitable slip back into noninterpretivism. If the text is given priority, then the underlying insight of nonoriginalism is undermined and there is a slide into normative originalism. This is the nonoriginalist's dilemma. There is no easy answer here.

Another related problem is the limited scope and strength of both originalism and nonoriginalism. Neither constitutional theory claims to be appropriate for all constitutional questions nor to resolve them alone. The scope of nonoriginalism is really quite limited. Its main focus is individual rights cases involving the due process clauses of the fifth and fourteenth amendments (substantive due process), the equal protection clause of the fourteenth amendment (fundamental rights and suspect classifications), and the free speech clause of the first amendment.\(^\text{30}\) It does not even deal with all cases within this field. The scope of originalism is somewhat wider, but presumably ends with those clauses and cases that may be resolved according to the plain meaning of constitutional provisions.\(^\text{31}\) The problem is that these lines themselves need some justification. Perry argues that nonoriginalism is the constitutional theory which applies to the aspirational clauses of the Constitution.\(^\text{32}\) But exactly which provisions, if any, are aspirational and why is itself controversial. It is certainly not just a matter of the plain meaning of the text. The text does not clearly suggest any preferred method of interpretation. Moreover, both originalism and nonoriginalism sometimes conflict with textualism. Originalism is sometimes at war with the plain meaning of the text, adding qualifications and

\(^{30}\) For example, in his earlier book, before arguing for noninterpretivism in freedom of expression, equal protection, and due process cases, Perry conceded the viability of interpretivism in federalism and separation of powers cases. See M. Perry, supra note 18, at 60.

\(^{31}\) For, if the meaning of a constitutional provision is plain on its face, one need not recur to Framers' intent. But even plain meaning theorists often leave a loophole for applications resulting in absurd or manifestly unjust results. See Brest, supra note 4, at 206.

\(^{32}\) See Perry, supra note 6, at 565.
limitations not apparent on the face of the document. Likewise, nonoriginalism expands the meanings of some constitutional provisions well beyond their literal meaning. Moreover, neither originalism nor nonoriginalism define or justify their own scope, but rather take their range of application as given.

Lyons' problem also remains for both originalists and nonoriginalists. If Lyons is correct, there is no principled distinction between normative originalism and nonoriginalism: How can one then be superior to the other? How can one even be differentiated from the other? The only apparent way of maintaining the distinction is an arbitrary setting of levels of abstraction of constitutional norms, with the nonoriginalist pitching norms at a high degree of abstraction and the normative originalist taking a more cautious lower level of abstraction. But little other than a result orientation justifies either side in the abstraction level chosen. Worse yet, it is mainly this arbitrary difference in levels of abstraction which generates the practical differences between these two methods of constitutional interpretation. Moreover, neither theory confronts, let alone answers, the question of why norms must always be set at one given level of abstraction. A pragmatic/hermeneutic approach would argue against one privileged level of abstraction.

This and other unquestioned assumptions arise out of both theories' establishment as methods of constitutional interpretation. But I wish to raise the question of method, too. Part of the reason is negative. Neither originalism nor nonoriginalism transcends the familiar arguments and counterarguments of their set debate. They have a mutual need for each other. But, until we

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33. McCloskey's description, also quoted in Perry's earlier book, is excellent—American constitutional history has been in large part a spasmodic running debate over the behavior of the Supreme Court, but in a hundred seventy years we have made curiously little progress toward establishing the terms of this war of words, much less toward achieving concord.... These recurring constitutional debates resemble an endless series of re-matches between two club-boxers who have long since stopped developing their crafts autonomously and having nothing further to learn from each other. The same generalizations are launched from either side, to be met by the same evasions and parries. Familiar old ambiguities fog the controversy, and the contestants flounder among them for a while until history calls a close and it is time to retire from the arena and await the next installment. In the exchange of assertions and counter-assertions no one can be said to have won a decision on the merits, for small attempt has been made to arrive at an under-
get beyond their mutual assumptions and joint outlook, we cannot consider the questions they both overlook.

Positively, the questioning of method is an attempt to revive the pragmatic tradition in American constitutional theory exemplified by great judges such as Holmes\textsuperscript{34} and Cardozo\textsuperscript{35}. Both originalists and nonoriginalists hold these great judges in high regard and will cite them\textsuperscript{36}, but both also depart from Holmes' and Cardozo's fundamental pragmatic insights and fall into the snares of method.

But why go beyond methods of constitutional interpretation? Is some method not needed to avoid constitutional nihilism? A hermeneutic critique of constitutional theory objects to the distortions and exaggerations in interpretation brought about by the dogged attachment to any one method of constitutional interpretation. Hermeneutics is ambivalent about method\textsuperscript{37} and would say that the best approach and the best answer will vary from case to case depending upon the subject matter. This is in opposition to the assumption of both originalism and nonoriginalism that there exists some ideal mode of constitutional interpretation.

Both originalism and nonoriginalism assume the existence of right answers, single methods, and a unified interpretive whole. For intentionalistic originalism the right answer is a matter of historical fact, while for normative originalism, nonoriginalism, and noninterpretivism, it is a matter of moral reasoning. But no method questions the assumption of unique right answers. Likewise, all these versions of constitutional theory assume that their method is the single, true path to those right answers—at least within their scope of operation. Each method picks out a different level of concept generality in constitutional interpretation. Intentionalistic originalism focuses on the specific beliefs of the Fram-

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\textsuperscript{34} A classic statement of Holmes' legal pragmatism is found in his essay, \textit{The Path of the Law}. O. W. Holmes, \textit{The Path of the Law}, in \textit{Collected Legal Papers} 167 (1920).

\textsuperscript{35} Cardozo's most extended treatment of these themes occurs in his Storrs Lectures.


ers, nonoriginalism looks at abstract moral principles with textual referents, noninterpretivism deals with pure moral principles, and normative originalism takes an in-between level of generality in principles. But all assume that there is only one proper level of generality for envisioning these constitutional provisions. By their diversity, they prove that this is not so. In some ways the level of generality is the most important aspect to these methods. For example, if the level of generality is kept high, nonoriginalism can be readily recast as an abstract theory of Framers' intent.

Both originalism and nonoriginalism also methodically assume the unhistorical character of constitutional meaning. This is not immediately evident because both typically make some passing reference to history or change in their formulations. Originalism makes the obvious reference to the historical intent of the Framers and nonoriginalism usually takes at least a bow to evolving moral values. But the originalist appeal to history is frozen in the past.\(^{38}\) For the intentionalistic originalist it is frozen in the specific psychological beliefs of the Framers, while for the normative originalist it is set in the basic principles constitutionalized by those Framers.\(^{39}\) Subsequent precedent and tradition play no essential role. Similarly, while nonoriginalism pays tribute to evolving moral values, it is not tied to the actual conventional morality (although this was a position Perry once held\(^{40}\)). A conventional morality version of nonoriginalism would give the populace a veto on change in constitutional interpretation and would alter case outcomes with the change in a Gallup Poll.\(^{41}\) The position of Perry's nonoriginalist interpreter is the transcendental position of his own values and reasoning, not that of the populace itself.

Because of their methodical structure, both originalism and nonoriginalism also tend to make the assumption that constitutional meaning is something that can be determined in the abstract and then applied to cases. This is in direct conflict with

\(^{38}\) This point is well brought out in Cardozo's distinction between the method of history and the method of tradition. The former excludes the latter. See B. Cardozo, supra note 35, at 51-97.

\(^{39}\) See Bork, supra note 15, at x.


the hermeneutic/pragmatic position that meaning and application are inseparable. This criticism may be summarized by saying that both originalism and nonoriginalism are acontextual. They abstract from both time and place. For the hermeneut such abstraction is an illusion. We can step outside our time and place neither to step inside the minds of the Framers nor to assume some transcendental position for moral reasoning. The illusion that we can go through the looking glass in this way is just a willful distortion of the actual factors going into interpretation.

The hermeneutic critique of constitutional theory sees most of the shortcomings discussed in this Comment as arising out of the overvaluation of method. If this method fetish is dropped, constitutional theory will stop looking to history or moral philosophy for answers they cannot provide. Instead, it can once again get down to the pragmatic decision of cases in the tradition of great judges like Holmes and Cardozo.

42. See, e.g., H. Gadamer, Truth and Method 275 (G. Barden and J. Cumming trans. 1975). Perry also cites this passage. Perry, supra note 6, at 562 n.40.

43. These views, identified with romantic and transcendental hermeneutics, respectively, are two main positions Gadamer has consistently opposed. See, H. Gadamer, supra note 42, at 153-234. See also Gadamer, Rhetoric, Hermeneutics, and the Critique of Ideology, in The Hermeneutics Reader 274 (K. Mueller-Vollmer ed. 1983).
Enough About Originalism*

Richard B. Saphire**

The year 1987 was a particularly interesting year for the constitutional law business. The beginning of the year saw a continuation of the so-called “Meese-Brennan” debate, begun in 1985, focusing on the “jurisprudence of original intent” proposed by Attorney General Edwin Meese. As the year unfolded, symposia, colloquia, and conferences celebrating, commemorating, or otherwise noting the Constitution’s Bicentennial got into high gear. These events often focused on the role of the Framers’ intent or original understanding in constitutional interpretation.2 The Bicentennial season spawned a number of books focusing

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on the events that led to the formulation of the Constitution as well as a seemingly unending parade of related speeches and essays.

While all of these developments have provided a veritable smorgasbord for constitutional law buffs, perhaps the crowning jewel of 1987 was the extended hearings before the Judiciary Committee of the United States Senate on President Reagan's nomination of Judge Robert H. Bork to serve as the 104th Justice of the United States Supreme Court. While other Bicentennial goings-on no doubt captured the intellectual imagination of the cognoscenti, the Bork confirmation hearings precipitated a larger debate on the intrinsic value of examining our Constitution's historical context. Perhaps more than any single event in modern American history, these hearings focused public attention on the practical implications of a methodology of constitutional interpretation which purports to take very seriously—indeed which purports to take as uniquely and dispositively authoritative—the intent of the Framers in determining what the Constitution means. While it would be simplistic to suggest that the Senate's rejection of Judge Bork's nomination was attributable exclusively to his embrace of the jurisprudence of original intent, there seems little question that a perception of the consequences of a principled application of this philosophy to such problems as racial and gender discrimination, privacy and freedom of speech played a major role in Bork's defeat.


4. Those on the mailing list of the Commission on the Bicentennial of the United States Constitution have, no doubt, been struck by the number and thematic variety of Bicentennial essays. For an especially thoughtful example, see McDonald, Remarks at the 16th Jefferson Lecture in the Humanities (Washington, D.C., May 6, 1987).

5. I note in passing that the precise nature of Judge Bork's constitutional philosophy, as well as its consequences for particular constitutional problems, was itself the subject of much controversy and debate. I also note that the significance of his philosophy for particular constitutional issues was the subject of a good deal of caricature and exaggeration in the media and elsewhere and from all points on the political spectrum. For Judge Bork's own articulation of his philosophy at his confirmation hearings, see Philosophy of Role of Judge, New York Times, Sept. 16, 1987, at 16; see also Bork, The Constitution, Original Intent, and Economic Rights, 23 San Diego L. Rev. 823 (1986) [hereinafter cited as Bork, Economic Rights]; Bork, Styles in Constitutional Theory, 26 S. Tex. L.J. 383 (1985); Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971) [hereinafter cited as Bork, Neutral Principles].
Some have already suggested that the rejection of Bork for a seat on the Supreme Court constitutes a watershed in modern constitutional history. Perhaps there is some truth to such a claim. It may well be that the Bork affair can be understood as a general endorsement of the Supreme Court's modern individual rights jurisprudence—a jurisprudence whose substantive features would, no doubt, have been much different had Bork's (pre-nomination) philosophy of constitutional interpretation prevailed on the Court. Whether or not history will view these developments in this way, it does seem an appropriate time to reassess the nature and terms of the recent debate about constitutional interpretation. This Essay, along with the others in this Symposium, hopefully will contribute to such a reassessment.

In what follows, I argue that the contemporary debate in constitutional theory—with “originalists”7 on one side and “nonoriginalists”8 on the other—has portrayed constitutional interpretation in a quite distorting and unilluminating way. In


7. ‘‘Originalism’’ is the term constitutional scholars now use most frequently to describe the view that the legitimate sources for determining constitutional meaning are limited to the Constitution’s text and structure as illuminated by the intent or understanding of the Constitution’s drafters and ratifiers. The first—or at least earliest prominent—work to use the term “originalism” was Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204 (1980). Prior to “originalism,” the term most frequently used to describe the same general approach was “interpretivism.” See Grey, Do We have an Unwritten Constitution?, 27 Stan. L. Rev. 703 (1975) [hereinafter cited as Grey, Unwritten Constitution]. “Interpretivism” fell out of favor when everybody apparently began to realize that its opposite—“non-interpretivism”—was incoherent, since few judges or scholars seem to suggest (or at least to concede) that, in constitutional adjudication, one should be doing something other than interpreting the Constitution. Compare Van Alstyne, Interpreting the Constitution: The Unhelpful Contributions of Special Theories of Judicial Review, 35 U. Fla. L. Rev. 209 (1983), with Saphire, Constitutional Theory in Perspective: A Response to Professor Van Alstyne, 78 Nw. U. L. Rev 1435 (1984). Dissatisfaction with the term “originalism” (or with the originalism-nonoriginalism distinction) has recently led to a call for new terminology. See Grey, The Constitution as Scripture, 37 Stan. L. Rev. 1 (1984) (proposing the “less misleading” labels of “textualists” and “supplementers”).

8. In contrast to originalism, “nonoriginalism” is the term used to describe the view
part, this is attributable to the fact that originalism presupposes a conception of the Constitution which cannot account descriptively for the development of American constitutional doctrine. Nor, as I believe the Bork affair has made clear, does originalism's vision of the Constitution have much normative appeal. I do not, however, argue that originalism's vision of the Constitution is irrelevant to a proper understanding of the process of constitutional interpretation. Indeed, this vision yields insights which are essential to such an understanding. But originalism's vision of the Constitution is seriously incomplete. Because originalism is unable to account for the full richness and complexity of the Constitution's role in American society, it should be rejected.

I.

Originalism is a theory and methodology of constitutional interpretation according to which constitutional meaning is determined by reference to the Constitution's text as illuminated by the intent or understanding of its drafters and ratifiers. This standard description can be misleading. Some originalists believe inquiry should focus only on the particular practices and policies the Framers and ratifiers believed a particular provision would prohibit or permit. Others maintain that the relevant
ENOUGH ABOUT ORGANISM

point of departure is the general or abstract intention or understanding embodied in the provision in question. While these versions of originalism have important conceptual differences, and can, in theory, lead to different results in particular cases, they share a general commitment to the authoritativeness and dispositiveness of historical understandings—at some level of abstraction—for constitutional interpretation.

Originalism is defended for a variety of reasons, both absolute and relative. In absolutist terms, originalism is viewed as the only, theoretically defensible approach to constitutional interpretation. Absolutist arguments include: (1) all interpretation, including constitutional interpretation, is incoherent unless viewed as a search for authorial intention; (2) the Constitution


11. Judge Bork, for example, has argued that while Brown v. Board of Education, 347 U.S. 483 (1955), can be viewed as inconsistent with the Framers' precise thinking about racial discrimination in public education, it can be reconciled with the abstract principle of racial equality the Framers intended to embody in the fourteenth amendment. Bork's critics have argued that Bork's position on Brown cannot be reconciled with his positions on other contemporary constitutional issues. See, e.g., Dworkin, The Bork Nomination, 9 Cardozo L. Rev. 101 (1987).


13. See, e.g., Graglia, "Constitutional Theory": The Attempted Justification for the Supreme Court’s Liberal Political Program, 66 Tex. L. Rev. 789 (1987); Michaels, Response to Perry and Simon, 58 S. Cal. L. Rev. 673 (1985). The notion that the object of interpretation is necessarily to uncover authorial intention constitutes one strand of
explicitly requires originalist interpretation; \(^{14}\) (3) the original understanding itself requires originalist interpretation; \(^{15}\) (4) sound political theory requires originalist interpretation. \(^{16}\) Each of these absolutist defenses of originalism has been subjected to significant criticisms. Respectively, these include: (1) the search for authorial intention misdescribes, or at best only partially describes, the dynamics and aim of interpretation; \(^{17}\) (2) the Constitution nowhere designates a required or preferred methodology of interpretation and, in any event, to refer the question to the constitutional text begs the questions of whether and how the original understanding should be authoritative; \(^{18}\) (3) originalist interpretation is itself inconsistent with the original understanding concerning appropriate interpretive methodology; \(^{19}\) (4) sound political theory either precludes originalist interpretation or does not rule out other interpretive strategies. \(^{20}\)

The case for originalism is not made exclusively in terms of its intrinsic merit. Some theorists argue that originalism is instrumentally superior to other methods of constitutional interpretation because it is the most successful in imposing constraints on the judicial decisionmaking process. Perhaps the most prominent and forceful contemporary advocate of this view is Robert Bork. For Bork, "any defensible theory of constitutional interpretation must demonstrate that it has the capacity to control judges. An observer must be able to say whether or

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\(^{14}\) See, e.g., Melvin, Judicial Activism: the Violation of an Oath, 27 CATH. LAW. 283 (1982).


\(^{16}\) See, e.g., Bork, Neutral Principles, supra note 5; Nelson, History and Neutrality in Constitutional Adjuciation, 72 VA. L. REV. 1237, 1260 (1986).


\(^{19}\) Powell, The Original Understanding of Original Intent, 98 HARV. L. REV. 885 (1985). But see Lofgren, The Original Understanding of Original Intent?, 5 CONST. COMM. 77 (1988) (arguing that the founders expected that the understandings and expectations of the ratifiers, but not the Framers, would be relevant in determining the Constitution's meaning).

\(^{20}\) See, e.g., Perry, The Authority of the Text, Tradition, and Reason: A Theory of Constitutional Interpretation, 58 CAL. L. REV. 551, 576 (1985); Simon, supra note 9, at 1487. For an argument that the absolutist attacks on originalism have failed, see Maltz, The Failure of Attacks on Constitutional Originalism, 4 CONST. COMM. 43 (1987).
not the judge's result follows fairly from premises given by an authoritative, external source and is not merely a question of taste or opinion." 21 On this view, originalism has two paramount virtues. First, it enjoins judges to look outside themselves to an external, fixed, and objectively discernible reference point. The judge is cast in the role of historian, engaged in a self-conscious search for an original understanding. In this role, the judge is forced to screen out personal biases and values which would otherwise taint a decision with subjectivity. Although the original understanding may not mechanically or automatically provide neat and uncontestable conclusions, it can serve at least as a "major premise" 22 or "touchstone" 23 for judicial reasoning.

A second, related way in which originalism is claimed to constrain judicial decisionmaking (at least when compared to other methods of judicial review) is by providing an objectively discernible basis for evaluating judicial decisions. Were judges to decide cases by reference to "their own values," it would be quite difficult to assess objectively whether their decisions in fact were congruent with, or justifiable in terms of, those values. However, original understandings provide a much more fixed and determinate reference point for evaluating judicial conclusions, and thus provide a better criterion for holding judges formally accountable for their decisions.

Critics of originalism respond to these claims in a number of ways. Few deny that some constraints on the ways judges engage in constitutional interpretation are desirable. 24 However, some dispute whether legitimate constitutional interpretation must be quite as constrained as originalists claim. Some non-originalists suggest that legitimacy depends upon—indeed, that the Constitution itself requires—a measure of judicial freedom or creativity that is incompatible with the originalists' vision of constrained decisionmaking. But even assuming that originalists'
obsession with a constrained judicial process is understandable, nonoriginalists argue that originalism is hopelessly unconstrained and unconstraining. As one commentator has aptly put it, "even if this flight from choice were appropriate, it is impossible if history is the chosen escape route."  

II.

The academic debate often proceeds as if originalism and nonoriginalism are fundamentally incompatible and irreconcilable approaches to constitutional interpretation; it also seems to presume that one must make an all-or-nothing, and perhaps even a once-and-for-all, choice between the two. The view that originalism and nonoriginalism are irreconcilable can be questioned at several levels. For example, originalism is not monolithic. A number of variations of originalism have been proposed, some of which more closely resemble nonoriginalist approaches than other permutations of originalism. Indeed, the two methodologies may not be as radically different as many suppose. While most originalists reject the notion that judges can consult extratextual (and non-historical) sources of constitutional meaning, few nonoriginalists believe that historical reasoning is irrelevant to the process of constitutional interpretation. This is not to say that there are not meaningful differences between originalist and nonoriginalist theories. As a general matter, the former hold that, at some level of abstraction, the original understanding is necessarily determinative of constitutional meaning; the latter hold that it is not.

25. Powell, supra note 9, at 691 (1987). The methodological problems that some find latent in originalism have led one commentator to claim that originalism is, "if not exactly incoherent, an utterly impoverished way of thinking about constitutional law." Bennett, Moral Reasoning, supra note 12, at 648. See also Hoy, Dworkin's Constructive Optimism v. Deconstructive Nihilism, 6 LAW & PHIL. 321, 328-29 (1987).

26. See E. CHEMERINSKY, supra note 18, at 57-67; Perry, supra note 20, at 597-602; Sedler, The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective, 44 OHIO ST. L.J. 93, 107 (1983).

27. On the differences between various models of originalism, see E. CHEMERINSKY, supra note 18, at 74-80; Brest, supra note 7, at 204.

28. There are also significant differences between nonoriginalist theories. See, e.g., Conkle, supra note 8; Saphire, Constitutional Theory in Perspective, supra note 7, at 1445-46.

The notion that originalism and nonoriginalism are irreconcilable has led to the corollary notion that judges and scholars must make a choice between them. Numerous criteria have been suggested for making this choice. For example, one might opt for the approach that currently prevails on the Supreme Court.30

30. A newly appointed or elected judge might feel bound to apply the methodology currently endorsed by the United States Supreme Court, especially when the judge conceptualizes himself or herself as the agent of the Court. Application of this criterion would present some major dilemmas. On the one hand, it can be argued that the Court has rejected originalism. Many of its modern cases seem irreconcilable, or at least in serious tension, with original understandings. See, e.g., M. Perry, The Constitution, The Court and Human Rights 63-77 (1982); Grey, Unwritten Constitution, supra note 7, at 703 (1975). Conkle, supra note 8 (little, if any, modern first amendment establishment clause doctrine supportable on originalist grounds). Moreover, at least in some contexts and cases, the Justices have candidly acknowledged that the original understanding cannot always govern its analysis, see, for example, Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575, 583 n.6 (1983) ("we have only limited evidence of exactly how the Framers intended the First Amendment to apply"); Wallace v. Jaffree, 472 U.S. 38, 80-81 (1985) (O'Connor, J., concurring) (noting "uncertainty as to the intent of the Framers of the Bill of Rights"); where Framers' intent is unclear, "both history and reason" should guide the Court, and, indeed, that it should not. See Thornburgh v. American College of Obstetricians and Gynecologists, 106 S. Ct. 2169, 2193 (White, J., dissenting) ("this Court does not subscribe to the simplistic view that constitutional interpretation can possibly be limited to the 'plain meaning' of the Constitution's text or to the subjective intentions of the Framers."); 106 S. Ct at 2197 n.5 ("there will be some cases in which those who framed the provisions incorporating certain principles into the Constitution will be found to have been incorrect in their assessment of the consequences of their decision"). On the other hand, the Court generally professes allegiance to original understandings. See, e.g., Marsh v. Chambers, 463 U.S. 783 (1983); Minneapolis Star Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575, 584 n.6 ("when we do have evidence that a particular law would have offended the Framers, we have not hesitated to invalidate it on that ground alone"). See Fallon, A Constructive Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189, 1244 (1987) ("I know of no constitutional case in which the Supreme Court has held that, although the Framers' intent would require one result, another must be upheld on some other ground.") (footnote omitted). Indeed, at least in some doctrinal areas, the Court has emphasized that its decisions are required by its perception of original understandings. See, e.g., Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983) (separation of powers); Bowsher v. Synar, 478 U.S. 714 (1986) (same); but see Schor v. Commodity Futures Trading Commission, 478 U.S. 833 (1986).

Ultimately, then, if one were to choose between originalism and nonoriginalism solely on the basis of the Court's performance, the choice might have to be qualified: in terms of both methodology and outcomes, its record has been inconsistent and unpredictable. It could be argued, of course, that since the Court has demonstrated that it cannot or will not apply originalism consistently and across the whole range of constitutional issues that come before it, originalism is, both descriptively and normatively, incapable of serving as a general theory of constitutional interpretation. See Sedler, supra note 26. But there still may be plausible arguments for originalism with respect to some constitutional provisions or as a general methodological framework during some historical periods. See infra, notes 44-45 and accompanying text.
Or one might choose the approach which is most likely to generate outcomes compatible with one or more normative criteria one happens to endorse—for example, justice, efficiency, good government, and so on.\textsuperscript{31} Thus, some have defended nonoriginalism, at least in part, because it has led to decisions more compatible with justice or moral growth than would have been possible under originalism.\textsuperscript{32} Moreover, some claim that originalism itself is defensible (if at all) only by reference to these kinds of normative standards.\textsuperscript{33} If the choice between methodologies is made in this way, it will, of course, depend on the normative criteria one applies, and the debate over methodology will ultimately reduce to a debate over the underlying normative criteria.\textsuperscript{34}

\textsuperscript{31} The question whether such standards are constitutional or extra-constitutional is, of course, also the subject of heated debate.

Of course, some originalists would argue that adopting a methodological framework on the basis of one's approval of the outcomes it would generate is unacceptable for the very reasons that nonoriginalism is unacceptable: only those outcomes which are required or supported by the original understanding are legitimate. Others would respond that this originalist argument is itself question-begging. See, e.g., E. Chemerinsky, supra note 18, at 60; Saphire, Constitutional Theory in Perspective, supra note 7; Simon, supra note 9. Moreover, nonoriginalists could point to the fact that even the most dogmatic originalists are reluctant to accept the full consequences of their theory, a reluctance which itself must be based on some nonconstitutional or extra-constitutional standard. See, e.g., Berger, Government, supra note 10, at 412-13.

\textsuperscript{32} See, e.g., M. Perry, supra note 30, at 117 ("only few persons—few members of the American polity, at any rate—upon surveying the broad features of the Court's work product ... would take issue with much of what the Court has done in the name of either freedom of expression or equal protection."); Conkle, supra note 12, at 601, 625; Grey, The Constitution as Scripture, 37 STAN. L. REV. 1, 20 (1984). Theorists who take this view recognize that nonoriginalism may lead to decisions which are in tension or even irreconcilable with their normative criteria. But they emphasize that any methodology is likely to lead to some decisions which are either wrong or anamolous; the question is which methodology is, on balance and over time, likely to lead to desirable results.

\textsuperscript{33} Thus, the originalist's claim that originalism imposes greater or better constraints on judges can also be understood as a claim that it is more conducive to "good government." Similarly, it has been argued that originalism is used to rationalize or mask judgments made on constitutionally exogenous grounds, and that its "political underpinnings ... should not go unnoticed." Brennan, The Great Debate, supra note 1, at 15. See also, Dershowitz, John Hart Ely: Constitutional Scholar (A Skeptic's Perspective on Original Intent as Reinforced by the Writings of John Hart Ely), 40 STAN. L. REV. 357, 369 (1988); Nichol, Commentary on Law: Wallowing in Intention, 39 U. FLA. L. REV. 613, 624 (1987) ("The intentionalist's desire to focus interpretation strictly on the founders' world can only be defended as strategic"); Powell, supra note 9, at 691.

\textsuperscript{34} Indeed, this observation seems to lie at the heart of some theorists' argument that there is an inevitable "fusion of constitutional law and moral theory." R. Dworkin, Taking Rights Seriously 149 (1977); Simon, supra note 9, at 1488 n.20.
The perceived irreconcilability of originalism and nonoriginalism is so strong that theorists often seem to hold and defend their positions as articles of faith. As Professor Levinson has noted, none "of the participants in the debates about constitutional theory are going to have their minds changed by reading a polemic by a person of another sect."\(^{35}\) Indeed, positions are often taken with such conviction that, at least for the initiated, the debate often seems somewhat pointless.\(^{36}\)

There are, however, some theorists who suggest that a choice between originalism and nonoriginalism need not be an all-or-nothing proposition. For example, some have suggested that the Court might be originalist with respect to some constitutional provisions but nonoriginalist with respect to others.\(^{37}\) There are several bases for these suggestions. First, one might argue that the Framers and ratifiers of the Constitution intended that different provisions would be interpreted differently.\(^{38}\) This view, of course, is not truly nonoriginalist, for it depends upon an original understanding of how particular provisions should be interpreted. Second, one might argue that certain constitutional provisions are simply more conducive to nonoriginalist interpretation than others; such a determination might be made by focusing on the precision or generality of the relevant consti-

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36. It has been argued that the debate is pointless because the Supreme Court appears to have ignored it, see Sedler, supra note 26. It has also been suggested that constitutional theory may matter "merely because it is a symptom of the confusion in our current political situation," and to that extent, "it merits little attention." Tushnet, Does Constitutional Theory Matter?: A Comment, 65 TEX. L. REV. 777, 781 (1987); see also, id. at 787 ("constitutional theory matters because it is one of the structures that defines the limits of our political discussions."); cf. Fish, Dennis Martinez and the Uses of Theory, 96 YALE L.J. 1773 (1987) (judging and theories of judging are independent practices: theories cannot and do not generate or guide practice). For more positive evaluations of the theoretical debate, see Laycock, Constitutional Theory Matters, 65 TEX. L. REV. 767 (1987); Saphire, Gay Rights and the Constitution: An Essay on Constitutional Theory, Practice and Dronenburg v. Zech, 10 U. DAYTON L. REV. 767 (1985).

37. M. PERRY, MORALITY, POLITICS AND LAW ch. 6 (forthcoming 1989). (Further references to Professor Perry's forthcoming book will be confined to Chapter 6, entitled "Interpreting Law: The Problem of Constitutional Adjudication." Page references will be made to the final draft of this chapter.) Monaghan, Perfect Constitution, supra note 12, at 361-67; see United States v. Lovett, 328 U.S. 303, 321 (1946) Frankfurter, supra note. 9

Finally, one might argue that while nonoriginalism may be appropriate for some kinds of constitutional issues, strategic reasons support originalist approaches to other issues. Thus, Professor Carter has argued that it "makes sense" to use originalism "as a strategy for understanding the political constitution." Carter argues that the "political" aspects of the Constitution—by which he means provisions concerned with government structure and institutional arrangements—are relatively precise and grounded in "knowable history"; originalist interpretation here can buttress the Court's claim to "a relatively value-free rule of interpretation."

Many theorists who have made these arguments have written as if they believe that once one chooses between originalism and nonoriginalism, the choice should be considered final. One prominent theorist, Professor Michael Perry, has resisted this notion. Perry has emphasized that any choice between originalism or nonoriginalism is, to a significant extent, strategic and thus provisional. Although he has been one of the most prominent, forceful and enthusiastic defenders of nonoriginalism, Perry has written that "a defender of noninterpretive review, faced with a Court that persistently generates policy choices he believes to be morally infirm, has the option of becoming ... a defender of interpretivism instead.... [C]onstitutional theory must not be propounded in a historical vacuum; it must be sensitive to context—the context of our own time." For Perry, the choice between methodologies is essentially political: as such, there is, in principle, no reason why that choice should

41. Id.
42. M. PERRY, supra note 30, at 119; see also PERRY, supra note 20, at 583 (acceptance of any conception of judicial role "is always contingent, speculative, and provisional and therefore revisable.")
not be reconsidered in light of new or changed political (and moral) circumstances.

In his most recent work, Professor Perry has further developed his earlier thinking about the provisional nature of the choice between originalism and nonoriginalism in a way that is more sophisticated, more complex, and I believe, more controversial. In his earlier work, I had understood him to argue that a judge (or theorist) should decide, during a particular historical period, whether to systematically embrace either originalism or nonoriginalism. More recently, he has argued that the judge not only need not make a life-time, all-or-nothing choice, but that a judge who is generally committed to nonoriginalism in human rights cases need not be a nonoriginalist in every case or with respect to every constitutional provision.

To understand and evaluate this position, it is necessary to appreciate Perry's general view of the nature of the Constitution and constitutional interpretation. He argues that the disagreement between originalists and nonoriginalists, is, in part, a disagreement "about what it means to say that the [constitutional] text is authoritative. They disagree about that, because they disagree about the meaning of the text." Whereas the originalist sees the meaning of the text exclusively in terms of the original meaning, the nonoriginalist's view is more complex: she views the text as meaningful in both an original and an aspirational sense. Perry writes:

A text can have multiple meanings.... Meaning is always meaning to someone, and what a text means to one person is not necessarily what it means to another.... To very, very many Americans—myself included—the constitutional text ..., in certain of its aspects, is more than one thing: It is a communication to us (the present) from the ratifiers and Framers (the past), and, in virtue of a role it has come to play in the life of our political community—a role not necessarily foreseen much less authorized by any group of ratifiers and Framers—it is also a symbol of

43. Perry had argued that nonoriginalism was not justified in separation of powers and federalism cases. M. Perry, supra note 30, at 37-60, but was fully justified in individual rights cases. Id. at 91-145. He did not suggest that when deciding cases within each category of cases judges would be justified, within any single historical period, in moving between originalist and nonoriginalist modes of adjudication.
44. M. Perry, supra note 37, at 43.
45. Id.
fundamental aspirations of the political tradition. . . .

To the nonoriginalist, unlike the originalist, what the Constitution means is not merely what it originally meant. Some provisions of the constitutional text have a meaning in addition to the original meaning: Some provisions signify fundamental aspirations of the American political tradition. Not every provision of the text signifies such aspirations, but some do.46

With respect to the aspirational meaning of constitutional provisions,47 Perry has this to say:

The aspirational meaning has emerged over time—in the course of constitutional adjudication and, more generally, of political discourse, including political discourse precipitated by constitutional conflict and adjudication—as a progressive generalization of the original meaning. As a progressive generalization of the original meaning, the aspirational meaning of the Constitution is not inconsistent with, but indeed includes, the narrow original meaning.48

Originalists, says Perry, deny that the Constitution is aspirational in the way he describes.49 For them, its meaning is found only in original understandings. The originalist judge would bring to bear the original meaning of a provision in deciding cases; there is, for her, no other meaning to apply. But the nonoriginalist judge’s Constitution has both original and aspirational meanings; at least in theory, she has a choice.50

46. Id. at 37-38 (footnotes omitted).
47. Perry points to the first amendment’s speech, press and religion clauses, the fifth amendment’s due process clause, and the fourteenth amendment’s due process and equal protection clauses as the “least controversial examples” of constitutional provisions signifying fundamental aspirations of our political tradition. id. at 38-39. For his discussion of “non-aspirational” provisions, see id. at 59.
48. Id. at 39.
49. I suspect that some originalists would not deny that there is a sense in which the Constitution, in whole or in part, is aspirational: It would not, however, be in the evolving, maturing sense that Perry has in mind.
50. In Perry’s first book, he argued that most modern individual rights decisions by the Supreme Court were nonoriginalist; they were not justified in terms of value judgments constitutionalized by the Framers. M. Perry, supra note 30, at 69. He suggested that the difference between originalist and nonoriginalist decisions was usually quite clear, a suggestion which entailed the view that original understandings and other (nonoriginalist) sources of constitutional meaning were really quite autonomous and unconnected. id. at 130. This view attracted especially significant and intense scholarly criticism. See, e.g., Saphire, Judicial Review in the Name of the Constitution, 8 U. Dayton L. Rev. 745, 750-64 (1983); Lupu, Constitutional Theory and the Search for the Workable
What is the nature of the choice confronting the nonoriginalist judge, and how does she make that choice? Recall that, for Perry, a nonoriginalist understands the Constitution to have both original and aspirational meanings. While the aspirational meanings are central to Perry's understanding of constitutional interpretation, he concludes that a judge is not obliged to bring to bear every constitutional aspiration: "It is important that such an aspiration be brought to bear if, but only if, the aspiration is a worthy one to which, therefore, the community should try—struggle—to remain faithful." Where a judge concludes that "a given provision signifies an aspiration that is not worthwhile [she] has no reason to pursue the nonoriginalist approach to adjudication under the provision." In such cases, to what does the judge refer—what does she bring to bear—in deciding the case at hand? Perry's answer is found in the following passage:

nonoriginalism does not presuppose that every aspiration signified by the Constitution is worthwhile. If a judge believes that an aspiration signified by some provision of the constitutional text is not worthwhile, then she has no reason to bring that aspiration to bear. She may, consistently with her oath of office, pursue the originalist approach to adjudication under the provision in question.

There are many aspects of Perry's analysis which are provocative and controversial. For purposes of this Essay, however, I wish only to focus on Perry's view of the methodological choice facing judges in constitutional cases. It is a view that seems quite different from those of other scholars who have written

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In his more recent work, Perry has apparently abandoned the notion that the effect of original understandings on constitutional interpretation must always and necessarily be an all-or-nothing proposition. Instead, he has portrayed constitutional interpretation as dialogic; part of that dialogue includes an effort to listen to and learn from the beliefs, values and aspirations of the constitutive generation as expressed and embodied in the written Constitution. In this concededly subtle sense, constitutional interpretation is informed, if not exactly shaped, by the past. Perry, supra note 20, at 569-70. M. PERRY, supra note 37, at 66 (discussing the prophetic and commemorative aspects of constitutional interpretation); id. at 82-84.

51. M. PERRY, supra note 37, at 71 (emphasis in original).

52. Id. Perry's discussion of the qualitative differences among constitutional aspirations and the way in which constitutional interpretation can and should be sensitive to those differences will surely be the subject of much critical evaluation. Due to the limited scope of this Essay, I shall defer my analysis of this issue to another time.

53. Id. at 42.
on the matter. As a general, theoretical proposition, Perry believes that nonoriginalism is a far sounder methodology than originalism. But he acknowledges that even a nonoriginalist may, for strategic or consequentialist reasons, revert to originalism. While other theorists have argued that some constitutional provisions are amenable to nonoriginalist interpretation and others are not (or are less so), Perry argues—at least I understand him to argue—that, even with respect to those provisions which are so amenable, the judge still can (and in some cases should) engage in originalist interpretation.

III.

To my knowledge, no contemporary constitutional theorist, including Professor Perry, has suggested that a judge should apply originalist and nonoriginalist methodologies in the same case. This should not be surprising. As I have suggested in the previous section, many theorists view originalism and nonoriginalism as alternative, competing, and ultimately irreconcilable approaches to constitutional interpretation. In this section, I shall sketch a somewhat different conception of constitutional interpretation. According to this conception, constitutional interpretation is neither originalist nor nonoriginalist in the purest or strongest sense of those terms. Instead, it should be understood as a process in which the different conceptions of the Constitution which underlie each methodology are brought to bear in resolving each (or at least many) constitutional case.

Before elaborating the conception of constitutional interpretation I have in mind, I should acknowledge two propositions

54. See supra notes 38-41 and accompanying text.

55. At one point, Perry argues that "a nonoriginalist approach to some provisions of the Constitution does not preclude an originalist approach to other provisions." M. Perry, supra note 37, at 59. As I understand his general argument, he does not seem to rule out the notion that, in different cases, a judge can alternate between originalism and nonoriginalism even with respect to the same constitutional provision. Cf. Hoy, supra note 29, at 489. ("If I read Perry correctly, the nonoriginalist answer is that provisions can be decided by relying on either original belief or nonoriginal belief.") For example, it may be that a single constitutional provision embodies or signifies more than one aspiration. In one case invoking that provision, the judge may find the relevant aspiration worthwhile and proceed nonoriginally. In another case under that provision, she may find another aspiration unworthy and, under Perry's analysis, would be justified in proceeding originally. While Perry doesn't explicitly deal with this possibility, his argument is open to such an interpretation. M. Perry, supra note 37, at 40-42.
ENOUGH ABOUT ORIGANILISM

upon which my conception is based. First, I agree with Professor Perry's suggestion that the Constitution is "meaningful" in different ways to different people, and that it can be meaningful simultaneously to the same person in more than one way. Second, I also agree with Perry's characterization of the sense in which the Constitution has more than one meaning: "It is a communication to us (the present) from the ratifiers and framers (the past) and... also a symbol of fundamental aspirations of the political tradition." Thus, the Constitution has two personalities—two essences: one is rooted firmly in the past, in the historical context of our nation's birth and its subsequent development. The other looks not to the past, but to our present and our future—to an evolving and even transforming sense of the sort of people we have said and continue to say we aspire to be.

As I suggested earlier, others who have made similar observations have argued that these two personalities appear and manifest themselves in different types or categories of constitutional provisions; or, as Professor Perry has suggested, they may emerge in different cases implicating the same type of provision (e.g. individual rights), or perhaps even in different cases implicating the same provision. For these theorists, however, only one of these personalities can govern or influence the determination of what the Constitution means in any single case. As Professor Perry notes, a judge must choose between an originalist approach and a nonoriginalist, or aspirational, approach.

I believe that it is a mistake to presume that judges must or do make a choice between originalism and nonoriginalism in the way many constitutional theorists suppose. The originalists' conception of the Constitution is quite concrete. They under-

56. While it is necessary to state these foundational propositions, I shall make no effort to defend them in this Essay. For my earlier efforts to at least suggest some important elements of such a defense, see Saphire, supra note 50; Saphire, The Search for Legitimacy in Constitutional Theory: What Price Purity? 42 OHIO ST. L.J. 335 (1981).
57. M. PERRY, supra note 37, at 38-40. On the different ways in which the Constitution can be defined—can be "meaningful"—and the significance of the difference, see Saphire, Constitutional Theory in Perspective, supra note 7, at 1455-61; Saphire, Some Reflections on the Success and Failure of the Constitution, 12 U. DAYTON L. REV. 351 (1986).
58. M. PERRY, supra note 37, at 37.
59. See supra notes 38-42 and accompanying text.
60. M. PERRY, supra note 37, at 41.
stand the concrete Constitution as establishing the operational framework of and for government—its structure, institutions, and processes. They believe the concrete Constitution embodies rather specific limitations on the exercise of governmental power. These limitations may be defined in both procedural and substantive terms and are understood as representing the judgments of particular persons (the Framers and ratifiers) at a particular historical period. In contrast, the nonoriginalists' conception of the Constitution is quite abstract. This abstract Constitution is less concerned with defining either specific institutional structures and mechanics or particular limitations on the exercise of governmental power. Instead, it is a Constitution which, in its entirety, provides an organic framework for the developing and evolving expression of the nation's moral aspirations and ideals. It is the Constitution writ large, a Constitution with what has been termed a "purposive permanence." As such, it embodies a set of principles which capture a widely shared understanding of our basic values and national goals. It marks out the nation's identity—its sense of moral purpose and direction.

The principles and values embodied in the abstract Constitution are, by themselves, neither complete nor ultimate; they are subject to gradual elaboration, redefinition, and transformation in light of experience and ongoing reflection. From the perspective of the abstract Constitution, specific provisions are not immutable. They provide "a direction, a goal, an ideal citizen-government relationship." They establish a record of our past convictions and commitments while providing symbols of our aspirations and a direction for moral growth.

Viewed in its abstract form, the Constitution serves as both a record of our past and a charter for our future. It is, in an important sense, symbolic; it is more concerned with expressing the moral conscience of our society than with determining the content or validity of any single public policy. It serves to remind us of that part of our heritage which supports any claim we might make to uniqueness—the commitment to justice and to the fundamental equality and dignity of each individual which

61. Wright, Professor Bickel, The Scholarly Traditions and the Supreme Court, 84 HARV. L. REV. 769, 785 (1971).
62. Id.
we so often claim to be central to our national identity. It provides “the framework against which fundamental notions of morality evolve” and serves “as the moral background—the organizing force—against which our moral evolution takes place.”

Constitutional adjudication—particularly, but not exclusively, in human rights cases—need not, and in my view does not, require judges to choose between these two conceptions of the Constitution. Instead, it evokes the Constitution in both its concrete and abstract manifestations. In each case, the Constitution speaks in both of its voices. The voice of the concrete Constitution resonates from its separate clauses and provisions. In addressing such concepts as equal protection, due process, and freedom of expression, it suggests answers to particular dilemmas of ongoing human experience. The voice of the concrete Constitution will speak from and appeal to the past. It speaks to the record of our experience more than to our choices for the future. By addressing specific choices made by prior generations, it seeks to assure a connection between the values of yesterday and today.

In contrast, the voice of the abstract Constitution speaks primarily to our future. By capturing our deepest and most profound sense of justice, by speaking to the collective moral conscience of our people, it beseeches us to connect the values and aspirations of the past to our generation’s visions of the future. In an important sense, the abstract Constitution provokes us to reconcile the reality of the world in which we live—the conditions and practices which we have inherited and created for ourselves—with our visions of the world as it ought to be. It compels us to measure that reality against the moral values that we espouse and toward which we hope to move; it enjoins us to assess what we have done and continue to do against what we claim and aspire to be.

This does not mean that the abstract Constitution must be understood as expressing values which have been completely or unambiguously defined. Nor does it mean that our perceptions of the values it expresses are themselves not subject to reas-

63. Saphire, supra note 57, at 354.
64. Id. at 357.
ssessment or redefinition. Indeed, the abstract Constitution presumes that even our most fundamental and basic moral commitments—as we now perceive them—are not immune to reexamination and new understanding. It invites us, in the words of Richard Parker, to engage in an “elaboration of a new—a much more ambitious—conception of what our polity could and should be” and to undertake “a critique of our actual polity in the terms of that conception and then an analysis of its possible implications for the substantive values to be vindicated, and doctrines through which to vindicate them, in various areas on constitutional law.”

The interaction of these two conceptions of the Constitution in a case is concededly difficult, if not impossible, to specify or describe with precision. The process will invariably be subtle. Indeed, I do not argue that it will always be self-conscious. Nor do I believe that consideration of the way in which the concrete and abstract Constitutions speak to particular issues should proceed in any necessary order. But I believe the process I have sketched captures what scholars and judges mean when they say that constitutional interpretation must be “rooted” or “anchored” in the Constitution’s text, structure, and history, or that these sources should serve as the “touchstone” of interpretation. It is a process in which the judge seriously considers what our history has said, and what it has to say, about the meaning of equal protection, due process, the freedom of speech, separation of powers, federalism, and so on. Further, it is a process that values the lessons of history and respects the significance of tradition and experience as foundational in the life of our political community. But it is also a process in which

67. I have more fully discussed my views about the essential, although often subtle, role of historical analysis in constitutional interpretation elsewhere. Saphire, supra note 50. It is a view which has much in common with Professor Perry's view of the role of tradition in constitutional interpretation. Perry, supra note 20, at 568-69; M. PERRY, supra note 36, at 66; see also Powell, Parchment Matters: A Meditation on the Constitution as Text, 71 IOWA L. REV. 1427 (1986).
the judge is not constrained to apply the lessons learned from history by rote. Put differently, the voice of the concrete Constitution need not always dominate the judge's thinking. At least in some cases, the voice of the abstract Constitution will speak clearly, even forcefully, about the nation's aspirations, ideals, and commitments, and it will do so in ways which invite—even compel—the judge to move beyond the Constitution as concretely conceived. This (or something like it) is surely what Justice Brennan must have had in mind when he wrote:

We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time.

IV.

If we view constitutional adjudication in the way I have suggested, as implicating in each case two different conceptions or personalities of the Constitution, I believe we can avoid and move beyond much of the controversy, confusion, and misunderstanding generated by the contemporary debate in constitutional theory. At a descriptive level, we can begin to make

68. Most originalists believe that judges cannot and should not "move beyond" the meaning of the Constitution as historically conceived. To them, there is either no "beyond" there to which the judge can move, or that the "beyond" that is there is so uncertain and nebulous that one can never quite tell when one has arrived. See Bork, Economic Rights, supra note 5; Bork, Neutral Principles, supra note 5. But cf. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 785-814 (1986) (White, J., dissenting); id. at 772 (Stevens, J., concurring); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 55, 578 n.14 (1980) (noting that "[t]he Constitution guarantees more than simply freedom from those abuses which led the Framers to single out particular rights."). Consequently, originalists take invitations to "move beyond" the Constitution as calls for flouting or remaking it. See, e.g., Van Alstyne, supra note 7.

69. Brennan, The Great Debate, supra note 1, at 17. As so conceived, constitutional interpretation can "account for the transformative purpose of the text." Id. at 18.
sense of and even reconcile the apparent inconsistencies and tensions in the many cases where the Supreme Court seems so schizophrenic—cases where the Court seeks out and purports to rely upon original understandings but reaches outcomes that seem difficult or impossible to reconcile with the historical record.\(^{70}\) The Court is often criticized in such cases for the inaccuracy or incompleteness of its historical analysis. But the point of such criticism is not just that the Court got its history wrong: instead, the critics complain that the Court ultimately distorts or revises history so that a decision without clear and significant historical support (but with sound nonoriginalist justifications) seems at least plausibly originalist.

It is not surprising that the Court should act this way. Originalism, with its underlying conception of the concrete Constitution, has deep roots in the traditions of our constitutional jurisprudence and a strong influence on our sense of judicial propriety or legitimacy.\(^{71}\) Conceptualizing and interpreting the Constitution in this way has always been alluring, but it has seldom seemed enough. Cases and issues arise which, given the nation’s current understanding of the commitments and ideals symbolized by the constitutional text, demand answers that either cannot be provided by, or may seem at odds with those implied in, the concrete Constitution. In such cases, the abstract personality of the Constitution will invariably come into play.\(^{72}\)

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\(^{70}\) The cases in which the Court nods to, or professes to take seriously, original understandings and then reaches results which are difficult to justify on originalist grounds are legion. On some accounts, they constitute the bulk, if not the entirety, of modern individual rights jurisprudence. See, e.g., Grey, Unwritten Constitution, supra note 7, at 710-14. The case which receives most attention is, of course, Brown v. Board of Education, 347 U.S. 483 (1954). See M. Perry, supra note 30, at 61-70; R. Berger, supra note 10, at 117-133. In Brown, the Justices understood the difficulty of justifying on purely historical grounds a decision that segregated schools violated the fourteenth amendment. R. Kluger, Simple Justice 582-616 (1975). Nonetheless, they nodded to the historical record, found it “inconclusive” and concluded that “we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy was written.” Brown, 347 U.S. at 489, 492.

\(^{71}\) As Professor Richards has recently observed: “While there is no logical requirement that Founders’ intent play a central role in constitutional interpretation, such a practice has become indigenously American.” Richards, supra note 10, at 812.

\(^{72}\) As suggested earlier, see supra notes 67-70, it is difficult, if not impossible, to specify with precision the synergism I believe characterizes the relationship between the concrete and abstract conceptions of the Constitution and its interpretation. An originalist, no doubt, might argue that once free from the constraints of original understandings, the
The view of constitutional interpretation suggested here can also better explain those cases in which the Court has acknowledged the influence of original beliefs, but has gone on to candidly consider the significance of nonoriginalist factors in reaching its decisions. These are the cases which, quite understandably, bear the brunt of the originalists' criticism. But the originalists' criticism is, in its own terms, only partially correct. For notwithstanding the Court's reluctance to admit it, these cases often can be best explained by reference to both conceptions of the Constitution that I have described.

Finally, I believe that the approach to constitutional interpretation I have described has a normative appeal that neither originalism nor (even the purest or strongest forms of) nonoriginalism can possess. The nation, it seems to me, has seldom seen the Constitution through originalist eyes. In a fundamen-

abstract Constitution would come to dominate adjudication, and would do so in manner that would make the formal amendment process superfluous. I do not believe, however, that these fears are justified. While original beliefs may sometimes conflict quite clearly with the beliefs embodied in contemporary understandings of our aspirations and ideals, this will not always be the case. And even where the judge perceives a clear divergence, many factors—such as the influence of precedent, the values of stability and continuity in the law, assessments of prudential limitations on the exercise of judicial authority, and so on—will surely influence the occasions and extent to which the path suggested by the abstract Constitution will be taken. Moreover, acknowledgment of the influence of the abstract Constitution would not render the formal amendment process of Article V superfluous. First, constitutional amendments have, in practice, never been regarded as the exclusive vehicle for effectuating growth and change in constitutional meaning. See Ackerman, The Storrs Lectures: Discovering the Constitution, 93 Yale L.J. 1013 (1984). Second, nothing in the approach to constitutional interpretation I have elaborated denies a significant and independent role for Article V: viewed either concretely or abstractly, it suggests an important mechanism for constitutional change to which judges can and should be responsive. Cf. Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, J., concurring); M. Perry, supra note 37, at 61-63.


74. The strongest form of nonoriginalism would be one which takes original understandings to be irrelevant for constitutional interpretation. See Miller, An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis Upon the Doctrine of Separation of Powers, 27 Ark. L. Rev. 583, 584 (1973).

75. For a general discussion of the public understanding of the Constitution throughout American history, see M. Kammen, A Machine That Would Go Of Itself (1987).
tal sense, our Constitution has never been—and perhaps can never be—fully completed. 76 This is not to deny that the document—taken as a whole or in its constituent parts—had meaning for the people and the nation who created it. But while it may have constituted their sense of the proper ordering of political life, it did much more. Even had they intended it, the Constitution's meaning could not have been fully determined. Once promulgated, it could not belong just to those who brought it into being. 77

By the same token, however, the Constitution does not, cannot, belong only to us, or to our future. If the Constitution is to be understood as aspirational (and thus inspirational), if it is an "idealized reconstitution of the community," 78 we must acknowledge and account for the influence it has had in shaping and capturing the value and identity of our past. The nature of our aspirations and the direction in which they lead us cannot be fully understood without knowing the kind of community we have been. The concrete Constitution—what it has meant to our predecessors—serves as the foundation upon which the edifice of our political community's moral identity has been, and continues to be, constructed. 79

V.

In this Essay, I have argued that constitutional interpretation cannot be strictly characterized in either originalist or nonori-
ginalist terms. A more satisfactory characterization depends upon recognizing the different conceptions of the Constitution upon which originalist and nonoriginalist theories are based. In my view, neither conception of the Constitution is adequate, by itself, to provide a descriptively accurate or normatively appealing foundation for constitutional theory. As long as theorists proceed as if they are involved in an all-or-nothing, winner-take-all battle, it is difficult to see how the future of their enterprise can be very constructive or productive.

One final observation is in order. Perhaps it might seem that the title of this Essay, Enough About Originalism, is a bit misleading. I have not argued that originalism is a logically incoherent approach to constitutional interpretation. It is certainly fraught with theoretical and methodological difficulties, which continue to make me skeptical of its internal coherence. But I am not convinced that it is "impossible" to pursue. If one views originalism as not requiring absolute perfection and concedes that historical research can reveal a core original understanding of at least some constitutional provisions, it would be dubious to claim that originalism is completely hopeless or incoherent.

Nonetheless, I believe that originalism is inadequate as a general theory or methodology of constitutional interpretation. This is not because it has no insights to contribute to those who seek a full appreciation of the history and promise of our consti-

80. As previously noted, supra note 27 and accompanying text, all originalist positions are not the same. And, as Professor Perry has argued, some forms of originalism are easier to defend than others. Perry, supra note 20, at 597-602; but see Hoy, supra note 29. If originalism is understood, not as according a privileged status to the particular or concrete beliefs of those responsible for the original Constitution, but as requiring courts to give effect to a set of more general original beliefs, it might be viewed as a plausibly coherent option for judges. Moreover, it may be possible to implement even more narrow versions of originalism—requiring deference to less abstractly conceptualized notions of original understandings—at least with respect to some constitutional provisions in some cases.

81. Perry, supra note 20, at 601 (originalist judges' task is "to discover that 'original' understanding as best they can"); Maltz, supra note 12, at 813.

82. Saphire, supra note 50, at 777. For a forceful argument that originalism, while problematic, is not impossible or incoherent, see Kay, Adherence to the Original Intentions in Constitutional Adjudication: Three Options and Responses, 82 Nw. U.L. Rev. (forthcoming, 1988); see also Nelson, supra note 16, at 1245-60.

83. To be sure, nonoriginalism is not free of its own theoretical and methodological dilemmas. But unlike originalism, it is able to account for and embrace the role of both historical (original) and non-historical (aspirational) beliefs in constitutional interpretation. See Saphire, supra note 50.
tutional jurisprudence; indeed, I have suggested that the vision of a "concrete Constitution" upon which originalism is grounded has played, and will continue to play, a vital role in the development of that jurisprudence. But originalism has failed to see—indeed it is incapable of seeing—that it is both descriptively and normatively inadequate to capture the full role the Constitution has played, and will surely continue to play, in our national experience. It should, therefore, be rejected.
COMMENTS

The Evolution of Dram Shop Law: Is Kentucky Keeping Up With the Nation?

I. INTRODUCTION

The state of the law, with regard to the civil liability of servers of intoxicating beverages, for damages to third persons caused by the drunken recipients of those beverages, has changed through the years to reflect our society's increasingly mobile nature and its attitudes toward the proper allocation of responsibility for injuries. Drinking alcohol has always been an important part of our culture; society during the Prohibition Era functioned, at least partially, through the lubrication of alcohol. It is almost impossible to overstate the effect that the automobile has had on the United States. Unfortunately, the combination of these two elements of our culture has been devastatingly lethal.

"Dram shop" is a traditional British term for a bar or saloon. However, in a legal context, the phrase "dram shop law" has become a catch-all phrase for the body of law surrounding civil suits against the servers of alcoholic beverages for damages caused by the negligent service of alcohol to someone (generally a minor or an obviously intoxicated individual) when it is reasonably foreseeable that injury might occur as a result. It is the question of whether an injury is reasonably foreseeable that has been central to the overall issue of whether society is willing to hold the bartender responsible for the actions of his patrons. As the reasonable foreseeability of alcohol-related automobile accidents has grown, so has the civil liability of the dram shop.

II. ALCOHOL AND AUTOMOBILES IN AMERICA

A. America’s History of Drinking

"There has always been drinking in America. From the earliest days of colonial settlement to the present, Americans have incor-

1. WEBSTER'S NEW WORLD DICTIONARY 424 (2d College ed. 1972).
porated beverage alcohol—in one form or another—into their daily lives."2 Alcohol use dates back as far as we have recorded history.3 In fact, the securing of a reliable flow of alcohol was a compelling concern of American colonists dating back to the Mayflower.4 This was true for two reasons. First, water had a bad reputation with seventeenth-century Europeans since much of the water available to them was polluted, and the early colonists were unaware of the amount of clean potable water that was accessible in America.5 Second, it was believed that the drinking of alcohol was essential to good health and non-drinkers were considered "crank-brained."6 Consequently, when the Mayflower colonists reached Plymouth with an inadequate beer supply, and only a small amount of distilled liquor, they begged the crew of the ship to give them an additional supply of beer from the ship's rations. Even William Bradford, the future governor, pled for a draft of beer. The sailors at first angrily rejected the colonists' attempt to deplete their liquor supply, but the Mayflower's captain finally relented and allowed them to dip into his vessel's stores so that there would be "beer for them that had need for it."7

The early colonists were faced with two problems with regard to alcohol. The first was that they were simply too far away from England to rely on imports to provide them with a steady supply. The second was that the colonial population grew far too rapidly for it to get an adequate amount from ordinary shipping channels, assuming such channels were even available.8 Therefore, the colonists were forced to produce most of their alcoholic beverages themselves. This led them to produce a number of new drinks which utilized the ingredients and production methods available in America. "Equally important, they also developed a range of drinking patterns and attitudes to match, all of which reflected the environment and resources of their New World homes ....

3. HUMAN FACTORS IN HIGHWAY TRAFFIC SAFETY RESEARCH 305 (T. Forbes ed. 1972) [hereinafter HUMAN FACTORS].
4. LENDER & MARTIN, supra note 2, at 3.
5. Id. at 2.
6. Id.
7. Id. at 3.
8. Id.
The colonists integrated alcohol into their evolving American culture in ways that were distinctively their own.\footnote{Id. at 4.}

By modern standards, the great majority of colonial Americans would qualify as moderate to heavy drinkers. Informed estimates of alcohol consumption in America in the 1790s suggest that the average American, over the age of fifteen, drank approximately thirty-four gallons of beer, over five gallons of distilled liquor, and about a gallon of wine each year. This comes to six gallons of pure alcohol per person annually. The comparable modern average is less than 2.9 gallons per person annually.\footnote{Id. at 14.}

It is important to note that, despite the enormous amount of drinking, in general, early Americans were not plagued with the number of problem drinkers that we have today. There was little public outcry against alcoholism until much later. The social standards of the day kept intemperance in check. Most colonists willingly conformed to the shared community values because they inherited a common loyalty to, and identity with, their society. Through this loyalty, and a collective willingness to compel individuals to stay within acceptable community standards of behavior,\footnote{Id. at 15-16.} this unified society prevented drinking from becoming a social problem.

The deterioration of these strong viable community checks on drinking behavior started to become noticeable by the 1700s. Drunkenness became a full-fledged problem for society as the traditional limitations on drinking gradually lost their effect.\footnote{Id. at 34.} Total consumption reached its peak in 1830 with an average annual consumption of 7.1 gallons of pure alcohol per person annually.\footnote{Id. at 46.} The increasing societal difficulties posed by the problem drinker fed the fires of the temperance movement. In addition, the political philosophy of nonrepublicanism also contributed to the shift in attitude by emphasizing the importance of "virtue" in the way man governed himself in our democracy. Of course, this reform movement reached its zenith with the official beginning of Prohibition in 1920.\footnote{Id. at 142.}
A combination of ineffectiveness, public opinion, and a desire for the return of liquor revenues to the economy and to government coffers prompted the repeal of national Prohibition. As a result, the impact of problem drinking once again became a serious national concern. Present-day assessments of the damage done by problem drinkers to national health and finances are reminiscent of the worst projections of the temperance movement.\textsuperscript{15}

\textbf{B. Automobiles and Alcohol: An Expensive Combination}

The automobile was popularly introduced to the United States in 1895. Since then, the mass popularization and accommodation of the automobile has been the most significant force shaping the development of modern American civilization. The industrial city and suburb is purely a product of the automobile, as are most of the problems associated with the uncontrolled growth of the American megalopolis. An amazing element of the spectacular success of the automobile is that it rose from complete obscurity to complete predominance in our civilization during the life-span of only one generation.\textsuperscript{16}

Ransom E. Olds made the first sale of an American automobile in 1893. However, it was not until 1895 that the first patent was granted for an automobile and the innovation made its popular debut.\textsuperscript{17} Early cars may have been notorious for breaking down, but their slow speeds made them extremely safe. An automobile crash did not take its first life until 1899.\textsuperscript{18} The automobile industry grew at an amazing rate. In 1899 only 2,500 vehicles were produced in the United States.\textsuperscript{19} There were only 198,000 total vehicles registered in the United States in 1908 (not all states required registration); this number swelled to 944,000 by 1912.\textsuperscript{20}

It should come as no surprise that governmental officials had a great deal of difficulty enforcing traffic laws from the very beginning. When the first speed limits were imposed and enforced in 1905, the police had a serious problem getting violators to stop their car and accept the ticket. Usually the operator would just

\textsuperscript{15} Id. at 172-73, 181-82.
\textsuperscript{16} J. FLINK, AMERICA ADOPTS THE AUTOMOBILE 2-4 (1970) [hereinafter FLINK].
\textsuperscript{17} Id. at 17-19.
\textsuperscript{18} F. WHITLOCK, DEATH ON THE ROAD 6 (1971) [hereinafter WHITLOCK].
\textsuperscript{19} FLINK, supra note 16, at 29.
\textsuperscript{20} Id. at 54.
ignore the officer and drive right on by him. Even when police forces became equipped with vehicles, their cars were generally no match for those driven by most people. When a police department managed to track down an offender through license registration numbers, the resulting citations were commonly framed and considered a badge of honor among drivers.21

The automobile displaced all other forms of popular transportation. By 1969 there were over 3,700,000 miles of road in the United States, enough road to form a fifteen-lane highway from the Earth to the moon.22 Unfortunately, death by automobile accidents soon began to outpace the other leading causes of death in the United States. The first car related death came in 1899; by 1951 over one million people had been killed in car crashes in this country.23 Today, traffic accidents cause over one-third of all injuries in the United States.24 They are the third leading cause of death overall, and the leading cause of death for adults between the ages of thirty through fifty-nine.25 Automobile accidents cause well over 50,000 deaths and 400,000 injuries every year. Reliable statistics indicate that one out of every eight people in the United States will be killed or injured in a car crash during the next four years.26

The connection between alcohol and highway safety is undisputed. As early as 1904 scientific literature noted that drunken driving could become a serious social and health problem.27 There was a fairly rapid increase in the number of deaths caused by automobile accidents after the repeal of Prohibition.28 By 1924, studies indicated that between one-quarter and one-third of all accidents were at least partially caused by a driver who had been drinking.29 Evidence appeared from 1959 through 1967 that forty-five to fifty-seven percent of all drivers killed in car crashes had been drinking heavily enough to have a blood alcohol count (BAC)

21. Id. at 186-88.
23. Whitlock, supra note 18.
25. Id. at 3.
26. Id. at 3-4.
27. Human Factors, supra note 3, at 308.
28. Whitlock, supra note 18, at 76.
29. Human Factors, supra note 3, at 309.
of over .10% at the time of the wreck.30 It is a universally accepted general rule that individuals with a BAC of .10% or over have had their driving skills substantially impaired.31

About half of all drivers killed in automobile wrecks have high BAC readings (.10% or above).32 One investigation found that almost seventy percent of drivers killed in crashes had been drinking, and that forty-nine percent of those drivers had a BAC of over .15%.33 Extremely high BAC readings have been found to be present in drivers in twenty-five percent of all serious crashes. High BAC levels are very rarely found in drivers who are not involved in accidents.34 These facts lead to the conclusion that drivers with high BAC levels (and their passengers) are much more likely to be killed in a car crash than sober individuals on the road. More precisely, the chance of being involved in an accident is six to seven times higher for those in a car driven by someone with a BAC of .10% or above than for those in a vehicle with a sober driver; the likelihood of a crash is twenty-five times more likely when the driver's BAC is .15% or above.35

Another frightening fact is that high BAC levels not only increase the chance of being involved in a wreck, but they also make it more likely that a wreck will be at high speed and that serious or fatal injuries will be involved.36 Crashes involving alcoholics consistently occur at higher speeds than those caused by the drunken social drinker.37

A 1965 study of persons over the age of twenty-four, who were killed in automobile accidents, found that two-thirds of the people who had been drinking in the hours before the wreck had livers which had been noticeably damaged by long-term alcohol consumption. Only fifteen per cent of the deceased drivers who had not been drinking had such damage.38 This, as well as a considerable body of other evidence, indicates that it is the consistently heavy drinker, not the social drinker, that poses the true menace

30. Id.
31. Id. at 310.
32. Id.
33. Id. at 312.
34. Id. at 310.
35. Id.
36. Id. at 311.
37. WHITLOCK, supra note 18, at 70.
38. Id. at 71.
when he drives after consuming alcohol. The real problem of alcohol and road accidents is the driving drinker rather than the drinking driver.

Americans historically displayed a curious ambivalence toward the subject of drinking and driving. When states first began passing legislation designed to penalize all forms of driving while intoxicated, these statutes were adopted only after strenuous opposition by various private groups. Public opinion at the time was in favor of such laws when applied to public transportation, but reluctant to apply the same standard of conduct to private drivers. Even as late as 1963 there was no strong popular disapproval of drunken driving offenders, probably because of a feeling of identification with the driver.

The latest studies of road collisions involving alcohol-related fatalities confirm the fears raised by earlier investigations. According to a 1986 publication from the National Highway Traffic Safety Administration, people in the United States are being killed in crashes involving alcohol at the rate of three an hour. That totals up to seventy-one a day, five hundred a week, and over twenty-five thousand each year. In the past twenty years, more than five hundred thousand people have died in alcohol-related accidents. In addition, over 550,000 individuals are seriously injured in such accidents annually. Wide publication of statistics of this nature and the increasingly strong efforts of various special-interest groups, such as the Mothers Against Drunk Driving, have shifted the traditional ambivalent attitude concerning driving while intoxicated to a much harsher condemnation of this hazard.

III. NATIONAL DEVELOPMENT OF DRAM SHOP LIABILITY

In England, the first source of our common law, liability for the negligent sale of liquor simply did not exist. The traditional rule of common law dram shop liability was that "a vendor of intangi-
cating liquors is not ... answerable to a third person for injury or damage sustained by the latter as a result of the intoxication of the purchaser of the liquor." This ancient precept drew its basis from the reasoning that the act of drinking the alcohol, not its service, was the proximate cause of any injury suffered by the purchaser or by third persons as a result of the actions of the intoxicated purchaser.

This traditional rule is inconsistent with certain fundamental aspects of basic tort law. It alters the question of proximate cause by removing all questions of reasonable foreseeability from the inquiry. "Because a provider of a drink can never be the proximate cause of an injury, he effectively has no duty whatsoever to either the intoxicated person or the public at large." In fact, this complete immunity ran counter to the purpose of public protection, the driving force behind the Alcoholic Beverage Control Act's regulation of the liquor industry as a whole. A more consistent approach would have been to follow the basic theory of tort law and look to the facts of each case when determining proximate cause to see if the resulting injury was reasonably foreseeable.

The unilaterally restrictive approach to dram shop liability was probably the result of several factors. First, as discussed earlier, the real problem of injuries from alcohol-related traffic accidents did not emerge until the middle of the twentieth century. Second, beginning around 1850, the law of torts was strongly influenced by a judicial policy that emphasized fault and encouraged men to "venture for productive ends." This led courts to protect business enterprise and place the blame for drunken behavior solely on the head of the drunkard. Rampant industrialization also was supported by the legal community and served to discourage judges from tinkering with the common law in order to find ways to increase the liability of businesses.

50. Mishky, supra note 48, at 182-83.
52. Id. at 124.
The harshness of the traditional bar to all recovery from servers of alcoholic beverages was mitigated to a certain degree by the passage of dram shop statutes beginning in the post-Civil War era. These acts generally imposed liability on dram shops for damages caused by the illegal sale of alcohol to minors, habitual drunkards, and those obviously intoxicated. These reforms were the result of the growing temperance movement (which was the result of the growing number of problem drinkers).

The question of proximate causation was rendered moot by statutory provisions that limited the question of causation to whether an intoxicated person inflicted the injury. While the dram shop acts represented a tentative step toward the imposition of general liability for damages caused by the negligent service of alcohol, their limited nature and lackluster application by the courts kept them from being a true solution to the problem.

Finally, in 1959, two cases broke the dam of nonliability for dram shops and ushered in the modern age of dram shop law. Rappaport v. Nichols is the landmark ruling on the subject. In this case, Robert Nichols, a minor, had been unlawfully served alcoholic beverages by several taverns under circumstances clearly indicating that the tavern operators were well aware of the fact that Nichols was a minor. Nichols became intoxicated, and later crashed his motor vehicle into that of Arthur Rappaport and his wife. Arthur was killed and his wife was seriously injured. Mrs. Rappaport brought an action as the administratrix of her husband's estate and for her own injuries against Nichols and all of the taverns which had served him. The trial court granted summary judgment to the tavern owners on the ground of failure to state a cause of action according to the traditional common law rule. Mrs. Rappaport appealed.

Since the New Jersey dram shop act had been repealed in 1934, the New Jersey Supreme Court took it upon itself "to fill a judicially-perceived vacuum of restraint on commercial vendors of alcoholic beverages." The court wisely recognized that the eve-

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53. Liability, supra note 47, at 1015.
54. Social Host, supra note 47, at 231.
55. Id.
57. 31 N.J. 188, 156 A.2d 1 (1959).
58. Id. at __, 156 A.2d at 3.
ryday use of the automobile in modern society made it much more likely that the dram shop owner would, or reasonably should, foresee the deadly consequences of the drunken driving of his patrons:

When alcoholic beverages are sold by a tavern keeper to a minor or to an intoxicated person, the unreasonable risk of harm not only to the minor or the intoxicated person but also to members of the traveling public may readily be recognized and foreseen; this is particularly evident in current times when traveling by car to and from the tavern is so commonplace and accidents resulting from drinking are so frequent.60

The Rappaport court relied upon a 1957 Pennsylvania case as precedent for its holding that the mere consumption of alcoholic beverages and subsequent negligent operation of an automobile by a drunken driver did not constitute intervening causes sufficient to remove liability from the dram shop that had negligently served him liquor:

That the negligent operation of the automobile by Kordowski caused the accident is unquestioned in this appeal. But Kordowski's negligence was the result of his imbibing intoxicating liquor supplied by Yokas. Yokas thus . . . became as much responsible for the accident as if he had stripped the gears of the car or had damaged the steering wheel, which defects in the operation of the car were directly responsible for the uncontrollability which caused the collision.61

This removal of the common law bar to liability based on the theory of intervening cause is consistent with the general state of tort law. "Foreseeable intervening forces [such as the consumption of the served beverages and subsequent driving] are within the scope of the original risk, and hence of the defendant's negligence. The courts are quite generally agreed that intervening causes which fall fairly in this category will not supersede the defendant's responsibility."62

The New Jersey Supreme Court compared the negligence of the dram shop operator to that of adults who provide firearms to

60. Rappaport, 31 N.J. at ——, 156 A.2d at 8 (emphasis added).
61. Id. at ——, 156 A.2d at 5-6 (quoting Manning v. Yokas, 389 Pa. 136, 132 A.2d 198, 199-200 (1957)).
minors, thus enabling the minor to cause injury with the dangerous instrumentality. The court also compared dram shop actions based on the service of alcohol to a minor, in violation of state beverage control law, to a previous case against a taxi-cab driver who left his cab unattended while the key was in the ignition, enabling the cab to be stolen and wrecked while being driven by the thief. In this latter case, the court had allowed a plaintiff injured in the crash to recover against the taxi-cab driver. The driver violated a state statute by leaving his keys in the ignition of his unattended cab and the court reasoned that the violation of the statute was a form of negligence that was not too remote to have caused the plaintiff’s injuries.

Once again, this reasoning corresponds to basic principles of tort law concerning proximate causation.

The risk created by the defendant [by the negligent service of alcohol] may include the intervention of the foreseeable negligence of others.... [T]he standard of reasonable conduct may require the defendant to protect the plaintiff against that occasional negligence which is one of the ordinary incidents of human life, and therefore to be anticipated.... The same is true as to those intervening intentional or criminal acts which the defendant might reasonably anticipate.

The classic companion case to Rappaport is the 1959 decision of Waynick v. Chicago’s Last Department Store. This was a federal diversity action brought by the recipients of alcoholic beverages against the store that served them. The facts of the case on review indicated that the plaintiffs were obviously intoxicated when the defendant store sold them alcohol, and that the plaintiffs were subsequently seriously injured in a vehicle collision caused by their drunkenness. The complaint was dismissed by the trial court, but the Seventh Circuit reversed and remanded.

The circuit court based its decision on common law negligence principles rather than a dram shop act. However, the court’s reasoning did not entirely ignore the available statutes governing

63. See Rappaport, 31 N.J. at —, 156 A.2d at 7.
64. Id.
65. KEETON, supra note 62, at 304-5.
66. 269 F.2d 322 (7th Cir. 1959).
67. Id. at 322.
68. Id. at 326.
69. Id. at 324.
the sale of alcoholic beverages. The rationale of the court began with the statement, first enunciated in Judge Andrews' dissent in the famous case of *Palsgraf v. Long Island Railroad Co.*, that "[e]very person has a general duty to use due or ordinary care not to injure others, [and] to avoid injury to others by any agency set in operation by him."  

The court emphasized that, even though there was no applicable dram shop act, the sale of alcohol to obviously intoxicated persons had been made in violation of an Illinois alcohol control statute which prohibited the sale of intoxicants to drunken patrons. This statute did not create any form of civil liability in itself, but the *Waynick* court held that the statute created a standard of care on the part of liquor licensees for the protection of the general public.

The Illinois act making unlawful the sale of alcoholic liquor to any intoxicated person is for the protection of any member of the public who might be injured or damaged as a result of the drunkenness to which the particular sale of alcoholic liquor contributes. Obviously the plaintiffs in the case at bar are entitled to . . . [this] protection . . . . The effect of section 131 of the Illinois act is that a sale of alcoholic liquor cannot lawfully be made to an intoxicated person . . . . We hold that, under the facts appearing in the complaint, the tavern keepers are liable in tort for the damages and injuries sustained by plaintiffs, as a proximate result of the unlawful acts of the former.

These early holdings did not apply to non-commercial providers of alcoholic beverages and each relied, in some degree, upon alcohol control statutes to establish a duty on the dram shop operator. However, the Supreme Court of Pennsylvania bluntly stated in the 1964 case of *Jardine v. Upper Derby Lodge No. 1973, Inc.*, that servers of alcohol owe a duty to society as a whole to stop serving intoxicants to those people who have become so intoxicated that their reflexes, judgment, and "sense of responsibility" have been seriously impaired. The court emphasized that this duty exists entirely apart of any statutory requirements.

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70. 248 N.Y. 339, 162 N.E. 99 (1928).
72. Waynick, 269 F.2d at 325.
73. Id. at 325-26.
74. Rinden, supra note 59, at 938.
75. Liability, supra note 47, at 1022.
76. 413 Pa. 626, 198 A.2d 550 (1964).
77. Id. at 631, 198 A.2d at 553.
This trilogy of cases, *Rappaport*, *Waynick*, and *Jardine*, provided a coherent basis for the reversal of the traditional rule against dram shop liability. They began a strong trend among courts to judicially remove the traditional bar to actions against dram shops.\(^7\)\(^8\) In the most recent Kentucky opinion on the subject, the Kentucky Supreme Court noted that the following U.S. jurisdictions have recognized dram shop liability in one form or another: Alabama, Alaska, Arizona, California, Colorado, Connecticut, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming.\(^7\)\(^9\)

There are two recent trends in dram shop law which are worthy of note. The first is that some state legislatures have reacted to its court's judicial expansion of liability for servers of alcoholic beverages by enacting legislation which either abolishes, or severely limits, civil liability on the part of dram shops for injuries caused by drunken patrons. So far, five states, Alaska, California, Florida, Oregon, and South Dakota, have enacted such legislation.\(^8\)\(^0\) Whether this is a genuine trend away from dram shop liability or merely an over-reaction to judicial activism and the so-called "insurance crisis" remains to be seen.

The other changing aspect of dram shop law is that courts are beginning to hold *social hosts*, as well as vendors, liable for negligently serving alcoholic beverages to guests when injuries to third parties are later caused by the drunken guest.\(^8\)\(^1\) These decisions are largely based on policy concerns about the extreme threat that drunken driving poses to society.\(^8\)\(^2\) The fact that this threat is still a nationwide problem may indicate that the trend toward imposition of liability on social hosts is a valid one. The following states have recognized social host liability in some form: California, Connecticut, Georgia, Indiana, Iowa, Michigan, New

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81. *Id.* at 966.
IV. THE EVOLUTION OF DRAM SHOP LAW IN KENTUCKY

The 1911 case of *Britton's Adm'r v. Samuels* was the first case to directly address the issue of dram shop liability in Kentucky. This was a wrongful death action based on an allegation that the defendant sold alcohol to Britton, and that his consumption of these beverages resulted in his death. The opinion acknowledged that the sale had been illegal for various reasons. First, it was illegal to sell alcohol at all in the area where the sale occurred. Second, liquor licensees were prohibited from selling alcohol to habitual drunkards, or to persons actually or apparently intoxicated, and Britton was widely known to be a habitual drunkard and was obviously intoxicated at the time of sale. Nevertheless, Kentucky followed the traditional rule and the court dismissed the suit on the ground that "the unlawful or wrongful act was the sale of the liquor, but death was produced, not by the sale, but by the drinking thereof by the deceased. The proximate cause of death, therefore, was not the wrongful or unlawful act complained of."

Although it reaffirmed the traditional rule, *Britton* also contained the seeds of what was to become modern Kentucky dram shop liability. The court noted that its decision might have been different had the complaint contained specific allegations that "the sale was made for the purpose of injuring him [Britton], or with the knowledge that he intended to drink ... to such an extent as to produce injury or death, or that he [the defendant] had reasonable grounds to believe that the deceased could not be safely trusted with the whiskey ...." Kentucky courts used the special circumstances proposed in this dictum to gradually expand the scope of liability for the negligent sale of intoxicants.

83. Rinden, *supra* note 59, at 958.
85. Id.
86. Id.
87. Id.
88. Id. at 132, 136 S.W. at 144.
89. Id. (emphasis added).
The case of Waller's Adm'r v. Collinsworth followed closely on the heels of Britton and continued the Kentucky courts' denial of common law dram shop liability. This case involved another illegal dry county liquor vendor who sold alcoholic beverages to juveniles. The two minors consumed enough alcohol on the premises of the defendant's store to inebriate them. As a result of his intoxication, one of the youths became angry and shot and killed his companion.

The court of appeals affirmed the dismissal of the case. Once again, the basis of the opinion was a belief that the proximate cause of the death was not the wrongful sale of liquor. The act of consuming the alcohol was considered to be an intervening element which broke the chain of causation from the time of the sale to that of the shooting. The decision was also based on the fact that, at the time, the number "of homicides resulting from intoxication [was] so small that it cannot be said that he who sells the liquor that causes the intoxication may reasonably contemplate that murder will follow ...." This analysis indicates that the court would have considered allowing a cause of action in circumstances where a defendant had reasonable grounds to believe that injuries would result from his sale of intoxicants. This was precisely the situation the court reviewed some forty-five years later in Nally v. Blandford.

Nally was the first Kentucky case on record to permit an action for wrongful death against a dram shop for its service of alcohol. The case involved an egregious set of facts. Lawrence Nally, who was clearly intoxicated, had made a wager with a liquor store's customers that he could consume an entire quart of whiskey in one long drink. Blandford, the store clerk, and employee of the defendant liquor license holder, was aware of this wager, but nevertheless sold a quart of whiskey to the drunken Nally in order to enable him to attempt the feat on the store premises.

90. 144 Ky. 3, 137 S.W. 766 (1911).
91. Id. at 4, 137 S.W. at 766.
92. Id.
93. Id. at 6, 137 S.W. at 767.
94. Id. at 7, 137 S.W. at 767.
96. Id. at 833.
97. Id. at 833-4.
98. Id.
Nally made a valiant effort, consuming almost the entire quart without stopping; however, as a result he died the following day. 99

In reviewing the case, the court of appeals initially noted that Kentucky did not have a dram shop statute. 100 It proceeded, however, to develop an independent statutory argument for its finding that the vendor was liable. The court observed that the Kentucky Wrongful Death Statute “provides that whenever the death of a person results from an injury inflicted by negligence or wrongful act of another, damages may be recovered in a suit by the personal representative.” 101 Under the facts of the case, Nally’s death was the result of a sale of alcohol to an obviously intoxicated person, an act which was prohibited by KRS 244.080, one of the Kentucky alcohol control statutes. 102

The court then went on to clear the hurdle of proximate cause by taking advantage of the loophole provided by Britton and Waller:

[T]he test of causation is: Was the injury and death the natural and probable consequence of the wrongful acts, and ought they have been foreseen in the light of the attending circumstances? We think that it is reasonable to conclude ... that, since the vendor knew when he sold the liquor to the intoxicated person that such person intended to drink all of it without ceasing and that the vendee could not be safely trusted with it, the vendor could reasonably foresee that death might result. Thus, it is concluded that the unlawful sale ... was the proximate cause of the death. 103

Though Nally opened the door for dram shop liability in Kentucky, it was not until the 1968 case of Pike v. George 104 that general dram shop liability was established. Reginald Pike, a minor, was one of the passengers in a car driven by Jeffrey Allen, also a minor. The complaint alleged that the defendant, Hyleme George, a liquor licensee, “willfully and maliciously, in violation of KRS 244.080, sold and delivered a one-fifth gallon of intoxicating liquor to [the three minors in Allen’s car].” 105 The complaint further alleged that the defendant knew of the minors’ intention to “drink

99. Id. at 834.
100. Id.; See also Waller, 144 Ky. at 6-7, 137 S.W. at 776.
101. Nally, 291 S.W.2d at 834.
102. KY. REV. STAT. ANN. § 244.080 (Bobbs-Merrill 1981).
103. Nally, 291 S.W.2d at 835.
104. 434 S.W.2d 626 (Ky. 1968).
105. Id. at 626-27 (quoting the Complaint for Appellant Reginald Owen Pike.)
the liquor at once and thereafter operate and travel together in a motor vehicle on the public highways." 106 Soon after purchasing the alcohol and consuming it, the drunken minors were involved in an accident, causing the plaintiff's injuries. 107

The court of appeals did not reach the merits, but held that it was "unwilling to say that there are no circumstances under which a licensee who sells alcoholic beverages may be held responsible in damages proximately resulting from the violation of KRS 244.080." 108 The court reversed the dismissal and noted that the dram shop complaint stated a sufficient cause of action.

The rationale for expanding dram shop liability in *Pike* was based on two factors. The first was the growing trend in tort law to hold vendors and manufacturers liable for injuries directly related to the sale of products that could cause unreasonable danger. 109 The second was a recognition of Kentucky's "policy of special protection of minors from injury." 110 In this regard, the court compared the unlawful sale of intoxicants to minors to the maintenance of an attractive nuisance that results in injury to minors. 111

Because of *Pike* 's specific references to the protection of minors, Kentucky courts were left wondering exactly to what extent dram shop liability had been adopted. It was argued up until 1987 that *Pike* only created dram shop liability for sales to minors and had not recognized any other type of liability. 112 Finally, the matter came to the attention of the Kentucky Supreme Court and an opinion was issued in 1987 which has become the definitive statement of Kentucky dram shop law. 113

*Grayson v. Claywell* arose from a set of facts clearly calling for liability. The defendant, the Grayson Fraternal Order of Eagles Club in Carter County, Kentucky, had been operating an illegal bar in their club. Carter County prohibited all sales of alcoholic beverages within its borders. It was undisputed that the Eagles Club bartender served both beer and several double shots of

106. *Id.* at 627.
107. *Id.*
108. *Id.* at 629.
109. *Id.* at 628.
110. *Id.* at 629.
111. *Id.*
113. 736 S.W.2d 328 (Ky. 1987).
whiskey to Kevin Bailey and Homer Horton although he was aware that Horton was intoxicated when he first entered the bar. After the men spent about ninety minutes drinking in the club, Horton, according to the bartender, had gone from “a little tight” to being “very drunk.” At this point, the bartender literally forced them to get into Horton’s car and leave the parking lot so that he could close the gate. The very drunk Horton was driving, and he almost ran down the bartender as he drove away. Horton then proceeded to smash his car into the vehicle driven by Officer Claywell. Officer Claywell was killed; his wife brought suit.114

The Kentucky Supreme Court took this opportunity to state that these facts clearly constituted a dram shop cause of action. It ruled that Pike had established a general rule permitting dram shop suits.115 The majority opinion pointed out the loopholes in the traditional rule dating back to Britton and noted that it is “questionable that there ever was a blanket common law rule of nonliability for a tavern owner who illegally sells alcohol in Kentucky.”116

The court did not create strict liability for a violation of Kentucky liquor control statutes. Instead, it ruled that KRS 244.080 provides a standard of care that all commercial vendors of alcohol must follow.117 KRS 244.080 prohibits the sale of alcohol to minors, and anyone known to the seller to have been convicted of an alcohol-related misdemeanor, or of a felony.118 When a vendor breaches this standard of care under circumstances in which he could reasonably foresee the possibility of injury, he is liable to persons injured as a result.119

Grayson established this rule for all commercial vendors of alcohol, whether licensed or not. The decision expressly pointed out that it was not intended to create social host liability. Kentucky traditionally has recognized an important difference between the duty of care owed to a business invitee and that owed to social licensee.120 While Grayson does not expressly discuss the question of serving alcohol to a habitual drunkard, the rationale of the

114. Id. at 329.
115. Id. at 330.
116. Id. at 331.
117. Id. at 333.
119. Grayson, 736 S.W.2d at 333.
120. Id. at 335.
court refers to all of KRS 244.080 as creating a standard of care and does not limit itself merely to minors and obviously intoxicated persons. Thus, it seems clear that violation of any of the provisions of the statute constitutes negligence sufficient to impose liability if the resulting injuries were reasonably foreseeable.

V. CONCLUSION

With the emergence of the clarifications in Grayson, Kentucky has developed its laws regarding dram shop liability to a level equivalent to that of the majority of other jurisdictions. The question of social host liability still remains to be addressed, but Kentucky has achieved a worthwhile goal in establishing clear standards for dram shop cases.

The traditional rule against dram shop liability dates back to a time when problem drinking was not a serious social concern and travel was by horse and buggy. In such a setting, it is understandable that courts believed that tavern keepers were, as a rule, unable to reasonably anticipate that injuries could occur as a result of his sale of alcohol to a minor, or a habitual drunkard, or even an obviously intoxicated person. It was an age when the political and judicial philosophy centered around individual freedom and the encouragement of private enterprise.

That age is long past. Judicial thinking now looks to the causes behind a man's actions and each person is considered to owe a duty to the world at large to act in a reasonable manner. The focus in tort law has changed from fault-finding to restoring the victim of injuries.

The changes in our society's use of alcohol and the automobile have completely outdated the traditional dram shop rules. Problem drinkers are a major concern. The almighty car dominates our landscape like a mechanical deity. The combination of drinking and driving exacts a staggering toll of lost life and limb every day. The crisis is no longer one of unsightly intemperance; it is one of blood sacrifice.

ADDENDUM

The 1988 Kentucky General Assembly passed House Bill 570\textsuperscript{121} to codify the extent of civil liability that will be imposed for

\begin{footnote}
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serving alcoholic beverages. The end result is a muddying of the waters recently cleared by Grayson. 122

On one hand, the bill declares that "the consumption of intoxicating beverages, rather than the serving, furnishing or sale of such beverages, is the proximate cause of any injury," and that "[t]he intoxicated person shall be primarily liable with respect to injuries suffered by third persons." 123 However, the second section of the bill only extends protection from liability to those who serve alcohol to "a person over the age for the lawful purchase thereof." 124 This same section also states that this protection from liability does not extend to situations where "a reasonable person under the same or similar circumstances should know that the person served is already intoxicated at the time of serving." 125

The statute appears contradictory, but the logical meaning of the bill when read as a whole, is that dram shop liability is abolished except where alcoholic beverages are served to minors or those who are obviously intoxicated (the specific causes of action embraced in Pike 126 and Grayson). The statute is prospective in nature and does not apply to civil actions filed prior to July 15, 1988.

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124. Id. (emphasis added).
125. Id.
126. Pike v. George, 434 S.W.2d 626 (Ky. 1986).
THE FERES DOCTRINE: SHOULD IT BAR CLAIMS BY MILITARY PERSONNEL AGAINST CIVILIAN FEDERAL EMPLOYEES?

In the late 1940s and early 1950s, the United States Government was concerned with the threat that the Soviet Union, the People's Republic of China, and other communist countries were using chemical or biological agents in interrogations, brainwashing, and attacks on Allied personnel. Of particular concern was the use of lysergic acid diethylamide (LSD), and because of the perceived threat to national security, programs for testing the effects of LSD were developed. The United States Army surreptitiously administered LSD to over 1000 American soldiers during chemical warfare experiments. Veterans who suffered injuries as a result of these tests have brought suit against the Federal Government under the Federal Tort Claims Act (FTCA).

The courts faced with the claims of veterans suffering from hallucinations, mental illness, and physical pain caused by LSD have denied recovery as a result of the judicially created exception to the FTCA begun in Feres v. United States. The Feres doctrine precludes tort actions by military personnel against military officials and the Government "where the injuries arise out of or are in the course of activity incident to service." The

2. Id. at 393. The Report stated:
   In order to meet the perceived threat to the national security, substantial programs for the testing and use of chemical and biological agents—including projects involving the surreptitious administration of LSD to unwitting nonvolunteer subjects “at all social levels, high and low, native American and foreign”—were conceived, and implemented. These programs resulted in substantial violations of the rights of individuals within the United States.
3. Id. at 392. The CIA initiated chemical warfare experiments “to perfect techniques ... for the abstraction of information from individuals whether willing or not” and in order to “develop means for the control of the activities and mental capacities of individuals whether willing or not.” Id. What had started as a defensive program had been transformed into an offensive operation by the United States intelligence community.
7. Id. at 146.
Feres doctrine has been applied to an endless list of situations, and has been the subject of much criticism and discussion. A brief list of claims which have been barred by the doctrine will aid in highlighting the criticism: injuries suffered by the children of a veteran due to the negligent mistyping of their father's blood; injuries to military personnel ordered to participate in atomic weapons testing by the United States; charges, brought by black soldiers, of racial discrimination including unjustified punishment, poor performance ratings, and failure to investigate harassment; a wrongful death claim when a serviceman was kidnapped and murdered by another serviceman claiming that the Army knew the assailant had been previously convicted of manslaughter and was dangerous.

Despite the criticism and often harsh results, two 1987 Supreme Court decisions indicate the Court's continuing unwillingness to modify the Feres doctrine. In United States v. Johnson the Court applied Feres to deny a claim when a serviceman was killed due to the negligence of a civilian employee of the Federal Government. In United States v. Stanley, the Court again relied on Feres to deny the respondent's constitutional claim against civilian federal employees based on Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.

This Comment analyzes the Feres doctrine as applied to these two cases. Part I examines the background and application of

9. West v. United States, 744 F.2d 1317 (7th Cir. 1984).
10. Gaspard v. United States, 713 F.2d 1097 (5th Cir. 1983). An estimated 250,000 United States military personnel were exposed to large doses of radiation in an attempt to determine the effectiveness of combat troops in nuclear battlefields. H. WASSERMAN & N. SOLOMON, KILLING OUR OWN 33 (1982). Soldiers were instructed to cover their eyes with their forearms at detonation, and according to first-hand reports, soldiers with their eyes shut could see the bones in their forearms at the moment of the explosion. T. Saffer & O. Kelley, COUNTDOWN ZERO: GI VICTIMS OF U.S. ATOMIC TESTING (1982).
14. 107 S. Ct. at 2069.
the FTCA. Part II analyzes the reasoning and evolution of the Feres doctrine. Part III examines the decisions in Johnson and Stanley and Part IV analyzes those decisions in comparison with the Feres line of cases and lower court decisions.

I. THE FEDERAL TORT CLAIMS ACT

The doctrine of sovereign immunity was developed in the common law courts of England and was recognized as early as 1821 by the Supreme Court.18 Under this doctrine, the Federal Government was immune to legal action for the tortious acts of its employees or agents. In Kawananakoa v. Polybank,19 Justice Holmes provided a justification for the doctrine: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."

Before the FTCA was passed, Congress had enacted several other acts which limited the doctrine of sovereign immunity.20 Besides these few narrow exceptions, the only other avenue by which an injured individual could bring an action against the Federal Government was through a private bill in Congress. As the size of the federal government increased, so did the number of private bills, and it became apparent that Congress was not providing adequate or consistent results.21 To relieve both the hardship of an injury without a remedy, and the burden on Congress in considering private bills, Congress waived the Government’s tort immunity and passed the Federal Tort Claims Act in 1946.22

The FTCA allows a suit to be brought against the Federal Government for negligent or wrongful acts if a private individual would be liable for similar acts under the law of the situs of the act.23 This broad waiver of immunity is limited by thirteen ex-

21. Feres, 340 U.S. at 140. See also Comment, supra note 8, at 932.
22. See supra note 4.
23. 28 U.S.C. § 1346(b) (1982) provides:
ceptions. One of these exceptions prohibits military personnel from bringing any claim against the government which arises out of combatant activities, but there is no other language which expressly prohibits noncombatant claims by servicemen against the government. The *Feres* doctrine is the only judicially created exception to the FTCA, and it has been a very effective means of barring almost all claims by military personnel and their families.

II. **THE FERES DOCTRINE**

A. **Evolution of the FTCA**

The first opportunity for the Supreme Court to apply the FTCA to claims by military personnel occurred in *Brooks v. United States*. In *Brooks*, the Court allowed a claim under the FTCA when two servicemen, who were off-duty and off-base in a private car, were hit by a United States Army truck. The Court held that because none of the express exceptions to the FTCA barred recovery, the servicemen could bring claims for injuries that were not incident to their military service. The Court reasoned that Congress did not intend to exclude these types of claims, and the availability of veterans benefits did not foreclose additional tort recovery.

One year after *Brooks*, the Court took a much more restrictive view of the FTCA in *Feres v. United States*. *Feres* was a
consolidation of three cases involving servicemen who were injured while on active duty. In the first case, a serviceman died in a fire while asleep in his barracks. His executrix alleged that the Government negligently quartered him in barracks which it knew or should have known were dangerous due to a defective heating plant. The second case was brought by a former serviceman who underwent surgery while in the Army, and, in a nonmilitary operation six months later, an Army towel thirty inches by eighteen inches was removed from his body. The serviceman brought a medical malpractice claim against the Federal Government. The third case was brought by the executrix of a serviceman's estate claiming that negligent medical treatment caused the decedent's death.

The Court denied all three claims under the FTCA and held that the Government was not liable for injuries to servicemen "where the injuries arise out of or are in the course of activity incident to service." The Court distinguished Brooks because in that case the soldiers were on furlough and not acting on orders of the Government, but in the Feres cases the servicemen were all injured while on active duty. The Court did mention factors from which it might imply that the claims could be included under the FTCA, but in denying the claims the Court stated that the FTCA "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole."

The Feres Court relied on three separate rationales to support its decision. First, it determined that there was no parallel private liability, and the purpose of the FTCA was not to create

35. Feres, 340 U.S. at 146.
36. Id. at 138. The Court stated the Government may be responsible for the negligence of military personnel because an "employee of the Government" was defined to include "members of the military or naval forces of the United States," and "‘acting within the scope of his office or employment’ in the case of a member of the military or naval forces of the United States, means acting in the line of duty." 28 U.S.C. § 2671. Id. at 138.
37. Id. at 139.
38. See Note, supra note 8, which indicates that Feres relied on a four part rationale.
new causes of action. The Court stated: "'The United States shall be liable ... in the same manner and to the same extent as a private individual under like circumstances.'"\(^{39}\) Because private individuals did not have the power to "conscript or mobilize a private army"\(^{40}\) the Court reasoned the FTCA did not create a new law of intramilitary negligence.\(^{41}\) The Court stated: "Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities."\(^{42}\)

The second rationale concerned the FTCA provision that the applicable law of the state in which the negligent act or omission occurred determines liability.\(^{43}\) The Court believed that "[i]t would hardly be a rational plan"\(^{44}\) to base recovery on state laws "which fluctuate in existence and value."\(^{45}\) The distinct federal relationship between servicemen and the Government dictated that federal law should control the relationship, and recovery was denied because "[n]o federal law recognizes a recovery such as [that which the] claimants seek."\(^{46}\)

The third rationale involved the availability of veterans benefits. Congress had previously provided "systems of simple, certain, and uniform compensation for injuries or death of those in armed services,"\(^{47}\) and the Court determined that Congress intended these benefits to be the sole source of recovery.\(^{48}\)

In 1954, the Court in United States v. Brown\(^{49}\) enunciated the fourth and final rationale of the so-called Feres doctrine. In Brown,
the serviceman had suffered a knee injury while on active duty. The serviceman underwent two operations at Veterans Administration hospitals after his honorable discharge. Following his second operation, he brought an action, alleging negligent treatment, and the court upheld his claim. The Court held that Brooks was controlling because the claimant was not on active duty or subject to military discipline. Although the Court did not hold Feres controlling, it did develop the military discipline rationale based on Feres. The Court defined the military discipline rationale as follows:

The peculiar and special relationships of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read the Act as excluding claims of that character.

B. Early Application of the Feres Doctrine

The Supreme Court has not consistently construed the FTCA with the strict interpretation it applied in Feres. Several other 1950's and early 1960's cases required the Court to interpret the application of the FTCA and in these cases the Court construed the FTCA liberally. One year after Feres, the Court urged a more liberal construction of the FTCA in United States v. Yellow Cab Co. In Yellow Cab the Court held that the United States could be sued by a joint tortfeasor because the claim was not listed as one of the enumerated exceptions and because the waiver of immunity by the FTCA as the Court interpreted it was broad.

In Indian Towing Co. v. United States, the Court eliminated from its Feres doctrine the parallel private liability rationale. The Court held the United States liable when the Coast Guard

50. Id. at 112.
51. Id.
54. Id. at 550.
negligently repaired a lighthouse. The Court reached this conclusion even though no analogous private liability existed. The Court reaffirmed *Indian Towing* in *Rayonier, Inc. v. United States*,\(^6^6\) and held the Government liable for the negligence of Forest Service employees while fighting a fire. The Court determined that the FTCA provisions creating government liability, to the same extent as private individuals, must be given their plain meaning, and the United States should be liable if local law would impose liability on private individuals under similar circumstances.\(^5^7\)

In 1963, the Court undercut from its *Feres* doctrine the federal relationship rationale in *United States v. Muniz*.\(^5^8\) In *Muniz*, federal prisoners claimed injuries due to the negligence of prison employees. Since, like soldiers, prisoners had no control over their residence, the Government argued that *Feres* should apply because in the government's opinion the federal prison administration should not be subject to varying state laws. In allowing the prisoners' claims, the Court noted that the action was not expressly excluded by the FTCA, and nonuniform recovery could not possibly be worse than uniform nonrecovery.\(^5^9\)

**C. Modern Supreme Court Cases**

Despite criticism of the *Feres* doctrine and the lower courts' inconsistent application of it,\(^6^0\) the Supreme Court was hesitant to reevaluate the doctrine. Following *United States v. Brown*,\(^6^1\) twenty years would pass before the Court would elect to hear another case involving the *Feres* doctrine. In 1977 the Court completely reaffirmed the doctrine in *Stencel Aero Engineering Corp. v. United States*.\(^6^2\)

In *Stencel*, a serviceman suffered serious injury when the egress life-support system of his fighter plane malfunctioned during a midair emergency. The serviceman sued Stencel, the manufacturer of the system, and the United States. Stencel then cross-claimed against the United States for indemnification. Both

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57. Id. at 318.
59. Id. at 162.
60. See supra note 8.
61. See supra text accompanying notes 49-51.
claims against the United States were dismissed, but Stencel was the only party to appeal, and the Supreme Court, relying on Feres, denied its claims.

The Court determined that for service-related injuries it would apply Feres rather than the more liberal interpretation of Yellow Cab. The Court analyzed three of the rationales from the Feres doctrine in determining that a third-party claim for indemnity should be denied just as the serviceman’s claim would be. First, the Court examined the distinct federal relationship between the Government and its servicemen and concluded that since it was unfair to “permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to a serviceman, ... it makes equally little sense to permit that situs to affect the Government’s liability to a Government contractor for the identical injury.”

Second, the Court concluded that although the contractor was not eligible for benefits, the Veterans Benefits Act provided a limit on the Government’s liability. The Court held that the VBA acts as an upper limit for liability and to allow recovery would circumvent this limitation.

Finally, the Court analyzed the military discipline rationale and concluded that a third-party suit would also have an adverse effect on military discipline since the Court would be required to second-guess military orders, and members of the military would be required to testify as to each other's decisions and actions.

The next Supreme Court case to apply Feres was Chappell v. Wallace. Five black sailors brought an action against their superior officers alleging injuries as a result of racist treatment in violation of their constitutional rights. The sailors relied on Bivens v. Six Unknown Named Agents of Federal Bureau of Nar-
as the basis for their claim that their superiors had violated their individual constitutional rights. The Court in Bivens had indicated that a remedy would not be available when "special factors counselling hesitation" are present; therefore, the Chappell Court attempted to determine whether such factors existed.

The Court determined that the "special factors" to be examined in a Bivens action were the same as required by Feres and therefore stated: "The analysis in Feres guides our analysis in this case." The Court reaffirmed the Feres doctrine and reasoned that "Feres seems best explained by the peculiar and special relationship of the soldier to his superior, and the effects of the maintenance of such suits on discipline...." One factor the Court relied on concerned Congress' activity in the field. Congress had exercised its constitutional authority over the military by establishing an internal justice system "taking into account the special patterns that define the military structure." Because Congress had not provided a remedy for the alleged violations the Court concluded a judicial remedy would be inconsistent with "Congress' authority in this field."

The other factor relied on by the Court was the established relationship between military personnel and their superior officers—a relationship based on special military discipline which required that "the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection." The Court decided that it would be tampering with the unique structure of the Military Establishment.

70. 403 U.S. 388 (1971).
71. In Bivens, the Court allowed a suit for damages against the offending federal officials who violated the individual's constitutional rights, even though Congress had not expressly authorized such action. Id.
72. Id. at 396.
73. Chappell, 462 U.S. at 299.
75. Id. at 302.
76. Id. at 304.
77. Id. at 300.
if it were to allow these soldier’s claims. In the Court’s opinion this amounted to a “special factor” making a *Bivens* remedy unavailable.

In the 1985 case of *United States v. Shearer*, a serviceman was kidnapped and murdered by another serviceman while both were off-duty and away from their base. The Army was aware of the assailant’s violent nature. He had been convicted of manslaughter while stationed in Germany, and he had just been released from a four-year prison term a few months prior to Shearer’s murder. The decedent’s mother brought suit against the United States claiming that the Army was negligent for failing to exert reasonable control over the assailant; for failing to warn others he was at large; and for failing to remove him from active duty status.

The Court, basing its decision on *Feres* and the FTCA exclusion for assault and battery, reversed the lower court’s decision which had allowed the claim. The Court again emphasized the importance of the military discipline rationale. The Court concluded that too much weight had been given to the fact that the decedent was off-duty and off-base when murdered. The Court determined that the “situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions,” and “[t]he *Feres* doctrine cannot be reduced to a few brightline rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases.”

The Court distinguished its earlier decision in *Brooks* because although in both cases the injured serviceman were off duty, Shearer’s claim would require officers to testify as to each others decisions and actions in an effort to convince a civilian court of the propriety of military decisions, whereas, in *Brooks* the court

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79. The FTCA did not waive immunity for “[a]ny claim arising out of assault [or] battery.” 28 U.S.C. § 2680(h). Four justices agreed that the claim was barred by this express exclusion. *Shearer*, 473 U.S. at 54.
80. Id. at 57.
81. Id.
82. See supra text accompanying notes 26-30. The claim in *Brooks* was based on the negligent operation of a motor vehicle, and the Court concluded that was “quite different” from the claim of *Shearer*. Id. at 58.
was only required to determine whether the injuries were caused by the negligence of an Army truck driver.

The Court’s decision was based primarily on the military discipline rationale, and in a footnote the Court even stated that the federal relationship rationale and the availability of veterans benefits were no longer controlling factors to be considered.

The Court’s decisions in Stencel, Chappell, and Shearer reaffirmed the application of the Feres doctrine, but placed primary importance on evaluating the effect a claim would have on military discipline. The four rationales of the Feres doctrine had seemingly been cut down to one primary factor, with little or no effect given to the other three factors.

The following section begins with a discussion of the two most recent Supreme Court cases based on Feres. It discusses the decisions in United States v. Johnson and United States v. Stanley in detail and is followed by an analysis of those decisions based on the cases discussed above and other lower court decisions.

III. THE EXTENSION OF FERES

Prior to 1987, those cases reaching the Supreme Court which involved the Feres doctrine had concerned the negligence of military personnel or military officials. In 1987, the Court was confronted with two cases against the United States where a serviceman was injured by civilian employees of the Federal Government. The first of the two cases, United States v. Johnson, was a claim on behalf of a serviceman killed when his helicopter crashed into the side of a mountain in Hawaii.

Lieutenant Commander Johnson was a helicopter pilot for the Coast Guard in 1982 when he was dispatched to search for a lost boat. Due to inclement weather, Johnson requested radar assistance from the Federal Aviation Administration (FAA), a civilian

83. Id. at 57-58.
84. Id. at 58 n.4.
85. See supra text accompanying notes 38-51 discussing the four rationales. In Shearer, the Court relegated the federal relationship and veterans benefits rationales to secondary consideration. The parallel private liability rationale had been eliminated by Indian Towing and Rayonier. See supra text accompanying notes 55-57.
 agency of the Government. While under the FAA radar control, the helicopter crashed into a mountain killing Johnson and all other crew members. Johnson's wife applied for, and received, statutory compensation as provided for by the Veterans Benefit Act (VBA), but she also filed suit against the United States under the FTCA. She claimed that the FAA flight controllers negligently caused the death of her husband.

The district court dismissed the suit concluding that Johnson was killed in the course of his military duties and therefore Feres barred the claim. The Court of Appeals for the Eleventh Circuit reversed because it determined that a suit against a civilian employee of the Government would not adversely affect military discipline. On rehearing, the court of appeals affirmed its prior decision, relying on Shearer, and held that the claim was not barred by Feres because civilian courts would not need to inquire into military decisions or actions adversely affecting military discipline.

In a 5-4 decision, the Supreme Court reversed the court of appeals and held that the claim was barred by the Feres doctrine. In analyzing the case, the Court first stated that none of the cases previously decided by the Court under Feres had considered the status of the tortfeasor as critical to the decision.

The Court then evaluated the claim under the three original rationales of Feres in spite of decisions which had indicated that an adverse effect on military discipline was the best and primary factor to be evaluated. First, the Court held that the "situs of the alleged negligence" should not affect the liability of the Government when a serviceman is performing activities incident to service.

Second, the Court followed statements in Stencel which indicated that the VBA placed an upper limit on liability of the Government despite decisions which expressly stated that the

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89. See supra note 65.
90. 749 F.2d 1530 (11th Cir. 1985).
91. 779 F.2d 1493 (11th Cir. 1986).
92. See supra text accompanying notes 78-84.
94. Id. at 2066. The Court determined that the Feres opinion used broad language, and that the doctrine barred all suits incident to service. Id. at 2066 n.7. For a discussion of the 'but for' rule, see infra notes 123 and 132 and accompanying text.
availability of veterans benefits was not a limitation on tort recovery. The Court also disregarded the footnote in Shearer which indicated that the veterans benefits rationale was no longer controlling. The Court saw "no reason to modify what the Court has previously stated to be the law...." 96

The final rationale relied upon by the Court was the military discipline rationale. The Court held that judicial inquiry into "sensitive military affairs" would have an adverse effect on military discipline even though military negligence was not alleged since "a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of military mission." 97

In a dissenting opinion, Justice Scalia also evaluated the claim in the light of the Feres rationale, but he concluded that "Feres was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." 98 First, he noted that the parallel private liability requirement had been rejected in Indian Towing and Rayonier. Second, the federal relationship rationale, as announced in Feres, was concerned with the unfairness to the serviceman of recovery depending on the situs of the injury. This rationale had been twisted by later cases to revolve around the unfairness to the Government in not having uniform standards of liability. 99 Justice Scalia stated that the need for uniformity under the FTCA had been discredited by allowing federal prisoners to sue the Government under varying state laws, by allowing servicemen to recover under the FTCA if the injury was not incident to service and permitting all civilians to recover for injuries caused by military negligence.

Justice Scalia also determined that the veterans benefits rationale had been undermined as "no longer controlling." 100 The

96. Id. at 2068-69.
97. Id. at 2069.
98. Id. at 2074 (Scalia, J., dissenting) (quoting In re 'Agent Orange' Product Liability Litigation, 509 F. Supp. 1241, 1246 (E.D.N.Y. 1984), appeal dismissed, 745 F.2d 161 (2d Cir. 1984)).
99. In Stencel, the Court held it would be unfair to "permit the fortuity of the situs of the alleged negligence to affect the liability of the government..." Stencel, 431 U.S. at 672, but in Feres the Court had evaluated this rationale from the perspective of the serviceman. The Feres Court stated: "It would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value." Feres, 340 U.S. at 143.
decisions in *Brooks* and *Brown* both allowed recovery under the FTCA along with benefits under the VBA and those decisions have not been overturned.

In determining that the three rationales above were too frail to be relied on, Justice Scalia turned to the military discipline rationale. Scalia did not deny that some suits could adversely affect military discipline, but the effect was not so certain or substantial to justify barring this claim.101 Scalia concluded that *Feres* should not be extended to exclude claims alleging civilian negligence.102

One month after *Johnson*, the Court extended *Feres* even further in *United States v. Stanley*.103 James B. Stanley was an Army sergeant in 1958 when he volunteered to participate in a program to test clothing and equipment against chemical warfare. Stanley was sent to the Army's Chemical Warfare Laboratories in Maryland where on four different occasions he was secretly administered doses of LSD. As a result, Stanley has suffered from incoherence, hallucinations, loss of memory, and on one occasion he awoke in the middle of the night and violently beat his wife and children, but he was unable to recall the incident later. Stanley was honorably discharged from the Army in 1969. However, it was not until 1975, when he received a letter from

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102. *Johnson*, 107 S. Ct. at 2075. Justice Scalia offered the following hypothetical:

A serviceman is told by his superior officer to deliver some papers to the local United States Courthouse. As he nears his destination, a wheel on his government vehicle breaks, causing the vehicle to injure him, his daughter (whose class happens to be touring the Courthouse that day) and a United States marshall on duty. Under our case law and federal statutes, the serviceman may not sue the Government (*Feres*); the guard may not sue the Government (because of the exclusivity provision of the Federal Employees' Compensation Act...); the daughter may not sue the Government for the loss of her father's companionship (*Feres*), but may sue the Government for her own injuries (FTCA). The serviceman and the guard may sue the manufacturer of the vehicle, as may the daughter, both for her own injuries and for the loss of her father's companionship. The manufacturer may assert contributory negligence as a defense in any of the suits. Moreover, the manufacturer may implead the Government in the daughter's suit... and in the guard's suit... even though the guard was compensated under a statute that contains an exclusivity provision (FECA). But the manufacturer may not implead the government in the serviceman's suit... even though the serviceman was compensated under a statute that does not contain an exclusivity provision (VBA).

*Id.* at 2074-55.
the Army requesting his participation in a follow-up study of the 1958 'volunteers,' that he learned he had been given LSD by the Army. Stanley filed an administrative claim with the Army which was later denied.

Stanley then filed suit in federal district court under the FTCA alleging negligence in the administration, supervision, and subsequent monitoring of the drug testing program. Following a lengthy district and circuit court history, the Eleventh Circuit Court of Appeals in *Stanley II* held that Stanley had a valid constitutional claim under *Bivens*, and also allowed Stanley to reinstate his previously dismissed FTCA claim against the Government.

The Supreme Court quickly disposed of the court of appeals decision to allow Stanley's FTCA claim, and moved on to the more difficult issues surrounding Stanley's *Bivens* claim. The Court concluded that Stanley's *Bivens* claim was barred based upon the reasoning of *Chappell* and *Johnson*. Surprisingly, Justice Scalia wrote the opinion of the Court only one month after his staunch dissent in *Johnson*.

104. In an unreported opinion, Stanley's original complaint was held to be barred by *Feres* because he was on active duty during the drug testing. Stanley v. CIA, No. 78 Civ. 8141 (S.D. Fla. May 14, 1979). The Fifth Circuit Court of Appeals agreed, but ruled the claim should have been dismissed for lack of subject matter jurisdiction, instead of granting the Government's motion for summary judgment, and the case was remanded. Stanley v. CIA, 639 F.2d 1146 (5th Cir. Unit B 1981). In response to the Government's claim that a remand would be futile, the court stated that Stanley "has at least a colorable constitutional claim based on *Bivens*," and the remand would allow Stanley to amend his complaint. Stanley, 639 F.2d at 1159.

Stanley then added claims against unknown individual federal officers for violation of his constitutional "rights of privacy and bodily integrity, and of the right of an individual to control his mind, his private thoughts and his intellectual process," Stanley v. United States, 549 F. Supp. 329, 331 (S.D. Fla. 1982), and he also alleged a post-discharge claim of negligence. (See Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979), in which the court agreed that post-discharge negligence was a separate tort.)

The district court dismissed the post-discharge claim, but allowed Stanley to amend his complaint a second time prior to ruling on the *Bivens* claim. Stanley's second amended complaint named nine individual defendants and the court held that the claim was valid and not barred by *Chappell* v. *Wallace*, 462 U.S. 296 (1983). Stanley v. United States, 574 F. Supp. 474 (S.D. Fla. 1983).

105. Stanley v. United States, 786 F.2d 1490 (11th Cir. 1986).
106. Id. at 1499.
107. *Stanley*, 107 S. Ct. 3054 (1987). The Court determined that the FTCA claim was not part of the "order appealed from" and therefore the court of appeals had no jurisdiction over the matter. Id. at 3060.
108. Justice Scalia was joined by all members of the Court in dismissing the FTCA
In evaluating the constitutional claim the Court looked to language from *Bivens* which indicated that claims would not be allowed if there were "'special factors counselling hesitation' or an 'explicit congressional declaration' that another remedy is exclusive. . . ."

The Court determined that the same reasoning underlying *Chappell* was applicable to Stanley. The need for "special regulations in relation to military discipline" and Congress' establishment of a "comprehensive internal system of justice to regulate military life" were "special factors" which would bar the claim. Stanley claimed that because the defendants were not his superior officers, and because he was certainly not acting under orders when he was secretly drugged with LSD, the military discipline rationale could not be applied to bar his claim. The Court reverted back to the incident to service test from *Feres*, and concluded that the officer-subordinate relationship was not controlling. The Court also concluded that the lack of a congressional remedy for Stanley was irrelevant especially since "uninvited intrusion into military affairs by the judiciary is inappropriate."

The Court had further extended the *Feres* doctrine to exclude *Bivens* claims against civilian employees of the Government when the injuries arise out of conduct "incident to service."

In a dissenting opinion, Justice O'Connor found the conduct in this case "so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission."

The involuntary experimentation on human beings was outside the bar of *Chappell*, which excludes injuries which are "incident to service," and the defendants could not be insulated from liability.

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111. *Id.* at 3063.
112. *Id.*
113. *Id.* at 3065 (O'Connor, J., dissenting).
114. *Id.* O'Connor agreed with Justice Brennan in concluding that the Government conduct involved here was the same type of conduct which the military had condemned in establishing the Nuremberg Code as the standard of conduct for human experimentation performed by German scientists. *Id.*
In another dissenting opinion, Justice Brennan addressed the underlying reasoning from *Chappell* along with the military discipline rationale. *Chappell* involved a claim against superior officers, but the claim here involved civilian officials, so the concern for obedience was not implicated. The fear of judicial inquiry into military decisionmaking by the majority was also considered to be misapplied by Justice Brennan because it already occurs.

The second factor relied by the Court in *Chappell*, congressional activity in the field, was also deemed by Brennan to be misapplied. Stanley had no recourse to use the military justice system because the defendants were civilians and he was no longer in the service. The VBA also provided no benefits to Stanley because it does not cover the injury Stanley incurred. Justice Brennan concluded that “the existence of a constitutional provision authorizing Congress to make intramilitary rules does not answer the question whether civilian federal officials are immune from damages in actions arising from service-connected injury.” The mere existence of the authority to act in an area does not preclude a *Bivens* action, otherwise, “there would be no *Bivens*.”

**IV. ANALYSIS**

The decisions in *Johnson* and *Stanley* have extended the *Feres* doctrine to exclude servicemen's claims for negligence and intentional constitutional violations against civilian federal employees. This section will illustrate how these decisions are inconsistent with the reasoning developed in the *Feres* line of cases, and will also show how the lower courts have applied a different analysis in allowing servicemen's claims.

In *Atkinson v. United States*, the Court of Appeals for the Ninth Circuit allowed an FTCA claim by a servicewoman that negligent medical malpractice had caused her to deliver a stillborn child and to suffer physical and emotional injuries of her

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115. See supra text accompanying notes 68-77.
116. *Stanley*, 107 S. Ct. at 3075 (Brennan, J., dissenting). Brennan reiterated the instances in which the judiciary is already involved with military decisions and actions. *See also Johnson*, 107 S. Ct. at 2070 (Scalia, J., dissenting).
118. *Id.*
119. *Id.*
120. 804 F.2d 561 (9th Cir. 1986).
own. The court determined that, subsequent to Shearer, it would bar the claim only if it implicated the military discipline rationale. The court rejected the contention that merely because Atkinson was on-duty and on-base the claim should be barred per se. "[I]n each case we determine the effect of a suit on military decisions or discipline, we cannot rely on any particular factor or factors as a 'substitute for analysis' of whether the suit would threaten military discipline." The court determined that prenatal care could hardly be considered distinctively military in character and judicial review would not involve a "decision requiring military expertise or judgment..." The court held that because there was no connection between the medical treatment sought and the military discipline interest protected by Feres the claim should not be barred.

The Court of Appeals for the Eighth Circuit has also outlined a test to determine if an activity is incident to service therefore barring any injury claim. In Brown v. United States, a black National Guard member was subjected to racial threats and was the victim of a mock hanging by fellow servicemen which led to severe depression and a suicide attempt causing permanent dam-

121. Id. During her pregnancy, Atkinson had gone to the Army medical center on two occasions complaining of blurred vision, dizziness, nausea and hypertension, but each time she was merely told to go home. She was eventually hospitalized for pre-eclampsia, a condition associated with kidney failure, high blood pressure, stroke, and premature birth. Id. at 562.
122. Id. at 563-64.
123. Id. at 564. The 'per se' prohibition, or 'but for' rule, has been a very effective means of barring claims when the serviceman is injured while on active duty and subject to military control. The injury is found to be incident to service because 'but for' the serviceman's active duty status he would not have been injured. See, e.g., Henninger v. United States, 473 F.2d 814 (9th Cir. 1973), cert. denied, 414 U.S. 819 (1973), in which a sailor's claim for negligence was denied even though the government admitted a pre-discharge operation was performed negligently. The court held that Feres was an absolute bar when a serviceman is injured "'while on active duty and not on furlough ... due to the negligence of others in the Armed Forces.'" Id. at 816.
See also Harten v. Coons, 502 F.2d 1363 (10th Cir. 1974), cert. denied, 420 U.S. 963 (1975), in which a serviceman and his wife sued for the cost of raising their child who was conceived after the serviceman had undergone a vasectomy at a military hospital. The court rejected the claim, and indicated that 'but for' his active duty status the serviceman would not have been admitted to the hospital.
124. 804 F.2d at 565.
125. Id.
126. 739 F.2d 362 (8th Cir. 1984).
age. Although the court held that the Feres doctrine barred the FTCA claim because it would involve judicial inquiry into military decisionmaking, it allowed claims against participants in the hanging action because those claims would not involve the relationship between a serviceman and his superiors.

The court developed a two-part test to evaluate each claim instead of relying solely on the active duty status of the claimant. The court asked whether the tortious activity “served some military purpose of mission” and whether the trial would question an interaction between officer and subordinate.\(^ {127}\)

In Downes v. United States,\(^ {128}\) a serviceman was struck by a military vehicle while leaving his base on a pass. In evaluating the claim the court determined that the question to ask was whether the serviceman was “performing duties of such a character as to undermine traditional concepts of military discipline if he were permitted to maintain a civil suit for injuries resulting therefrom.”\(^ {129}\) The court allowed the claim rejecting the notion that Feres bars all claims for active duty servicemen.

The decisions in Atkinson, Brown, and Downes indicate that it is still possible to uphold military discipline without resorting to an absolute prohibition against claims by servicemen.\(^ {130}\) In Johnson and Stanley a primary factor in the decisions was that the injury occurred while the serviceman was on active duty. Because the Court had indicated that military discipline was the primary factor to be considered\(^ {131}\) it should not have fallen back on the ‘but for’ prohibition.\(^ {132}\) Shearer had determined that each case

\(^{127}\) Id. at 367-69.


\(^{129}\) Id. at 628-29.

\(^{130}\) For other cases which have allowed claims by active duty servicemen see, e.g., Roush v. United States, 752 F.2d 1460 (9th Cir. 1985) (Marine injured by bouncer at enlisted men’s club); Cooper v. Perkiomen Airways, Ltd., 609 F. Supp. 969 (E.D. Pa. 1985) (serviceman killed in airplane crash after reassignment); Parker v. United States, 611 F.2d 1007 (5th Cir. 1980) (serviceman on leave killed in automobile collision with military vehicle).

\(^{131}\) See supra text accompanying notes 78-84.

\(^{132}\) The ‘but for’ rule has also been an effective means to bar claims brought by family members because their claim had its ‘genesis’ in a claim by the serviceman. See, e.g., Hinkie v. United States, 715 F.2d 96 (3d Cir. 1983); Monaco v. United States, 661 F.2d 129 (9th Cir. 1981), cert. denied, 456 U.S. 989 (1982); Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983). But see In re ‘Agent Orange’ Product Liability Litigation, 580 F. Supp. 1242 (E.D.N.Y. 1984), appeal dismissed, 745 F.2d 161 (2d Cir. 1984) in which the claims of Vietnam War veterans’ families were not barred by Feres.
FERES DOCTRINE

must be evaluated on its own facts and that there were no bright line rules to be followed.

The Court in Johnson and Stanley should have evaluated the effect on military discipline more thoroughly as the lower courts have done in Atkinson, Brown, and Downes. In Johnson, the Court stated: "Suits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word."133 In Stanley, the Court stated: "[T]he 'incident to service' test ... provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters."134 These statements are evidence that the Court will merely state that a claim could disrupt military discipline, without doing any level of analysis. Radar control of aircraft does not require special military expertise or judgment, and the surreptitious administration of drugs by civilian federal officials does not implicate an interaction between a soldier and a superior officer. These are facts the Court should have taken into account instead of using the 'but for' incident to service test.

The military discipline rationale was the primary factor relied on by the Court in denying the claims in Johnson and Stanley even though both cases involved actions by civilian federal employees. The military discipline rationale is based on "the peculiar and special relationships of the soldier to his superiors,"135 and this relationship is not implicated when the suit is against civilian federal employees. Merely because an injury is incident to service does not mean a claim based on that injury will have an adverse effect on military discipline.136

To deny the claims of servicemen injured while on active duty because it would require judicial inquiry into the military has also been undermined by several exceptions. The exceptions include: suits for post-discharge negligence;137 injuries occurring

133. Johnson, 107 S. Ct. at 2069.
134. Stanley, 107 S. Ct. at 3063.
135. Brown, 380 U.S. at 112.
136. See supra text accompanying notes 120-130.
while off-duty;\textsuperscript{138} civilian claims of military negligence;\textsuperscript{139} and claims by family members.\textsuperscript{140} The claims involved in Johnson and Stanley would not require any more judicial inquiry than is already allowed. This is especially true when the action complained of involves civilian federal employees, not implicating the relationship with superior officers.

The Court in Chappell stated that “compliance with military procedures and orders must be virtually reflex with no time for debate or reflection.”\textsuperscript{141} In direct contrast with that dictum from Chappell is a statement from United States v. Calley:\textsuperscript{142} “The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person.” Because Johnson and Stanley were not acting directly upon orders from superiors when the injuries occurred, military obedience is not implicated. Johnson’s death was a result of directions by an FAA flight controller, and Stanley’s injuries are a result of the secret administration of LSD by civilian doctors. Military discipline is not implicated because it was civilian federal officials and not superior officers who were involved. In Stanley, Justice Scalia stated: “Stanley underestimates the degree of disruption that would be caused by the rule he proposes.”\textsuperscript{143} This reasoning is not convincing because there are already exceptions allowing judicial inquiry which would be no less disruptive than if it were allowed for Stanley.

The Court in Johnson also relied on the federal relationship rationale, but that was deemed no longer controlling by the Court in Shearer.\textsuperscript{144} The Court had also limited this rationale in Muniz\textsuperscript{145} by allowing federal prisoners to sue for injuries due to the negligence of prison employees. The Court has relegated military servicemen to a lesser position than federal prisoners. This could just as adversely effect military discipline as allowing the claim.

\textsuperscript{138} See, e.g., Brooks v. United States, 337 U.S. 49 (1949); Parker v. United Staes, 611 F.2d 1007 (5th Cir. 1980).
\textsuperscript{141} Chappell, 462 U.S. at 300.
\textsuperscript{142} 22 C.M.A. 534, 541, 48 C.M.R. 19, 26 (1973).
\textsuperscript{143} Stanley, 107 S. Ct. at 3063.
\textsuperscript{144} See supra text accompanying notes 83 and 84.
\textsuperscript{145} 374 U.S. 150 (1963).
When a serviceman, who has volunteered to put his life on the line for this country, is aware that a federal prisoner has greater access to the federal courts for negligently inflicted injuries it will certainly not be a morale builder.

In *Johnson*, the Court had also determined that the VBA placed an upper limit on recovery. Although *Stencel* indicated that the VBA placed an upper limit on government liability, the Court in *Shearer* had indicated that the availability of veterans benefits was not a controlling factor. The Court had previously allowed claims under the FTCA along with veterans benefits and those cases have not been overturned. The Court has also weakened the reasoning from *Stencel* by allowing a third party to seek indemnity from the government even when a controlling statute exclusively provided for compensation.

In *Stanley*, the Court also relied on congressional authority in the field in barring Stanley’s claim. It was irrelevant to the Court that Stanley had no remedy available because it was up to Congress and not to the Court. The Court’s decision not only deprives Stanley of damages for his injuries, but it also does nothing to deter the intentional violation of a serviceman’s rights from reoccurring. A *Bivens* action is the precise remedy for

146. See supra text accompanying notes 62-67.
147. 473 U.S. at 58 n.4.
149. See *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983), in which a civilian federal employee was killed in an airplane crash. Death benefits were paid under the Federal Employees Compensation Act (FECA) and a wrongful death suit was brought against Lockheed, the manufacturer of the plane. Lockheed then impleaded the United States under the FTCA and the Court allowed the claim. The Court rejected the Government’s contention that the claim was barred by FECA’s exclusive liability provision because the provision was directed at employees and their families.

For a discussion of the uncertainty of collecting veterans benefits, see Note, supra note 8, at 1106-08.

150. Although Congress provided a compensation scheme, the Government had intentionally withheld information from Stanley and he was unable to meet the VBA requirements to show service connection that a chronic disease became manifest during active service or within one year from discharge. *Pensions, Bonuses, and Veterans’ Relief*, 38 C.F.R. §§ 3.307, 3.309 (1986).

151. The Court defers to the authority of Congress to make intramilitary rules, but Congress was also intentionally misled by the CIA and the Army regarding drug testing programs. See S. Rep., supra note 1, at 394 which states:

There were no attempts to secure approval for the most controversial aspects of these programs from the executive branch or Congress.... It was deemed imper-
intentional constitutional violations by federal officials, and Congress' authority in the field does not bar such an action.\textsuperscript{152}

In \textit{Stanley}, the Court defers to Congress' authority over the military establishment as authorized by the Constitution.\textsuperscript{153} Congress has created an internal justice system within the military and also enacted the VBA, but neither avenue provides a remedy for Stanley. Even though the Army has acknowledged that it violated the rights of soldiers,\textsuperscript{154} Stanley and others go uncompensated for their injuries merely because they were injured incident to service.\textsuperscript{155}

This Comment does not argue for the complete abolishment of the \textit{Feres} doctrine, but the \textit{Johnson} and \textit{Stanley} decisions have extended it far beyond reasonable boundaries. The Court should refrain from a mechanical application of the doctrine. The incident to service test should be the starting point and not the determining factor for each claim. As the doctrine has evolved through \textit{Chappell} and \textit{Shearer} the primary factor to be considered should be the effect of a claim will have on military discipline.\textsuperscript{156}

\textsuperscript{152} \textit{Stanley}, 107 S. Ct. at 3074 (Brennan, J., dissenting).

The Court has again placed servicemen in a lesser position than federal prisoners. In \textit{Carlson v. Green}, 446 U.S. 14 (1980), the Court held federal prisoners were not precluded from a \textit{Bivens} remedy even though they might also be compensated under the FTCA. The result in \textit{Stanley} is therefore inconsistent because he is denied a \textit{Bivens} remedy because Congress has provided a compensation scheme for veterans.

\textsuperscript{153} U.S. C(JPS6)ONST.(PS8) art. I, § 8, Cl. 14.

\textsuperscript{154} See supra note 2.

\textsuperscript{155} See, e.g., \textit{Jaffee v. United States}, 663 F.2d 1226 (3d Cir. 1981), \textit{cert. denied}, 456 U.S. 1972 (1982) (Action brought against military and civilian officials for damages resulting from exposure to nuclear explosions. The court did not allow a \textit{Bivens} action because the injury was incident to service); \textit{Kohn v. United States}, 663 F.2d 922, 925 (2d Cir. 1981) (\textit{Feres} doctrine "applies to both negligent and intentional torts"); \textit{Lewis v. United States}, 663 F.2d 889 (9th Cir. 1981) (\textit{Feres} doctrine bars incident to service injuries for intentional as well as negligent acts); \textit{Nagy v. United States}, 471 F. Supp. 383 (D.D.C. 1979) (the court rejected a fifth amendment \textit{Bivens} claim based upon LSD experiments without informed consent and inadequate follow-up); \textit{Misko v. United States}, 453 F. Supp. 513 (D.D.C. 1978) (the court rejected a fifth amendment \textit{Bivens} claim based upon army psychiatrists administering drugs to the plaintiff against his will and without justification).

\textsuperscript{156} The effect on military discipline should be evaluated by a thorough analysis as performed in \textit{Atkinson, Brown and Downes}. See supra text accompanying notes 120-30. See \textit{Johnson}, 107 S. Ct. at 2074 (Scalia, J., dissenting), for a discussion indicating that not allowing a claim could also adversely affect military discipline.
discipline is only implicated when "the special and peculiar relationship of the soldier to his superiors" would become the subject of judicial inquiry. Because judicial inquiry into military decisionmaking already occurs this factor alone cannot be dispositive to a claim. The VBA should not be considered as an upper limit on Government liability based on Brooks and Shearer. When a serviceman's constitutional rights are violated by civilian federal officials a Bivens remedy must be available, otherwise the activity will continue undeterred. In Stanley, not only does the activity go undeterred, but Stanley is without a remedy because Congress has not provided one. The Feres doctrine should not be broadened to exclude claims based on negligent acts or intentional constitutional violations by civilian federal officials because there is no certainty military discipline will be adversely effected. The decisions in Johnson and Stanley have not clarified the reasoning of Feres and the Court and the doctrine will continue to come under attack.

V. CONCLUSION

The Feres doctrine as it now stands will effectively bar almost all claims by service members injured while on active duty even when it is a civilian federal official who causes the injury. The Johnson and Stanley decisions are inconsistent with the Chappell and Shearer decisions because they revert back to the incident to service test and rely on the federal relationship rationale and the veterans benefits rationale, which were both previously discredited. The primary factor to be evaluated is the effect a suit will have on military discipline, but this is only implicated when a subordinate-superior officer relationship is involved and not when the conduct complained of is by non-military members. The lower courts will continue to decide cases inconsistently because of the Supreme Court's confusion as to the proper rationale and reasoning to be applied. As an example, it is difficult to reconcile Justice Scalia's dissenting opinion in Johnson which condemned Feres with his majority opinion in Stanley which extended Feres.

159. There has been recent action in Congress to allow service members to sue for medical or dental malpractice while on active duty. See H.R. Rep. No. 288, 99th Cong., 1st Sess. (1985).
There may be some hope for change in the near future since both cases involved 5-4 decisions and the original Feres decision was unanimous. The Feres doctrine was not developed based on claims against civilian federal officials. A claim should be denied only when military discipline will be adversely effected, and after a proper analysis the Court should have determined that the effect is not so certain to bar the claims. The courts in Atkinson, Brown, and Downes developed tests which more thoroughly analyze a claim, and the Court should adopt that type of analysis instead of relying on the incident to service test.

Martin J. Kenworthy
I. INTRODUCTION

The subjects of obscenity and pornography have invoked a great deal of concern, legislation, and litigation over the past thirty years. While many individuals find sexually-explicit films and publications offensive, others find that these materials are a valuable source of entertainment. In many communities throughout the United States there is a persistent and strong outcry, backed by political pressure, to close adult bookstores and similar establishments. State and local legislative bodies over the years have frequently responded to these concerns and pressures by enacting a variety of statutes aimed at controlling or eliminating establishments that disseminate sexually-explicit materials. However, in many cases these regulations have been subsequently struck down as being unconstitutional infringements upon protected first amendment liberties. Nevertheless, citizens and legislatures continue to persist in their pursuit of means which will allow the government to address what they perceive to be the undesirable influence and effect yielded by the “purveyor of obscenity.” Perhaps the most potent and broad-based weapons emerging today to combat “obscenity” and other crimes are Racketeer Influenced and Corrupt Organizations (RICO) Statutes.

The federal RICO statute prescribes criminal sanctions and/or the imposition of severe civil penalties against persons or entities who engage in “a pattern of racketeering activity”—defined as engaging in at least two incidents of racketeering activity within a ten year period. “Racketeering activity” means any act or threat involving one of thirty-two predicate offenses. State legislatures, like Congress, have generally included the offense of “dealing in obscene matter” as one of the proscribed predicate offenses.

If a "pattern of racketeering activity" can be established, the criminal sanctions or civil remedies provided by RICO statutes typically authorize the seizure and subsequent forfeiture of assets acquired with funds derived from the illegal activity. Additional civil remedies authorized by RICO statutes commonly include provisions which would allow a court to order a business license revoked, or to enjoin a defendant from engaging in a similar type of conduct in the future.

The scope of RICO's sanctions and civil remedies as they apply to the predicate offense of obscenity bring with them concerns over the possible infringement of rights guaranteed by the first amendment. Specifically, these rights include the right to exercise free speech and freedom of the press. This potential conflict between first amendment protections and RICO actions which are founded upon the predicate offense of obscenity is by no means merely an academic issue. RICO is presently being used as a tool to seize the assets of adult bookstores and its use within this context is receiving increased focus. The Attorney General's Commission on Pornography supports and recommends the following:

[T]he use of RICO [is supported] as a method of requiring many of those convicted of multiple and substantial obscenity violations to disgorge the profits from their enterprises. Whether in this form or another, methods of attacking profits, or the assets purchased with those profits, seem likely to be more effective financial deterrence than substantially smaller fines. 4

More specifically, the Commission recommended that the Department of Justice and United States Attorneys use RICO as an avenue for prosecuting major producers and distributors of obscene material. 5 The Commission also recommended the enactment of RICO statutes by state legislatures which include obscenity as a predicate offense. 6 Several states do in fact presently have RICO statutes patterned after the federal RICO statute. Of the eleven states 7 that currently have RICO type

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5. Id. at 437.
6. Id. at 435.
7. CONN. GEN. STAT. ANN. § 53-393 to -403 (1982); FLA. STAT. ANN. § 895.01-.09 (West Supp. 1987); GA. CODE ANN. § 16-14-1 to -15 (1984); IDAHO CODE § 18-7801 to -7805 (1987);
RICO statutes, nine of these states specify that the dissemination of obscenity is a predicate offense which constitutes racketeering activity.

This Comment will explore the inherent conflict between RICO actions founded upon the predicate offense of obscenity and the first amendment. The purpose and history of RICO legislation will be explored, the scope of the first amendment will be reviewed, and the constitutional definition of obscenity, as well as the procedural requirements associated with obscenity determinations, will be discussed. The first amendment prohibitions against prior restraints, overbroad statutes, and the judicially imposed requirement of least restrictive means will also be addressed within the context of RICO legislation.

II. RICO'S LEGISLATIVE HISTORY

Congress enacted the Organized Crime Control Act of 1970 in an attempt to eradicate organized crime in the United States. The means Congress authorized to carry out this legislative purpose included strengthening the legal tools in the evidence-gathering process, establishing new penal prohibitions, and providing enhanced sanctions and new remedies. Many of these new tools for combatting organized crime were embodied in Title IX of the Act, which is known as the Racketeer Influenced and Corrupt Organizations Act (RICO). RICO was enacted "to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." In addition, Congress declared that its provisions were to be liberally construed to

IND. CODE ANN. § 34-45-6-1, 2 (West 1986); MISS. CODE ANN. § 97-43-1, -3, -5, -7, -9, -11 (Supp. 1987); N.C. GEN. STAT. § 75D-1 to -14 (Supp. 1986); N.D. CENT. CODE § 12.1-06.1 to -06.1-07 (1985); OR. REV. STAT. ANN. § 166.715, .720, .725, .730, .735 (1985); UTAH CODE ANN. § 76-10-1601 to -1609 (Supp. 1987).


effectuate the Act's remedial purposes. The Act prescribes criminal sanctions and/or the imposition of civil penalties against persons or entities who engage in a pattern of proscribed racketeering activity.

Under RICO, the resulting criminal sanctions and civil liability are derivative in the sense that they are imposed for engaging in "a pattern of racketeering activity." Racketeering activity is defined as any act or threat involving one of thirty-two enumerated predicate offenses. Eight of these predicate offenses are criminal offenses under state law, whereas the remaining twenty-four predicate offenses are criminal violations under federal law.

A pattern of racketeering activity is defined as engaging in at least two incidents of racketeering activity within a ten year period. The federal RICO statute prohibits persons from engaging in conspiring to engage in a pattern of racketeering activity and from receiving or conspiring to receive income from such activity and subsequently using or investing that income to acquire any interest in an enterprise which affects interstate commerce. Funds derived from a pattern of racketeering activity cannot be used to acquire or maintain any interest in, or control of, any enterprise affecting interstate commerce.

A defendant must have engaged in "a pattern of racketeering activity" to be held criminally liable or subject to civil remedies under RICO. However, this does not mean that a defendant must have been convicted of a predicate offense. In a criminal prosecution under RICO, the prosecutor must prove beyond a reasonable doubt the existence of a "pattern of racketeering activity." In contrast, the plaintiff who seeks a civil remedy under RICO need only establish by a preponderance of the evidence that a pattern of racketeering activity in fact existed.

The civil remedies authorized by RICO can be initiated by the federal government or by individuals who sustain injuries to

14. 18 U.S.C. § 1963(a) (1982) (The criminal penalties for a violation of § 1962 are maximum fines of $25,000, imprisonment for a maximum of 20 years, or both, and forfeiture of any interest or right acquired or maintained through a pattern of racketeering activity).
15. 18 U.S.C. § 1964(a), 1964(b) (1982) (Available civil remedies include divestiture, permanent injunctions, temporary injunctions, and dissolution or reorganization of the enterprise).
their business or property as a result of a RICO violation. The district courts of the United States have jurisdiction to prevent and restrain violations of RICO by issuing orders which include, but are not limited to, ordering any person to divest himself of any interest in an enterprise, imposing reasonable restrictions on the future activities or investments of a person, or ordering dissolution or reorganization of an enterprise. In the case of a private party plaintiff, RICO authorizes treble damages and an award of attorney's fees.

The predicate offenses that were originally enumerated in RICO concededly do not conflict with any of the freedoms guaranteed by the United States Constitution. However, Congress amended the statute to include as a predicate offense "any act ... dealing in obscene matter ... which is chargeable under State law and punishable by imprisonment for more than one year." The statute was further amended to include "any act which is indictable under ... title 18, United States Code ... sections 1461-1465 (relating to obscene matter)." Unlike RICO's original predicate offenses, the addition of obscenity to the list of predicate offenses is arguably not in accord with the first amendment. The first amendment prohibits the government from abridging the exercise of free speech and guarantees freedom of the press. These fundamental rights are safeguarded through prohibitions against prior restraints and prohibitions against governmental actions which "chill" the exercise of these rights.

III. FREEDOM OF SPEECH

Freedom of speech and freedom of the press are protected by the first amendment from abridgment by Congress. These freedoms are among the fundamental personal rights and liberties that are afforded protection by the due process clause of the fourteenth amendment. Accordingly, state governments, like Congress, may not impair the exercise of these fundamental freedoms. A fundamental right is a principle of justice that is rooted

in the traditions and consciousness of our people. It follows that the abolishment or curtailment of such a right would offend our basic precepts of liberty and justice. 25

All speech is presumptively protected from governmental infringement by the first amendment. This constitutional guarantee of freedom of expression embraces the publication of books as well as their circulation and distribution. 26 Likewise, the first amendment protects one's right to hear and receive information. 27 Film and other media of expression, like books, fall within the scope of materials afforded first amendment guarantees. 28 The purpose of this protection is to safeguard all ideas, even the unorthodox, the controversial, and the hateful. 29 It follows that the government has no power to restrict expression because of its message, its ideas, its subject matter or its content, 30 since persons within the United States are guaranteed the right to express any thought free from government censorship. 31 The essence of this forbidden censorship is content control. 32 Consistent with first amendment guarantees, the inherent worth of speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether that source is a corporation, association, union, or individual. 33

An infringement upon first amendment freedoms need not be accomplished by an express or intentional act. Unconstitutional suppression of speech can be found not only when government overtly enjoins speech, but also where ostensibly neutral, regulatory means are used, such as through zoning or taxation regulations. 34 For example, when a city licenses a bookstore, adult

31. Id. at 96.
32. Id.
or otherwise, "it is licensing an activity protected by the First Amendment, and as a result the power of the city is more limited than when the city licenses activities which do not have First Amendment protection, such as the business of selling liquor or running a massage parlor." Thus, although the city is not overtly infringing upon freedom of speech, a neutral, regulatory act such as licensing may nonetheless constitute an infringement.

A. Protected Speech v. Obscenity

Expressive materials are provided broad protection by the first amendment. However, some speech, including obscene materials, fall outside the coverage of the first amendment. The reason for excluding obscenity from first amendment protections is that this speech has been deemed to be void of any serious social value. In other words, obscenity is not protected speech since this type of speech does not convey or advance "ideas." Obscene materials are not considered speech at all, or at least they are not considered to be the kind of speech that advances the principles of the first amendment. Accordingly, these materials may be regulated by the government.

In order to justify the regulation of obscene materials, the legislature need only establish that there is a "rational basis" between the interest sought to be advanced by the regulation and the means by which the regulation is imposed. This "rational basis" standard affords great deference to legislative bodies. For example, even though there is no conclusive proof that a connection between antisocial behavior and obscene material exists, in an effort to control such behavior and material, a legislature, before enacting such legislation, would be required to simply determine that such a connection does or might exist. As the Supreme Court noted in *Paris Adult Theater v. Slaton*,


36. The standard of review for determining whether material is obscene has been broadened to limit that which lacks serious literary, artistic, political or scientific value. (See infra note 44) from a requirement that the material be "utterly without redeeming social value" as established in Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966).


38. Id.

39. Id. at 60.

40. Id.
The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.\textsuperscript{41}

The regulation of obscene materials is a legitimate governmental interest.\textsuperscript{42} However, the definition employed by the government and the means used by the government to distinguish obscene materials from those which are protected is a matter of constitutional law. Since the ability to regulate obscenity does not mean that anything that certain segments of society or the legislature deems to be obscene may be regulated, the definition of what is “obscene” cannot be left to the seizing agents.\textsuperscript{43} In order for materials to be regarded as obscene all of the following conditions must be examined:

[W]hether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest . . . ;

[W]hether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state [or federal] law; and

[W]hether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.\textsuperscript{44}

This three part test which was set forth in \textit{Miller v. California}\textsuperscript{45} provides a constitutional framework for defining obscenity and establishes the standard courts must use when deciding whether first amendment protections apply to the materials in question. If all three conditions of the test are not met, then the material is protected and within the scope of the first amendment.

Even though the application of contemporary community standards is an integral part of the \textit{Miller} test, deference to community standards is not without limitations. In a unanimous

\begin{footnotes}
\item[41] \textit{Id.} at 63.
\item[42] \textit{See supra} note 29.
\end{footnotes}
decision, the Supreme Court of the United States reversed a Georgia conviction for distributing obscene materials based upon "contemporary community standards." The material at issue was the Hollywood produced film \textit{Carnal Knowledge}. The Supreme Court, in an opinion written by Mr. Justice Rehnquist, held that the film was not obscene and that it would be a serious misreading of \textit{Miller} to conclude that juries have unbridled discretion in determining what is "patently offensive." This holding indicates that there are limits to what a jury or court can find "patently offensive" or to be without "serious literary, artistic, political, or scientific value."

\textbf{B. The Standard of Review}

The freedoms guaranteed by the first amendment have been closely guarded by the Supreme Court of the United States. The "First Amendment needs breathing space and statutes attempting to restrict or burden the exercise of First Amendment [freedoms] must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." 

When addressing the standard of review the courts will apply, it is important to recognize that it is not the type of regulation that immunizes governmental action from the first amendment. Rather, when first amendment freedoms are involved, the Court will look to the substance of the regulation, recognizing that informal censorship may inhibit the circulation of publications as much as direct censorship. When deciding constitutional questions in this area, a statute must be tested in light of its operation and effect. Therefore, the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed. It has been held that:

\begin{itemize}
\item 47. \textit{Id.} at 160.
\item 49. \textit{See supra} note 29.
\end{itemize}
[t]he fundamental freedoms of speech and of press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.58

The Supreme Court also discussed deference to legislative judgment in *Landmark Communications, Inc. v. Virginia.*54 The Court held that respect for legislative judgment cannot limit judicial inquiry when first amendment rights are at stake:

A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether ... the legislation is consonant with the Constitution. Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.55

Under the fourteenth amendment, a state is not free to adopt whatever procedures it pleases for dealing with obscenity without regard for the possible consequences such procedures may have on constitutionally protected speech.56 For example, mass seizures of presumptively-protected materials cannot be carried out without taking safeguards to protect legitimate forms of expression.57 It is no answer to say that obscene books are contraband, and that consequently the standards governing searches and seizures of allegedly obscene books should not differ from those applied to narcotics, gambling paraphernalia and other contraband.58 Similarly, the regulation of a communicative activity, such as the exhibition of motion pictures, must adhere to more narrowly-drawn procedures than is necessary for the abatement of an ordinary nuisance,59 and the burden of supporting an injunction against a future exhibition is even heavier than the burden of

53. See supra note 29.
55. Id. at 844.
57. Id. at 738.
justifying the imposition of a criminal sanction for a past communication.60

Prior restraints of indefinite duration on the exhibition of materials that have not been finally adjudicated to be obscene are particularly onerous. Presumably, an exhibitor would be required to obey such an order pending review of its merits and would be subject to contempt proceedings for violating such an order even if the materials were ultimately found not to be obscene. Imposing such prior restraints would be more objectionable than the threat of criminal sanctions after a film has been exhibited since nonobscenity would be a defense to any criminal prosecution.61 Inhibition as well as prohibition against the exercise of precious first amendment rights is a power denied to government.62

Although drafted in content-neutral terms, RICO statutes impinge upon protected first amendment freedoms. This is due to the fact that the wide scope of RICO sanctions and civil remedies may deter the exercise of first amendment freedoms. In particular, RICO's civil remedies are especially burdensome in that injunctive actions carry the burden of the possibility of contempt irrespective of the fact that the basis of the injunctive order may have been erroneous.

While the control of obscenity is a legitimate governmental interest, it is clear that the nature of the right infringed upon, rather than the asserted governmental interest, controls the standard of review.

C. Statutory Vagueness and the Chilling Effect63

When prosecuting an individual or entity for an obscenity offense, the government need not prove that the defendant had knowledge that the materials were legally obscene.64 However, a person cannot be prosecuted for an obscenity offense unless it

60. Id. at 316.
61. Id.
can be shown that he had knowledge of the general contents, character, and nature of the materials involved. If the law were otherwise, booksellers and others would avoid stocking anything even slightly sexually oriented, with which they had not completely familiarized themselves, for fear of being prosecuted.\(^{65}\)

In contrast, a state may dispense with the element of scienter when prosecuting or regulating such evils as impure foods and drugs. This is because there is no constitutional inhibition against making the distributors of food the strictest censors of their merchandise. On the other hand, the constitutional guarantees of freedom of speech and of the press stand in the way of imposing a similar standard on the bookseller.\(^{66}\) If the bookseller is criminally liable without knowledge of the contents, he will tend to stock only those books he has inspected. The result would be a form of state-compelled self-censorship on the part of booksellers, and the state will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature.\(^{67}\) This censorship would affect the whole public since the distribution of all books, both obscene and not obscene, would be impeded.\(^{68}\)

It has been held that the possible harm to society by permitting some speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances would be left to fester because of the inhibitory effects of overly broad statutes.\(^{69}\)

A statute that is held to be overbroad is in effect declared to be facially unconstitutional and unenforceable. The Supreme Court has repeatedly noted that this “remedy” should only be invoked when absolutely necessary. This is due to the fact that a declaration of facial unconstitutionality has by definition particularly broad application. Three requirements must be met before a statute can be declared to be facially unconstitutional.\(^{70}\) First, the statute must bring within its sweep expression protected by the first amendment. Second, the statute must not be readily subject to a narrowing construction by the state courts which


\(^{66}\) Smith v. California, 361 U.S. at 152.

\(^{67}\) Id. at 153.

\(^{68}\) Id. at 154.

\(^{69}\) See Broadrick, 413 U.S. at 612.

\(^{70}\) Id. at 601.
might cure the unconstitutional deficiency. Third, the deterrent effect on legitimate expression must be both real and substantial.

In Interstate Circuit, Inc. v. City of Dallas,\(^{71}\) the constitutionality of a city ordinance which authorized the classification of motion pictures by a city-established motion picture board was challenged. The Court struck down the the ordinance as unconstitutionally vague. A statute is void for vagueness and is overbroad if its prohibitions are not clearly defined\(^{72}\) or if it does not aim specifically at evils within its allowable area of control, but sweeps within its ambit activities that constitute an exercise of first amendment rights.\(^{73}\) The Court held that the evils associated with statutory vagueness were not rendered less objectionable in Interstate merely because the regulation of expression was one of classification rather than one of suppression.

Vague and overbroad statutes have a "chilling effect" in that they provide enforcement personnel with unbridled discretion as to their enforcement.\(^{74}\) It is for this reason that the traditional requirements of standing have been somewhat relaxed when a first amendment overbreadth challenge is asserted. In Freedman v. Maryland\(^{75}\) the Supreme Court of the United States held that:

> [i]n the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license. "One who might have had a license for the asking may ... call into question the whole scheme of licensing when he is prosecuted for failure to procure it." Standing is recognized in such cases because of the "... danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application."\(^{76}\)

RICO statutes based on the predicate offense of obscenity are arguably overbroad and void for vagueness. "Incorporation of the statutory definition of obscenity—usually a listing of forbidden sexual acts or acrobatics—merely begs the question, for few of

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\(^{71}\) 390 U.S. 676, 688 (1968).
\(^{73}\) Thornhill v. Alabama, 310 U.S. 88, 97 (1940).
\(^{74}\) Coates v. Cincinnati, 402 U.S. 611, 612 (1971).
\(^{75}\) 380 U.S. 51 (1965).
\(^{76}\) Id. at 56 (citations omitted).
us have the omniscience to determine, in advance of a final judicial ruling, whether material is legally obscene." Moreover, it is possible that a film containing many of the acts listed in the statute may eventually be determined not to be obscene, since the work must be taken as a whole, and since state law cannot define the "contemporary community standards" that must be applied by the factfinder. A seizure of materials or an injunction that forbids the showing of any materials portraying the particular acts enumerated in the obscenity statute suppresses future materials because past materials have been deemed offensive.

**D. Prior Restraint**

The presumption that expressive materials are protected by the first amendment places constitutional limitations on the scope of governmental actions affecting the availability or dissemination of these materials. These limitations focus upon the procedures surrounding the initiation of a prosecution involving obscenity issues, or an action to enjoin the dissemination of expressive materials, including searches and seizures. The purpose of these procedural requirements is to prevent suppression of expressive materials prior to a judicial determination of obscenity.

The seizing of a film that is being exhibited to the general public, presents essentially the same restraint on expression as the seizure of all the books in a bookstore. A prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness as such applies to search warrant requirements under the fourth amendment. The issue is what is reasonable in light of the values of freedom of expression. State regulation of obscenity must conform to procedures that insure against the curtailment of constitutionally-protected expression. This is difficult since protected and unprotected materials are often separated by only a dim and uncertain line. The seizure of books prior to an adversary determination of their obscenity presents the danger of abridgment of the

77. Universal Amusement Co. v. Vance, 587 F.2d 159, 169 (5th Cir. 1978).
78. Id.
80. Id.
public's right to have unobstructed access to nonobscene books.\textsuperscript{82} Even though particular speech may be outside the parameters of the first amendment and thus punishable criminally, this does not provide any basis for enjoining the speech before its occurrence.\textsuperscript{83}

It has been held by the Supreme Court that "prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights"\textsuperscript{84} and that any system which allows prior restraints of expression comes to the Court bearing a heavy presumption against its constitutional validity.\textsuperscript{85} Nevertheless, a state may constitutionally impose a prior restraint, such as an injunction against the future dissemination of obscenity, under certain specified circumstances. In these situations, an injunction will be issued only after the procedural guidelines enumerated in \textit{Freedman v. Maryland}\textsuperscript{86} have been met. The \textit{Freedman} holding established that before unprotected speech can be enjoined or suppressed: 1) the censor must bear the burden of proof that the material is unprotected under the first amendment; 2) a prompt adversarial hearing and final adjudication on the obscenity issue must be assured by statute or by "authoritative judicial construction"; and 3) any prior restraint before judicial review must be strictly limited in duration.\textsuperscript{87}

The requirements specified by \textit{Freedman} were addressed by the Supreme Court in \textit{Kingsly Books, Inc. v. Brown}\textsuperscript{88} and \textit{Marcus v. Search Warrants of Property}.\textsuperscript{89} The Court upheld the narrow and precise New York obscenity statute in \textit{Kingsly} which authorized an \textit{ex parte} injunction against a particular book alleged to be obscene. This statute required a trial on the merits within one day and a final decision within two days of trial. In contrast, four years later, the Supreme Court held that the Missouri statutory scheme at issue in \textit{Marcus} was procedurally deficient and unconstitutional. The Missouri statute authorized \textit{ex parte} injunctions provided that there was a rapid trial on the issue of

\textsuperscript{82} Id.
\textsuperscript{84} Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).
\textsuperscript{86} 380 U.S. 51 (1965).
\textsuperscript{87} Id. at 58-59.
\textsuperscript{88} 354 U.S. 436 (1957).
\textsuperscript{89} 367 U.S. 717 (1961).
obscenity. This provision requiring a rapid trial did not provide assurance that the period of prior restraint before judicial review would be strictly limited as required by the third prong of Freedman.

In addition to prior decisions concerning injunctions and first amendment freedoms, prior decisions concerning the constitutionality of statutes designed to abate moral nuisances were particularly instructive when first amendment rights were implicated. It has been held that permanent injunctions to abate a nuisance are unconstitutional with respect to adult bookstores. Padlocking, which is in essence the closing of a business for all purposes, bars the future distribution of all books and movies without regard to their content.\(^{90}\) As such, the application in obscenity cases of a one-year closing provision in a nuisance statute constitutes an impermissible prior restraint. The allowance of such an order would in effect permit the government to enjoin the future operation of a business which disseminates presumptively protected first amendment materials solely on the basis of the nature of the materials which were sold in the past.\(^{91}\) Many courts have so held.\(^{92}\) One objectionable aspect to abatement statutes such as a padlocking statute is that "[t]he object of such a statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical."\(^{93}\) Likewise, restrictive zoning ordinances have oftentimes been held to constitute a prior restraint on speech.

In \textit{Purple Onion, Inc. v. Jackson},\(^{94}\) a federal district court held that the effect of an Atlanta, Georgia adult entertainment zoning ordinance was to disperse adult businesses from each other and

\footnotesize{\begin{itemize}
\item \(^{91}\) See supra note 77, at 166.
\end{itemize}}
to confine them to undesirable industrial areas of the city and to the downtown business district. The court held that the ordinance greatly restricted public access to presumptively protected speech and expression and was therefore void as a violation of the first amendment.95

A zoning plan which for all practical purposes creates a total ban on the establishment of new bookstores or movie houses is unconstitutional.96 This is true despite the fact that the ordinance may have been passed without any intention to suppress constitutionally-protected forms of expression.97 Similarly, a statute which provides that no building which contains any adult bookstore, motion picture theatre, or massage business shall contain any other adult establishment is an unconstitutional infringement on first amendment rights.98 A state may not limit the activities of bookstores and movie houses that choose to deal in sexually-oriented materials, many of which are not obscene, in a manner that serves no apparent purpose except to stifle constitutionally-protected expression.99 Courts must be alert to the possibility of direct rather than incidental effects that zoning may have on expression, and especially to the possibility that the power to zone is being used as a pretext for suppressing expression.100

In addition to prohibitions against sweeping injunctive orders and overly restrictive zoning, a governmental entity cannot tax the exercise of first amendment rights. When government imposes a tax that might implicate these rights, it has the burden of demonstrating that the tax is designed to finance a system of administration unrelated to the suppression of speech, and that the taxes are as minimal as necessary to meet the costs of that system.101 The concept of "tax" is not limited to its traditional definition but also encompasses the imposition of fines for law violations. If an extremely high fine is imposed and threatens to force the closure of a business and thereby acts as a prior

95. Id.
97. Id. at 703.
99. Id. at 908.
101. See Bayside Enters., 450 F. Supp. at 704.
restraint, the fine provisions can be challenged as applied.\textsuperscript{102} This is not to say that a court may not consider a defendant's resources and impose a fine that incidentally draws on some assets earned through lawful activities. A fine based on these considerations does not constitute a prior restraint so long as the fine does not pose a threat of closing a business.\textsuperscript{103}

In addition to the above, first amendment liberties cannot be denied to a person simply because that person was once convicted of a crime or other offense.\textsuperscript{104} A statute which authorizes the denial, suspension, or revocation of an adult entertainment license based upon the commission or conviction of a specified criminal act is unconstitutional.\textsuperscript{105} In \textit{Eagle Books, Inc. v. Ritchie}\textsuperscript{106} the plaintiff requested that the defendant be enjoined from enforcing the terms of an Ogden, Utah city ordinance. This ordinance allowed the city to revoke the license of a business once that business, or any officer, employee or partner thereof, was convicted of violating any of Utah's antipornography laws. The district court granted the injunction and held that by its terms the ordinance precluded the sale of any materials by plaintiffs whether or not the materials have been determined to be obscene. To that extent, the ordinance is similar to other ordinances which have been struck down as prior restraints of presumptively constitutionally-protected materials.\textsuperscript{107} Consistently, the constitutional freedom from previous restraint is not lost because criminal charges have been filed against the publisher or disseminator.\textsuperscript{108}

The provisions of RICO do not make allowance for the requirements enumerated in \textit{Freedman}. In addition, the standard of review required by RICO is not compatible with the high standards of review that the Supreme Court has mandated when first amendment liberties are at issue. With respect to civil actions, RICO's procedural dictates merely require proof of "a pattern of racketeering" by a preponderance of the evidence. It can be argued that these procedural requirements invite indis-

\textsuperscript{102} Polykoff v. Collins, 816 F.2d 1326, 1338 (9th Cir. 1987).
\textsuperscript{103} Id. (An extremely high fine might also implicate the eighth amendment, which protects a person from punishment that is disproportionate to the crime committed.).
\textsuperscript{104} Genusa v. City of Peoria, 619 F.2d 1203, 1219 (7th Cir. 1980).
\textsuperscript{105} Bayside Enters., Inc. v. Carson, 470 F. Supp. 1140, 1146 (M.D.Fla. 1979).
\textsuperscript{106} 455 F. Supp. 73 (D. Utah 1978).
\textsuperscript{107} Id. at 78.
\textsuperscript{108} Near v. Minnesota, 283 U.S. 697, 720 (1931).
criminal prosecution and are more burdensome on freedom of expression than are criminal sanctions. A criminal penalty is subject to the whole panoply of protections afforded the defendant by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after the judgment has become final, correct or otherwise, does the law's sanction become fully operative.

"A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." The state's burden of showing that defendants have purveyed obscenity in the past hardly satisfies the constitutional requirement that the state prove the obscenity of all suppressed materials. A forfeiture remedy extending to presumptively legitimate expression, and the facilities used for purposes of such expression, is overbroad and therefore facially invalid as a prior restraint. In a prosecution based upon prior obscenity convictions or the bare allegation of contemporaneous obscenity violations, the application of any one of the enumerated civil RICO remedies threatens closure of the defendant bookstores, theatres or similar establishments and therefore poses an impermissible prior restraint.

E. Least Restrictive Means

In the area of first amendment freedoms, the government has the duty to confine itself to the least intrusive regulations necessary to advance a legislative purpose. Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest. Accordingly, a law which impinges upon a fundamental right explicitly or implicitly secured by the Constitution is pre-

111. See 4447 Corp, 479 N.E.2d at 596.
112. See id. at 587.
113. Id.
114. See Lamont v. Postmaster General, 381 U.S. 301, 310 (concurring opinion).
sumptively invalid.\textsuperscript{116} Even though the governmental purpose is legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.\textsuperscript{117} The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.\textsuperscript{118}

"When 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."\textsuperscript{119} A governmental regulation is sufficiently justified if it is within the constitutional power of government; if it furthers an important governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged first amendment freedoms is no greater than that which is essential to the furtherance of that interest.\textsuperscript{120}

An obscenity statute is unconstitutional if it provides that the amount of the fine shall be based, even in part, on the proceeds from constitutionally-protected material.\textsuperscript{121} In other words, a statute authorizing the imposition of civil fines which places focus on the place where obscene materials are sold or exhibited rather than on the unprotected materials themselves, endangers free speech.\textsuperscript{122}

It can be argued that RICO statutes are directed at "nonspeech" elements rather than at protected speech. Even if this is conceded, the incidental effect on protected speech via RICO legislation based on the predicate offense of obscenity is broad and not the least restrictive means available to address obscenity. The coercive and debilitating effects of a threatened or successful RICO prosecution will promote self-censorship, particularly in those communities where county prosecutors are zealous in pursuing RICO actions based on obscenity.

\textsuperscript{118} Id.
\textsuperscript{120} Id. at 377.
\textsuperscript{121} J-R Distribs., Inc. v. Elkenberry, 725 F.2d 482, 494 (9th Cir. 1984).
\textsuperscript{122} Id.
IV. THE CURRENT CONSTITUTIONAL STATUS OF OBSCENITY-BASED RICO ACTIONS

The constitutionality of RICO statutes and RICO actions based on the predicate offense of obscenity have been upheld by the Supreme Court of Indiana, the Supreme Court of Florida, and the United States District Court for the Northern District of Georgia. Perhaps the most encompassing and far-reaching interpretation of the constitutionality of RICO was handed down by the Supreme Court of Indiana in its 1987 decision in Corporation v. Goldsmith. This decision emanated from a consolidation of two cases. The various individual and corporate defendants in these consolidated cases, owners and operators of adult bookstores, challenged the constitutionality of Indiana's RICO and civil RICO (CRRA) statutes under the first and fourteenth amendments of the United States Constitution. The Indiana anti-racketeering statute is similar to many state racketeering statutes which are essentially patterned after the federal RICO laws. In each of the consolidated cases the state initiated proceedings seeking civil remedies under RICO. In the first of these actions a county prosecutor filed a complaint against individual and corporate defendants, who were owners and operators of two operating bookstores. The complaint alleged that the bookstores constituted an "illegal enterprise" and that the defendants had engaged in "a pattern of racketeering activity" in violation of Indiana's RICO statute. The prosecutor in his complaint sought CRRA remedies and, pursuant to this authority, he filed, in addition to his complaint, a Petition for Seizure of Property Subject to Forfeiture which incorporated by reference the allegations of the complaint and a probable cause affidavit. This petition alleged that the defendants intended to open an additional adult bookstore in furtherance of their "racketeering activity," i.e., the dissemination of obscene material. The peti-

123. 4447 Corp. v. Goldsmith, 504 N.E.2d 559 (Ind. 1987).
126. 504 N.E.2d 559 (Ind. 1987).
127. Civil Remedies for Racketeering Activity, IND. CODE ANN. § 34-4-30.5-1 to -6 (West 1989).
tion asserted that the new bookstore contained numerous obscene items, although none were specified, and cited possession of these allegedly obscene materials as probable cause to establish RICO violations. 130

The probable cause affidavit, upon which the above referenced petition for seizure was based, stated that police had visited the two operating adult bookstores where they had observed sexually-oriented books, magazines, films, and videotapes. They had purchased four sexually-explicit movies, which they submitted to the court. The affiant also stated that while visiting the construction site of the soon-to-be-opened bookstore, the police were informed that sexually-oriented materials would be available there as well. The police further alleged that the bookstores constituted a single enterprise under common ownership and control. 131

On the basis of these allegations, at an ex parte proceeding the trial court issued an order that police seize, i.e., padlock, the third bookstore prior to its opening. This order was authorized by CRRA. 132 The defendants' filed a motion to dismiss the complaint and to vacate the original seizure order three days after the initial ex parte hearing. The motion was denied. 133

In the second consolidated case, a county prosecutor initiated a similar civil action against the owners and operators of three bookstores. Like the 4447 case, the complaint alleged that the operation of the bookstores constituted an illegal enterprise. In this case, the complaint cited a pattern of racketeering activity which consisted of thirty-nine obscenity convictions incurred by the three bookstores and their agents. These convictions were sustained during the three year period immediately preceding the filing of the complaint. The prosecutor filed a petition for seizure of property, seeking forfeiture of the three bookstores, their entire contents, and all corporate assets.

The forfeiture petition incorporated by reference the allegations of the complaint and the probable cause affidavit. The latter

130. Id. at 581-82.
131. Id. at 582.
132. Subsequent to the issuance of this order, the prosecutor amended his complaint and prayed for a panoply of CRRA remedies, including license suspension, corporate charter revocation, and forfeiture of all property related to the operation of these bookstores.
133. Id.
stated that police had been monitoring the activities of the three bookstores and that the defendant corporations and their employees had incurred thirty-nine obscenity convictions. The affiant related that he and other police officers had recently visited the bookstores, where they had observed materials which he believed were obscene.

At an *ex parte* hearing held the same day on which the complaint was filed, the trial court reviewed the above noted documents and heard taped descriptions by police concerning the contents of the seized materials. On this basis, the prosecutor obtained an order directing the sheriff to padlock all three bookstores and to seize their contents. The defendants filed a motion to vacate the trial court's order four days after the *ex parte* hearing. However, one week after the defendants filed this motion, the police seized and removed the entire contents of the three bookstores. The defendants responded with an Emergency Motion for Inventory of Property Removed and/or Return of Property. The trial court denied both of these motions, as well as the Motion to Vacate the original judgment.\footnote{134. *Id.* at 583.}

The defendants in the above two cases appealed the trial court judgments which denied their respective motions to vacate the injunctive orders authorizing the padlocking of their bookstores and the seizure of the contents therein. The Fourth District Court of Appeals of Indiana held that the forfeiture sanctions of the state RICO act and the associated civil remedies were facially unconstitutional prior restraints as applied to the predicate offense of obscenity.\footnote{135. 4447 Corp., 479 N.E.2d at 578.} The court of appeals also held that the procedures utilized under RICO were constitutionally deficient, even as applied to suppress actual obscenity, and that the statute was also unconstitutional as there were less restrictive means available to advance the state's legitimate purpose.

The Supreme Court of Indiana reversed\footnote{136. *See 4447 Corp. v. Goldsmith*, 504 N.E.2d 559 (Ind. 1987).} and held that RICO actions based on the predicate offense of obscenity were constitutional. The court reasoned that the purpose of forfeiture provisions was unrelated to the nature of the assets in question since forfeiture was intended to *disgorge assets* acquired through racketeering activity rather than to *restrain* the future distri-
bution of presumptively protected speech. The court also held that the procedures authorized by RICO did not offend due process. The court stated that defendants are afforded a prompt adversarial hearing within a reasonable time if the defendant makes a motion to vacate a seizure order or initiates a motion for a hearing on the question of forfeiture. It was also held that prior convictions for predicate offenses are not required to sustain a conviction under RICO.

V. CONCLUSION

The wrath of RICO, when founded upon the predicate offense of obscenity, will have a tendency to inhibit constitutionally-protected expression. Accordingly, RICO, as it applies to obscenity, is facially unconstitutional and is not capable of being saved by a narrowing construction. The attempt to narrow the provisions of RICO would be to engage in judicial legislation. This is particularly true with respect to this type of legislation since the remedies enacted are equally applicable to numerous predicate offenses.

With regard to obscenity, the direct effect of RICO sanctions and remedies is the closure of bookstores and theaters. The injunctive and forfeiture remedies permitted by this legislation threaten to have a dramatic impact upon public access to controversial materials and divergent opinions. The suppression of entire bookstores inevitably affects protected as well as any unprotected expression. As the Court stated in Near v. Minnesota:

> Some degree of abuse is inseparable from the proper use of everything .... It has accordingly been decided by the practice of the States, that it is better to leave a few ... noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits.

The federal and state governments are by no means powerless to fight obscenity without RICO. The government is free to strengthen the punitive criminal sanctions associated with producing and disseminating obscene materials. However, the practice of effecting a complete ban through a prior restraint against

137. Id. at 591.
the sale of all publications because of past obscenity violations is an excessive and unconstitutional means of advancing a state interest. This is particularly true with respect to Indiana’s anti-racketeering statute as construed by the Indiana Supreme Court. The right to sue for the recovery of goods seized through an adversarial action instituted by the owner subsequent to actual seizure does not cure the constitutional deficiency. As Blackstone noted:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is illegal, he must take the consequences of his own temerity.

Today, any RICO action, criminal or civil, founded upon obscenity violations presents the real and present danger of chilling the exercise of one's right to engage in free speech since an individual who wishes to engage in communications that include sexually explicit materials will probably elect self-censorship rather than chance being held subject to the wide ranging sanctions of RICO.

Glenn Rudolph

140. 4 W. BLACKSTONE, COMMENTARIES *151-52.
For Better or for Worse: Marital Rape

I. INTRODUCTION

"Damn it, when you get married you kind of expect you're going to get a little sex."

"But if you can't rape your wife, who can you rape?"

Over the past decade, marital rape has become a controversial social and legal issue. The fact is that in most states, it is legal for a man to rape his wife. Although progress has been made in some states in the form of legislative or judicial action abolishing the spousal exemption from rape statutes, the issue is far from resolved. Considering the magnitude of the studies which have demonstrated that marital rape is, in fact, a common phenomenon in the American family, it becomes apparent that the issue needs to be confronted and given political priority until every state is willing to recognize marital rape as a criminal act.

The aim of this Comment is to encourage legislatures to abolish the marital rape exemption. The Comment begins with the historical treatment of the marital rape exemption and a critique of the theories justifying that position. The current status of marital rape laws will be discussed, along with the judicial responses to marital rape. The Comment then addresses the constitutional right to privacy and equal protection issues surrounding the marital rape exemption. Finally, a survey conducted in Hamilton County, Ohio, to determine what the public thinks about marital rape will be discussed. The Hamilton County study

1. When a Wife Says No... Ms., April, 1982, at 23 (quoting Alabama Senator Jeremiah Denton).
3. For a summary of legislative responses to marital rape see text accompanying notes 72-85 infra.
4. See text accompanying notes 72-83 infra.
5. See, e.g., D. RUSSELL, supra note 2, at 57. Russell's survey revealed that at least fourteen percent of married women were victims of one or more attempted or completed rapes by their husband. See also D. FINKELHOR & K. YLLO, LICENSE TO RAPE (1985). Finkelhor and Yllo's survey results indicate that at least ten percent of married women reported that their husbands had used physical force or threat of force to try to have sex with them.
was undertaken with the idea that given the current salience of marital rape, it seems critical to know what people think about it.

II. THE ORIGIN OF THE MARITAL RAPE EXEMPTION

A. The Historical Treatment

The marital rape exemption originated at common law with a statement made in the seventeenth century by Lord Matthew Hale who declared, "[b]ut the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract." 6

For over 300 years this statement alone served as a justification for a spousal immunity involving rape charges, and was the origin for judicial recognition of the marital rape exemption in the United States. 7 It also served to maintain the position of men in our society as dominators and women as their property. 8 Hale's statement has since been criticized on the basis that Hale cited no authority for this statement, 9 and because in actuality the common law does not support an absolute spousal exemption. 10

Hale's comments were discussed in the Virginia case of Weishaupt v. Commonwealth 11 when the court was asked to consider whether a rape statute, which does not expressly preclude prosecution of a husband, nonetheless retains the common law marital rape exemption. Specifically, the court was asked to determine whether the reference to a provision in the state code which adopts the common law of England was repugnant to Virginia's constitution. The court never decided the constitutional question. Rather, the court held that "the true state of English common law was that marriage carried with it the implied consent to sexual intercourse; but that consent could be revoked." 12 Since the husband and wife in this case had been living separate and

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12. Id. at 399, 315 S.E.2d at 852.
apart for nearly one year, the court reasoned that the wife had revoked her implied consent to marital sex. The court stated that "Hale's statement was not law, common or otherwise. At best it was Hale's pronouncement of what he observed to be a custom in 17th century England." The court concluded that English common law never recognized an absolute irrevocable marital exemption that would protect a husband from rape charges in all circumstances.

Similarly, in State v. Smith, the Supreme Court of New Jersey criticized Hale's statement when confronted with the defendant's argument that New Jersey's rape statute incorporates the common law marital rape exemption. The court criticized Hale for citing no authority for his extrajudicial proposition. The court stated that such a declaration cannot be considered binding as a definitive common law view and thus it "decline[d] to apply mechanically a rule whose existence is in some doubt and which may never have been intended to apply to the factual situation presented by this case."

Nonetheless, Hale's statement has traditionally been accepted as the origin for the marital rape exemption. However, in recent years, the positions and views emulating from his statement have been facing increased criticism.

B. Critique of Theories Justifying the Marital Rape Exemption

(1) Permanent consent rationale

Various justifications, including Hale's notion that the marriage contract implies permanent consent to sex, have been advanced in support of a spousal exemption in the law of rape. The rationale utilized by Hale is that when a woman marries, she gives up her rights to her body because she has formed a contract with her husband which cannot be retracted. As was previously discussed, the rationale of permanent consent has been criticized and rejected as being the definitive common law rule and is generally
no longer accepted as an adequate justification for the marital rape exemption.\textsuperscript{17} In response, one commentator argues that "[t]he doctrine of permanent consent recently has been characterized as legal fiction, since it appears unrealistic to assume that modern women give unqualified consent to sexual relations with their husbands during marriage."\textsuperscript{18} No one consents to violence when they marry. Though they may consent to sex in the marital relationship, women do not voluntarily consent to being raped by their husbands simply because they have entered into a contract for marriage.

(2) Preserving the sanctity of marriage rationale

Proponents of the marital rape exemption, who believe that the exemption preserves the sanctity of marriage, argue, among other things, that an abolishment of the exemption would violate the marital right to privacy and thwart efforts toward reconciliation.\textsuperscript{19} One advocate of this position argues that "[a]llowing access to the criminal justice system for every type of marital dispute will discourage resolution by the spouses and will make their ultimate reconciliation more difficult."\textsuperscript{20} Under this theory, it is inappropriate for the state to intervene with the institution of marriage and the family.

In\textsuperscript{21} \textit{Weishaupt v. Commonwealth}, the Supreme Court of Virginia responded to this argument by stating:

[i]t is hard to imagine how charging a husband with the violent crime of rape can be more disruptive of a marriage than the violent act itself. Moreover, if the marriage has already deteriorated to the point where intercourse must be commanded at the price of violence we doubt that there is anything left to reconcile.\textsuperscript{22}

An analogy can be drawn between punishing marital rape and incest. If we are prepared to argue that the state should not meddle in family matters, we must ask ourselves if we are ready

\textsuperscript{17} See text accompanying notes 9-15 supra.
\textsuperscript{18} Note, Rape in Marriage: The Law in Texas and the Need for Reform, 32 BAYLOR L. REV. 109, 114 (1980) (citations omitted) [hereinafter cited as Note, Rape in Marriage].
\textsuperscript{19} Hilf, Marital Privacy and Spousal Rape, 16 NEW ENG. 31 (1980) [hereinafter cited as Hilf, Marital Privacy].
\textsuperscript{20} Id. at 34.
\textsuperscript{22} Id. at 405, 315 S.E.2d at 855.
to decriminalize incest just because it is a family affair.

It has been further suggested that an argument in favor of the marital rape exemption based on the theory that it preserves marital harmony by encouraging reconciliation is just one more attempt to promote inequality between the sexes.23 Thus, one commentator has noted that "[w]hile perhaps the concern with reconciliation was appropriate in the 1700s when divorce was nearly unthinkable, such an approach today is harmful to the individual, to women, and to the society purporting to be democratic and protective of freedom."24

Supporters of the marital rape exemption, who focus on the marital right to privacy, tend to view the couple as one entity.25 Therefore, the public should not be permitted to examine the intimacies of a marital relationship when one party (i.e., the husband-rapist) objects to such intrusion. These supporters question "whether the complaining spouse alone has the right to waive the marital privacy right of the couple by presenting the matter before the courts and the public."26

This position is mistaken for two reasons. First, modern developments in the legal status of married women do not support the view that a married couple is one entity.27 The United States Supreme Court has declared that "[n]owhere in the common-law world—[or] in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being."28 Second, the marital right to privacy does not extend to violent sexual assaults.29 In People v. Liberta, addressing the marital right to privacy issue, New York's highest court aptly stated "[j]ust as a husband cannot invoke a right of marital privacy to

24. Id. at 388.
25. Hilf, Marital Privacy, supra note 19, at 41.
26. Id. at 34.
27. See, e.g., Note, The Marital Rape Exemption, supra note 7, at 310 which discusses areas of law which do not support the idea that husband and wife are one. For example, since the adoption of the Married Women's Property Acts women have had recognized rights separate from their husbands.
escape liability for beating his wife, he cannot justifiably rape his wife under the guise of the right to privacy.”

(3) Problems with evidence and proof rationale

Supporters of a spousal immunity for rape charges offer as a basis for the exemption that marital rape would be a difficult crime to prove. Legislatures which are considering abolishing the marital rape exemption, the argument goes, should be aware that marital rape is simply one spouse’s word against the other, making it difficult to prosecute. A related argument is that women will use the criminal justice system to file false charges should the exemption be removed. The commentator conjures up images of “a horde of spiteful wenches ... lying in wait for such a change, ready to blackmail their husbands into favorable divorce settlements or get even for some real or imagined wrong.”

The fact that prosecutions will be difficult is not a reasonable justification to forbid them. As was stated in *State v. Smith,* proving lack of consent, an essential element in a rape prosecution, is a difficult problem in any rape case. However, the court did not accept this as a sufficient rationale for maintaining the marital rape exemption. Furthermore, even if marital rape is a difficult crime to prove, there is another reason for abolishing the exemption. The law sometimes operates both as an educational tool and as a deterrence. In theory then, an unknown number of husbands will be deterred from raping their wives by the abolishment of the exemption, while an unknown number of other persons will come to recognize marital rape as a criminal act. Men need to realize that they are going to be held responsible for any behavior that violates a woman’s right to her own body. The only way to promote this goal is to remove the marital rape exemption thereby “mak[ing] an important statement about the relative position of women in society ... [which is the assertion of] the right of married women to the physical integrity of their

30. *Id.* at 165, 474 N.E.2d at 574, 485 N.Y.S.2d at 214.
31. See, e.g., Note, *Rape in Marriage,* supra note 18, at 115.
34. See generally Schwartz, *The Spousal Exemption,* supra note 32.
bodies, and of the right to choose what uses their bodies will be put to."\textsuperscript{35}

As far as vindictive women taking advantage of a law allowing them to charge their husbands with rape, several courts have responded that this is also a meritless argument.\textsuperscript{36} The Florida Court of Appeals stated that it is doubtful that women will file false complaints against their husbands out of spite "because the offense of battery which can now be exerted by one spouse against another has not been used for such purpose, at least not to the point that law enforcement has been taxed."\textsuperscript{37} Furthermore, in \textit{Liberta}, the court reasoned that the possibility that married women will fabricate rape charges is no greater than the possibility of unmarried women doing so.\textsuperscript{38} In the court's opinion, "[t]he criminal justice system, with all of its built-in safeguards, is presumed to be capable of handling any false complaints. Indeed, if the possibility of fabricated complaints were a basis for not criminalizing behavior which would otherwise be sanctioned, virtually all crimes other than homicides would go unpunished."\textsuperscript{39}

Another weakness with the rationale that women will fabricate charges is its failure to recognize that a social stigma is still attached to rape.\textsuperscript{40} Thus, it is much more likely that a woman bent on revenge or blackmail would do so through an avenue which is less embarrassing for her and more likely to result in a conviction for him.\textsuperscript{41}

(4) \textit{Spousal rape is not as serious as non-spousal rape rationale}

Another group of theories advocating the spousal exemption perceive that there is both a quantitative and a qualitative difference between marital rape and non-spousal rape.\textsuperscript{42} The quantitative argument is that marital rape does not occur often enough

\begin{footnotesize}
\begin{enumerate}
\item Id. at 51.
\item State v. Smith, 401 So. 2d at 1129.
\item Liberta, 64 N.Y.2d at 165, 474 N.E.2d at 574, 485 N.Y.S.2d at 214.
\item Id. at 166, 474 N.E.2d at 574, 485 N.Y.S.2d at 214.
\item See Note, The Marital Rape Exemtion, supra note 7, at 314-15; Schwartz, The Spousal Exemtion, supra note 32, at 54-55.
\item Note, The Marital Rape Exemtion, supra note 7, at 315.
\item Schwartz, The Spousal Exemtion, supra note 32, at 42-43.
\end{enumerate}
\end{footnotesize}
for the criminal justice system to be concerned. The qualitative argument is that marital rape victims do not suffer much damage from the incident; that it is really just a bedroom squabble that should not be treated like rape by a stranger.

Although far from voluminous, the data which exist, as to the quantitative issue of marital rape, suggest that marital rape is a common phenomenon in as much as fourteen percent of American families. However, there are a number of reasons as to why there is not a massive amount of quantitative data in this area. For one, the fact that marital rape is not a crime in many jurisdictions can only lead to the conclusion that wives are not reporting such incidents as rape. There is a tendency for people to associate conduct as immoral if it is defined "criminal." Thus, spousal rape victims may fail to perceive the incident as rape and simply accept their submissive position in the relationship.

As one commentator points out, "[o]ur entire culture perpetuates both the high incidence of rape and the level of family violence. Insofar as male aggressiveness is applauded in every realm of our society, including that of sexuality, rape becomes but a matter of degree along a socially approved continuum." To the same extent that women fail to perceive the experience as rape, the husband offenders who have been interviewed thought that they had a right to take what they wanted.

There is simply no merit to the argument that marital rape is qualitatively different from nonmarital rape. In fact, at least one

43. Id.
44. Id.
45. See D. RUSSELL AND D. FINKELHOR & K. YLLO, supra notes 2 & 5. Russell randomly interviewed 930 women 18 years of age and older in the San Francisco area. Of the 644 women who had ever been married, 14% were victims of at least one attempted or completed rape by their husbands. Russell defined marital rape as forced intercourse, forced oral sex, forced anal sex and forced digital penetration.
47. Id.
48. D. RUSSELL, supra note 2, at 359. The fact that it is legal in most states for a man to rape his wife perpetuates the problem because it allows men and women to establish a value system which tolerates wife rape. Outlawing rape in marriage is the first and easiest step to reversing this ideology.
50. D. FINKELHOR & K. YLLO, supra note 5, at 66. One man spoke of his frustrations due to his wife's lack of interest in sex. When he finally took her by force, this is how he explains his feelings: "I'm not proud of it, but, damn it, I walked around with a smile on my face for three days. You could say, I suppose, that I raped her. But I was reduced to a situation in the marriage where it was absolutely the only power I had over her."
study suggests that marital rape is frequently quite violent and generally has more severe and traumatic effects on the victim than non-marital rape. If accounts of the incident by victims are to be given any merit at all, then it is clear that marital rape victims are often emotionally scarred for life. Frequently these women are also battered. One study found that fifty-two percent of marital rape victims suffer extreme long-term effects. Moreover, psychologists tend to agree that the identity of the rapist does not lessen the traumatic effects on the woman who is raped. The worst part about being a victim of marital rape is that the woman has to confront her rapist the next day and is reminded that this man violated her love and trust.

Certainly, there is enough evidence to argue that marital rape is a serious problem both quantitatively and qualitatively warranting concern.

(5) Alternate remedies rationale

Closely related to the argument that marital rape is not as serious as nonmarital rape, is the argument that women can seek redress in other areas of the law. For example, proponents argue, because marital rape is not as serious as stranger rape, women should be allowed to file assault and battery charges but a husband should not be treated as a "rapist." It has been argued that "proceedings for separation or divorce can be instituted soon after a single nonconsensual encounter ... [and] serious cases of physical abuse will be taken care of by spousal assault and battery laws." Responding to this argument, the court in Liberta recognized that allowing a woman who has been raped by her husband to

51. D. Russell, supra note 2, at 359.
52. D. Finkelhor & K. Yllo, supra note 5, at 117-38. These authors provide examples where the marital rape victim is left, if not physically disabled, psychologically destroyed for a long time. Some examples, as reported by the victims include: one [woman] was jumped in the dark by her husband and raped in the anus while slumped over a woodpile; one had a six centimeter gash ripped in her vagina by a husband who was trying to "pull her vagina out"; one was forced to have sex with her estranged husband in order to see her baby, whom he had kidnapped.
53. D. Russell, supra note 2, at 90 (noting that ten percent of married women experience both wife rape and wife beating).
54. Id. at 192-93.
56. See Hif, Marital Privacy, supra note 19, at 42.
charge him with assault is not an adequate remedy. "The fact that rape statutes exist, however, is a recognition that the harm caused by a forcible rape is different, and more severe, than the harm caused by an ordinary assault...."\footnote{58} Thus, the court recognized a qualitative difference between these crimes. Prosecuting a husband for assault and battery would not redress the more serious harm caused by rape.\footnote{59} Rape is a "crime of violence"\footnote{60} and not just in a sexual sense since it is also a crime of humiliation, degradation, and domination designed to leave scars on the victim.\footnote{61}

The other problem that is raised by arguing that a woman has remedies in assault and battery laws is that not all women who are raped by their husbands are physically abused.\footnote{62} Thus, in a situation where a wife is raped by her husband but not beaten by him, he has effectively been given a license to rape since no criminal liability attaches to the act if her body lacks signs of physical abuse.\footnote{63} The possibility of an interesting paradox was raised in \textit{People v. DeStefano},\footnote{64} when a New York county court suggested that a husband who sets out to commit a simple assault and battery might decide to go further and commit the more heinous crime of rape in an effort to hide behind the marital rape exemption.\footnote{65} The court suggested that the exemption would lead to increased violence since permitting any kind of exemption was equivalent to giving "a husband a right to control his wife's bodily integrity."\footnote{66}

The argument that divorce is an alternative remedy justifying the marital rape exemption fails to acknowledge that divorce provides little relief for a woman who has been raped by her

\footnotesize
58. \textit{Id.} at 166, 474 N.E.2d at 574, 485 N.Y.S.2d at 214.
61. \textit{S. Brownmiller}, supra note 8, at 377-78.
62. \textit{D. Russell}, supra note 2. Of the fourteen percent of the respondents who were victims of wife rape, four percent were victims of wife rape only. If marital rape is viewed as one of the aspects of the battered women, Russell cautions, those wife rape only victims will be excluded from seeking a remedy in criminal laws. The result will be a situation where a husband can only be charged with rape if there are clear signs of injury to other parts of the body, a black eye or bruises, for example.
64. 121 Misc. 2d 113, 467 N.Y.S.2d 506 (Suffolk County Ct. 1983).
65. \textit{Id.} at 124, 467 N.Y.S.2d at 514.
66. \textit{Id.}
husband. Proponents of this argument believe that abolishment of the exemption is not necessary because a raped wife is able to obtain a divorce, thus avoiding the criminal courts. Rather than arguing that the raped wife has legal avenues of redress available other than prosecution for rape, at least one commentator and one court has responded that the husband who cannot obtain his wife’s consent has his remedy in matrimonial court. Thus, the New Jersey Supreme Court in State v. Smith stated “[i]f her repeated refusals are a ‘breach’ of the marriage ‘contract,’ his remedy is in a matrimonial court, not in violent or forceful self help.”

Thus, like the aforementioned theories justifying the marital rape exemption, little merit should be given to the argument that marital rape victims have alternative remedies available to them. To summarize the position that critics of the exemption have taken, one writer offers the following: “To the extent that one believes in marriage based on equality and partnership, and in the equal worth of women, the spousal exemption to forcible rape prosecution makes little logical or legal sense.” If our goal is to promote a society where women have the right to control sexual access to their own bodies, then the repeal of any marital rape exemption is the next logical step toward promoting that goal.

III. Current Status of Marital Rape Laws

A. Statutory Treatment

Although marital rape has been gaining increased attention nationwide, the fact remains that in all but eleven states, it

68. Schwartz, The Spousal Exemption, supra note 32.
70. Id. at 206, 426 A.2d at 44.
remains legal for a man to rape his wife without fear of prosecution while they are living together. In three states, the exemption ends only when there is a final decree of divorce. As long as the parties remain married, regardless of whether they are living separate, under a court order, or together, a husband cannot be prosecuted for the rape of his wife.

State statutes prohibit prosecution of a spouse in a number of ways. For example, the statute may define rape as nonconsensual sexual intercourse by a man with a female who is not his wife. Other states simply refer to intercourse with a female or person and then define that person to exclude the spouse of the actor. Still others define sexual intercourse as any act of sexual gratification between persons not married and then these statutes qualify that persons living apart under a judicial order are not married.

The majority of the state statutes contain a partial exemption. For example, in eight states, the exemption applies unless the parties are separated under a court order. In three states, the husband cannot be prosecuted for the rape of his wife unless the parties are living apart and one spouse has filed a petition for divorce, separation, annulment, or separate maintenance. In other states, the exemption ends when the parties are living apart or one spouse has initiated legal proceedings at the time of the rape. In still other states, as long as the parties were living apart at the time of the incident, the husband can be prosecuted.

In those states, no court order or separation agreement is required.

Other states recognize marital rape in limited circumstances. These states allow the prosecution of husbands for charges of first or second degree rape, but do not allow prosecution for lesser sexual offenses.

While the marital rape exemption allegedly protects harmony and the intimate nature of the marital relationship, this argument cannot be used to explain why some states have expanded the marital rape exemption to cover unmarried cohabitators and voluntary social companions. One commentator offers the following explanation:

The expansion of the exemption beyond the marital relationship reflects the deeply discriminatory vision of women inherent in the theories used to justify the exemption; in particular, the expansion reflects a modern version of Hale's theory that women who enter into relationships with men give an implied consent to sexual intercourse or that those who consent to sexual intercourse once are forever bound.

Knowing that many states do not permit a woman to bring rape charges against her husband, the question is raised why is it that some states have moved in the direction of abolishing the marital rape exemption while others have not and still others deny, not only wives, but also unmarried women who are either cohabitators or voluntary social companions the right to file a complaint against their male counterparts for rape? One explanation is rooted in the views of the two senators quoted in the Introduction. Perhaps we should not be surprised that Alabama


82. See, e.g., ALA. CODE § 13A-6-60(4) (1982); CONN. GEN. STAT. § 53a-67(b) (1985); IOWA CODE ANN. § 709.4 (West 1979); KY. REV. STAT. ANN. § 510.010(3) (Baldwin Supp. 1986); MONT. CODE ANN. § 45-5-511(2) (1985); PA. STAT. ANN. tit 18, § 3103 (Purdon Supp. 1987); W. VA. CODE § 61-8B-1.2 (1984).


84. Note, To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment, 99 HARV. L. REV. 1255, 1260 (1986) [hereinafter cited as Note, To Have and To Hold].
is one of three states that maintains an absolute exemption until the final divorce decree is issued since one of its own senators was quoted as saying "Damn it, when you get married you kind of expect you're going to get a little sex." 85

B. Judicial Recognition

There is not a great deal of case law currently addressing the subject of marital rape. The reasons for this vary, but are probably attributed to the fact that most states do not recognize marital rape as a crime. 86 The result is that victims fail to perceive the incident as rape and thus the crime is grossly underreported. 87 It has been suggested that because marital rape is seldom recognized as a criminal act, men and women are allowed to establish a value system which tolerates wife rape. 88 This serves to perpetuate the failure to report the crime and also explains why there is not an abundance of case law regarding marital rape.

Much of the case law that does exist fails to meet with precision the factual situation where the husband and wife are still living together and married when the rape occurs. For example, cases are universal which hold that the spousal rape exemption does not apply when a husband aids and abets in the rape of his wife by a third party. 89 Aside from this situation, case law which does not include third person involvement is not abundant.

The first American case in which the husband and wife were married and living together at the time the rape occurred was Frazier v. State90 in which the wife attempted to obtain a divorce from her husband but was refused by the court. Therefore, she stayed in the same house with her husband, but slept in a separate bedroom. When the husband forced himself upon his wife, the wife brought charges. The court adopted the common law, stating, "all the authorities" hold that a man cannot rape his wife. 91 Thus, the husband's conviction was reversed.

85. See Ms., supra note 1.
86. See notes 72-83, supra.
87. D. Russell, supra note 2, at 359.
88. Id.
90. 48 Tex. Crim. 142, 86 S.W. 754 (1905).
91. Id. at — , 86 S.W. at 755.
The common law view was also approved in State v. Parsons.\(^9\) However, in this case a divorce had been granted at the time of the rape. As such, the court determined that the wife's consent to unrestricted sex had been terminated and the husband's argument that sexual intercourse involved mutual agreement was unsuccessful. Thus, although the court adopted the common law view that when a woman marries she gives her consent to sex, this consent is retracted when a divorce has been granted. As a result, the wife was able to press charges against her ex-husband and the fact that the defendant was once the victim's husband was not a defense to the rape charge.

The rape trial of John Rideout in 1978 was perhaps the first case to make public the issue of marital rape.\(^9\) Prior to this case, no husband living with his wife at the time of the alleged offense had been prosecuted. The case was brought under Oregon's newly revised statute,\(^9\) which abolished the exemption preventing prosecution of the husband for raping his wife. Although John Rideout was acquitted, the issue had been raised and the public was made aware that husbands do not have unrestricted access to their wife's bodies.

The more recent cases in which a wife-rape victim has successfully pressed charges against her husband generally arise in the context where the couple is separated at the time of the offense.\(^9\) It has been suggested that rape victims in general, in order to prove they are deserving of the status of rape victim, must establish their legitimacy as victims.\(^9\) The fact that the reported cases tend to adhere to the same factual pattern may support the notion that the criminal justice system responds only

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92. 285 S.W. 412 (Mo. 1926).
95. See, e.g., State v. Smith, 85 N.J. 193, 426 A.2d 38 (1981) (the couple was legally married but had lived separately for approximately one year); State v. Morrison, 85 N.J. 212, 426 A.2d 47 (1981) (the parties had been living apart for 6 months and the wife had filed a complaint for divorce); State v. Smith, 401 So. 2d 1126 (Fla. Dist. Ct. App. 1981) (the parties were separated and the wife had filed for divorce); Commonwealth v. Chretien, 417 N.E.2d 1203 (Mass. 1981) (the wife had separated from her husband and instituted divorce proceedings); People v. Liberta, 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984) (the parties were separated and the wife had obtained temporary order of protection); Weishaupt v. Commonwealth, 227 Va. 389, 315 S.E.2d 847 (1984) (the parties had been living apart for 11 months).
96. See text accompanying notes 170-72, infra.
to cases where similar characteristics are present. Thus, it could be argued that the lack of reported cases where the husband and wife were living together at the time of the alleged rape is attributable to the fact that the women in this factual pattern are unable to establish that they are legitimate victims of rape.

One of the more recent cases which did not arise in a situation where the couple was separated at the time of the alleged rape was *State v. Rider.* Rather, in this case, Mr. and Mrs. Rider were living together as husband and wife, no dissolution of marriage action had been instituted, and no temporary restraining order or judicial decree of separation had been obtained at the time of the rape. In addition, it was apparent that this was the first time Mr. Rider had sexually abused his wife. Although this factual pattern seems contrary to the general trend established in previous cases, the court nonetheless refused to recognize a common law "interspousal exception" to prosecution under Florida's sexual battery statute.

Thus, the more recent cases that have confronted the issue of marital rape appear to be favoring the wife-victim, particularly where the parties were separated at the time of the alleged offense. Similarly, the *Rider* case seems to suggest that the courts are beginning to respond favorably to the wife who is raped by her husband even though they were living together as husband and wife. Perhaps legislatures can be similarly favorable to the woman and persuaded that abolishment of the marital rape exemption is the simplest guarantee of individual liberty.

IV. THE MARITAL RAPE EXEMPTION AND CONSTITUTIONAL CONSIDERATIONS

A. Right to Privacy

The right to privacy is an argument that has been advanced both on behalf of the husband-rapist and the wife-victim. In defense of the husband, the focus is on the constitutional right of marital privacy, while on behalf of the wife, the focus is on

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98. Id. at 907. The defendant argued that since the Florida statute is silent as to the common law exemption, it therefore had not abrogated it.
99. See Hill, Marital Privacy, supra note 19, at 35.
the right of individual privacy.\textsuperscript{100} In any event, the few courts\textsuperscript{101} that have addressed these arguments appear to have accepted the wife's individual right to privacy argument over the husband's right to marital privacy argument. However, a review of the cases interpreting the right to privacy is appropriate in an attempt to establish whether a marital right to privacy in any way supersedes an individual's right to privacy.

(1) Early cases interpreting the Right of Privacy

The right of privacy is not mentioned in the United States Constitution. Nevertheless, in a series of early cases,\textsuperscript{102} the Supreme Court recognized that a right of privacy, or at least a guarantee of certain areas or zones of privacy, is constitutionally protected.

In \textit{Meyer v. Nebraska}, the Supreme Court held that a statute which prohibited teaching any language except English until the child reached the ninth grade was unconstitutional.\textsuperscript{103} The constitutional issue involved was whether the statute unreasonably infringed the "liberty" guaranteed by the fourteenth amendment due process clause.\textsuperscript{104} The Court recognized that liberty is a fundamental right, including not only the right to make educational decisions, but also the right to contract, to marry, and to establish a home and bring up children.\textsuperscript{105} The concept of liberty thus included the freedom to control one's destiny.

In \textit{Skinner v. Oklahoma},\textsuperscript{106} a state law provided for involuntary sterilization of criminals convicted two or more times of crimes of moral turpitude. The Court struck down the statute on equal protection grounds, and expanded the right to privacy to include sexual matters, such as the capacity to reproduce, by stating, "[m]arriage and procreation are fundamental to the very existence and survival of the race."\textsuperscript{107} Thus, this case established the

\textsuperscript{100} See Note, \textit{To Have and To Hold}, supra note 84, at 1262.
\textsuperscript{103} Meyer v. Nebraska, 262 U.S. 390 (1923).
\textsuperscript{104} Id. at 397.
\textsuperscript{105} Id.
\textsuperscript{106} 316 U.S. 535 (1942).
\textsuperscript{107} Id. at 541.
interest in marriage or procreation as one of special constitutional significance.

2. Modern cases

In *Griswold v. Connecticut*, the Supreme Court struck down a statute which prohibited all persons from using contraceptive devices and prevented the counseling of individuals on the use of contraceptives. The statute was challenged by a doctor and Planned Parenthood who had been convicted for giving information to married persons about contraception. The majority opinion, written by Justice Douglas, found that the "penumbras" of the first, third, fourth, fifth, and ninth amendments established a right of privacy. The Court held that the statute invaded married persons' rights to privacy by interfering with their decision whether to use contraceptives. The state had no legitimate reason for an interference of this type and, therefore, the Court declared the statute unconstitutional.

Some commentators suggest that *Griswold* articulated a right of marital privacy and thus argue that abolishment of the marital rape exemption violates that right. However, the Court in *Eisenstadt v. Baird*, which also involved a statute prohibiting the dispensing of contraceptives to unmarried persons, dispensed with the notion that the Court recognizes a marital right over the individual right of privacy. The Court specifically stated:

[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

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108. 381 U.S. 479 (1965).
109. Id. at 484.
110. Id. at 485.
111. Id. The state argued that it had an interest in preventing sexual immorality. Even if this is a legitimate state interest, it is not furthered by this statute because people can be immoral without the use of contraceptives.
112. See *Hilf, Marital Privacy, supra* note 19 and Part II.B.2 of this paper for a critique of this argument.
114. Id. at 433.
Furthermore, the right to marital privacy, recognized in Griswold, involved freedom from state intrusion into consensual sexual behavior in marriage. Since marital rape involves nonconsensual sexual conduct, it cannot be said that Griswold in any way promotes the marital exemption to rape.

The Baird emphasis on personal, as opposed to marital privacy, was reinforced in Roe v. Wade. There, the right of a woman, whether single or married, to obtain an abortion during certain stages of pregnancy, was recognized as being within the right of privacy. Beyond this decision, the Court in Planned Parenthood of Central Missouri v. Danforth held that a state could not require the prior written consent of a husband before his wife could obtain an abortion. The Court’s rationale was that it was the woman who has to carry the baby; therefore, she should be given the ultimate veto power over her body. The Court thus confirmed that the right to privacy extends to the individual and is not a right of the marital couple.

In Roe, the Court adopted a balancing test to be applied when considering whether to invalidate a statute which threatens fundamental rights. The Court stated that when a statute threatens a fundamental right, the state must show a compelling interest to override the individual’s right of privacy. Applying this test to marital rape cases, support can be established for the elimination of the marital rape exemption. For example, based upon the Griswold decision, the right to privacy includes the decision of both parties whether to attempt or prevent conception. However, the marital exemption allows a husband to impregnate his wife against her will in denial of her reproductive freedom.

116. Id.
118. Id. at 154.
120. Id. at 69.
121. Id. at 71. The state argued that requiring a husband’s written consent would strengthen the marital relationship. The Court responded that no such goal could be achieved by giving the husband the ultimate power over his wife.
122. Id.
125. Note, To Have and To Hold, supra note 84, at 1263.
"Rape statutes which include the marital exemption impermissibly burden a woman's decision to use sexual abstinence as a method of contraception." Thus, such statutes should be invalidated as unconstitutional, unless justified by the showing of a compelling state interest attained through a narrowly drawn statute. (For example, the state could argue that it has a compelling interest in maintaining marital harmony.)

The abortion and contraception cases recognizing the personal liberty of women were applied in State v. Smith when the New Jersey Supreme Court was confronted with defendant's argument that he was deprived of due process. The defendant argued that his due process rights had been violated because he was not put on notice that marital rape is a crime. The Court ruled that because women's personal rights have been increasingly recognized through judicial and legislative actions, this was sufficient to put defendant on notice that "the people of this State would no longer tolerate a husband's violent sexual assault of his wife." The Court also declined to view as compelling defendant's arguments that the state has an interest in maintaining the marital rape exemption.

One commentator, however, has suggested that the Supreme Court has maintained a place for marital privacy. In cases involving consensual sodomy, the Court has been willing to draw a distinction based upon marital privacy. Although, as the commentator writes, "[t]hese cases illustrate the continued vitality of marital privacy as a constitutional doctrine," they do so only on the basis of consensual contact. The commentator would also like the reader to believe that when a person marries they lose some degree of personal autonomy and therefore, "the affront

126. Comment, Abolishing the Marital Exemption, supra note 16, at 218.
127. Roe v. Wade, 410 U.S. 113 (1973); Carey v. Population Servs. Int'l, 431 U.S. 678, 688 (1977). In Carey, the Court stated that to be constitutional the statute must be narrowly drawn to express the compelling state interest.
128. See § II.B.1.-5 for a discussion of this and other arguments in support of the exemption.
130. Id. at 210, 426 A.2d at 46.
131. Id. at 207, 426 A.2d at 44.
132. See Hilf, Marital Privacy, supra note 19, at 39.
134. See Hilf, Marital Privacy, supra note 19, at 40.
to one's autonomy is less in the case of spousal rape than in the case of ordinary rape."\textsuperscript{135}

\textbf{B. Equal Protection}

The equal protection clause of the fourteenth amendment of the United States Constitution is based on the premise that those who are similarly situated should be similarly treated.\textsuperscript{136} Since almost all laws are going to make some sort of classification, the issue becomes whether the classification is reasonable. If the classification relates to a proper state interest, then the classification will be upheld.\textsuperscript{137} The standard employed for reviewing the sufficiency of the relationship between the classification and the alleged state interest depends upon the nature of the individual's affected interest. Ideally, the challenger is going to argue that he or she qualifies for heightened scrutiny. In order to qualify for "strict scrutiny," the challenger must show either that the measure violates a fundamental right or that it involves a suspect classification.\textsuperscript{138} If the challenger qualifies for heightened scrutiny, the state has to show that there is a compelling state interest which is necessary to justify this classification.\textsuperscript{139} If the state cannot establish a compelling state interest, the regulation will be invalidated.

Another standard of review that may be applied in equal protection decisions is the rational basis test. Applying this test, the courts generally defer to the legislature and the regulation will be upheld as long as the classification bears some, however remote, rational relationship to a conceivable state purpose.\textsuperscript{140} As established by the court in \textit{People v. Liberta},\textsuperscript{141} the marital rape exemption cannot even pass the rational basis test.

Aside from the strict scrutiny and rational basis standards of review, the courts may also apply an intermediate test. Applying this standard, the courts will generally uphold a classification

\textsuperscript{135} \textit{Id.} at 41.
\textsuperscript{136} 2 J. NOWAK, R. ROTUNDA, \& J. YOUNG, CONSTITUTIONAL LAW 317 (1986) [hereinafter cited as J. NOWAK].
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} \textit{Id.} at 324-25.
\textsuperscript{139} \textit{Id.} at 324.
\textsuperscript{140} \textit{Id.}
\textsuperscript{141} See notes 149-151 and accompanying text \textit{infra}. 
only when the state can demonstrate that the classification is "substantially related" to "important governmental objectives." 142 Some commentators adopt the position that a statute which classifies on the basis of gender is automatically subject to intermediate scrutiny. 143

The validity of a statute which fails to treat those similarly situated in a similar manner largely depends upon the standards under which the court reviews the relationship between the classification and the alleged state interest. 144 The nature of the individual's interest may be given great consideration. 145 Like the right to privacy argument, the equal protection argument has also been invoked on behalf of the husband-rapist and wife-victim. In Liberta, the husband argued that a statute containing a marital exemption for rape is a denial of equal protection because "it classifies unmarried men differently than married men" in an arbitrary fashion. The wife argued that allowing some women to press rape charges while denying others that right based on their marital status is unduly burdensome. 147 Although the court did not articulate its reasoning, it appears they rejected the defendant's argument by recognizing that "the equal protection clause does not prohibit a State from making classifications, provided the statute does not arbitrarily burden a particular group of individuals...." 148 The court applied the lowest standard available but nonetheless found that "there is no rational basis for distinguishing between marital rape and nonmarital rape." 149 The court declared the marital exemption for rape in the New York statute unconstitutional as a violation of the equal protection guarantees of the fourteenth amendment. 150 The court stated

142. Craig v. Boren, 429 U.S. 190, 197 (1976). In Craig, the Court was faced with a gender classification. The Oklahoma statute which permitted the sale of 3.2% beer to women at age 18 but required males to be 21 was invalidated for failing to pass the intermediate scrutiny test.
143. Note, To Have and to Hold, supra note 84, at 1267. This author cites City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) for this position.
144. J. Nowak, supra note 136, at 322.
145. Id.
146. Liberta, 64 N.Y.2d at 163, 474 N.E.2d at 573, 485 N.Y.S.2d at 213.
147. Id. at 163, 474 N.E.2d at 573, 485 N.Y.S. at 213. The court agreed with the wife's position.
148. Id.
149. Id. at 163, 474 N.E.2d at 573, 485 N.Y.S.2d at 213.
150. Id. The fourteenth amendment provides that no state may enforce any law which deprives any person within its jurisdiction the equal protection of the laws.
that "[t]he various rationales which have been asserted in defense of the exemption are either based upon archaic notions about the consent and property rights incident to marriage or are simply unable to withstand even the slightest scrutiny."\(^{151}\)

The rights of the wife-victim include several recognized fundamental rights: marriage,\(^{152}\) procreation,\(^{153}\) and individual autonomy.\(^{154}\) The marital rape exemption makes a distinction which affects these fundamental rights.\(^{155}\) Statutes which contain a marital rape exemption provide protection of such rights as the ability to control procreation for non-spouses but denies this same protection to a wife by allowing nonconsensual sexual acts to occur.\(^{156}\) Thus, it can be argued, that such statutes should be subject to strict scrutiny.\(^{157}\)

Whether a court applies heightened scrutiny, intermediate scrutiny, or a rational basis test, the exemption for men who rape their wives does not serve a compelling state interest,\(^{158}\) nor is it substantially related to any important governmental objective,\(^{159}\) nor is there a rational basis for the exemption.\(^{160}\) Whether the state argues that the exemption protects the sanctity of marriage and encourages reconciliation of the spouses, or that it prevents the filing of false charges,\(^{161}\) these justifications alone cannot withstand even the lowest standard of review. As the court in \textit{Liberta} noted, the various rationales advanced in favor of the exemption are "archaic" and "simply unable to withstand even the slightest scrutiny."\(^{162}\)

\(^{151}\) Id.


\(^{156}\) Id.

\(^{157}\) Id.

\(^{158}\) Id.

\(^{159}\) Clancy, \textit{Equal Protection Considerations, supra} note 155, at 13.

\(^{159}\) Note, \textit{To Have and to Hold, supra} note 84, at 1269.

\(^{160}\) \textit{Liberta}, 64 N.Y.2d 152, 474 N.E.2d at 567, 485 N.Y.S.2d 207.

\(^{161}\) See Part II.B.1-5 for suggested rationales.

\(^{162}\) \textit{Liberta}, 64 N.Y.2d at 163, 474 N.E.2d at 573, 485 N.Y.S.2d at 213.
In sum, an individual's right to privacy is a right which is being denied by the spousal rape exemption. There is no rational basis for denying this right. "[T]he marriage relationship cannot be favored in the law at the expense of the fundamental rights of the individuals within that relationship...." Maried women are being denied equal protection of the laws on the basis of their marital status despite the absence of an overriding state interest. The justifications that have been offered do not reflect current modern thinking. For these reasons, and others, it is urged that any marital rape exemption be abolished.

V. A STUDY OF PUBLIC PERCEPTIONS

Undoubtedly, it is difficult for some people to imagine such a phenomenon as marital rape. In an attempt to determine what people think about marital rape, researchers have turned to the public for their opinions. Although the research provides information assessing what people think about marital rape, there have been no conclusive studies analyzing what people think should be done to men who force their wives to have sex with them. In connection with the University of Cincinnati's Department of Criminal Justice, a survey was conducted to provide this information.

A. The Survey

The data examined was derived from 300 telephone interviews conducted with adult respondents residing in Hamilton County, Ohio. The sample population was selected from a computer generated random sample of 1200 residential telephone numbers in Hamilton County.

164. See, e.g., D. Finkelhor & K. Yllo, supra note 5. These researchers asked groups of undergraduate students for their opinions and found that, indeed, many people are likely to deny that marital rape exists; C. Jeffords & R. Dull, Demographic Variations in Attitudes Towards Marital Rape Immunity, J. Marriage & Family, 755-62 (1982). According to Jeffords and Dull, of 1300 Texas respondents asked if they were in favor of a law in which husbands could be charged with rape by their wives, only thirty-five percent responded they were in favor of eliminating the marital rape exemption.
165. The computer generated random sample was provided by Survey Sampling, Inc. of Westport, Connecticut. The questionnaire was administered by seven interviewers, all trained in conducting the interviews. The survey was administered to adults only who were eighteen years of age or older and who lived in the household called. All interviews
The questionnaire was designed to determine public perceptions about a variety of issues. The survey included questions on demographic characteristics, religiosity, and a variety of criminal justice issues, including attitudes toward punishment, pornography, the death penalty, and prison policies. Attitudes toward marital rape were assessed by the following question:

There has been a considerable amount of discussion in the mass media about “marital rape,” that is, husbands who force their wives to have sex with them. In your opinion, what should happen to men who force their wives to have sex with them?

The choices they were presented with included:

1. Long term in a state prison.
2. Short term in a local jail.
3. Mandatory counseling and/or community service work.
4. He should not be treated as a criminal but this should definitely be grounds for divorce.
5. Nothing.

B. Results

Table 1 summarizes the results of the survey question assessing opinions about marital rape. Of the 300 respondents, nearly half (48.7%) would impose mandatory counseling and/or community service work as a way of dealing with men who force

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were conducted during the months of February and March, 1986. The survey was administered between the hours of 6:30 p.m. and 9:30 p.m. weekdays and 10:30 a.m. and 9:30 p.m. Saturdays and Sundays. A sex split was maintained with a maximum of ten percent differences in the number of men and women interviewed. These guidelines were established to assure the most accurate representation of the population as possible.

166. Table 1: What should happen to men who force their wives to have sex with them?

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<thead>
<tr>
<th>Sanction for Marital Rape</th>
<th>Number</th>
<th>Percent</th>
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<tbody>
<tr>
<td>1. Long term in a state prison</td>
<td>40</td>
<td>13.3</td>
</tr>
<tr>
<td>2. Short term in a local jail</td>
<td>21</td>
<td>7.0</td>
</tr>
<tr>
<td>3. Mandatory counseling and/or community service work</td>
<td>146</td>
<td>48.7</td>
</tr>
<tr>
<td>4. Not treated as a criminal but grounds for divorce</td>
<td>66</td>
<td>22.0</td>
</tr>
<tr>
<td>5. Nothing</td>
<td>12</td>
<td>4.0</td>
</tr>
<tr>
<td>6. Don’t know/Not applicable</td>
<td>15</td>
<td>5.0</td>
</tr>
<tr>
<td>TOTALS</td>
<td>300</td>
<td>100.0</td>
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their wives to have sex with them. Another twenty-two percent reported that, in their opinion, marital rape should be grounds for divorce but the husband should not be treated as a criminal. Four percent thought nothing should happen to men who rape their wives. In other words, nearly three-fourths of the respondents are opposed to punishing husband-rapists by confinement to a prison or jail. What is significant, however, is the fact that with the exception of the four percent who would do nothing, all of the respondents favored some form of state intervention. This suggests that progress is being made with regard to an awareness of the problem. The fact that most people favor some form of state intervention reflects a raised consciousness on the part of the public.

With regard to those who favored criminal sanctions, 13.3% thought men who rape their wives should serve a long term in a state prison. Another seven percent thought husband-rapists should serve a short time in a local jail. Therefore, when people are in favor of imposing criminal sanctions on marital rapists, they are more likely to favor the more punitive measure—a long term in state prison as opposed to a short jail sentence.

To determine if responses varied by sex, age, and marital status, statistical techniques were employed to analyze the data further. The results reveal that the differences were statistically significant with regard to all three variables. That is, patterns emerged when the respondent's sex, age, and marital status were statistically tested.

Table 2 summarizes the various responses by sex. Although men and women were as likely to impose criminal sanctions for

<table>
<thead>
<tr>
<th>Sanction for Marital Rape</th>
<th>Male</th>
<th>Female</th>
</tr>
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<tbody>
<tr>
<td>Number Percent</td>
<td>Number</td>
<td>Percent</td>
</tr>
<tr>
<td>1. Long prison term</td>
<td>19 13.4</td>
<td>21 13.3</td>
</tr>
<tr>
<td>2. Short jail sentence</td>
<td>9 6.3</td>
<td>12 7.6</td>
</tr>
<tr>
<td>3. Mandatory counseling and/or</td>
<td>54 38.0</td>
<td>92 58.2</td>
</tr>
<tr>
<td>community service work</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. Not treated as a criminal but</td>
<td>45 31.7</td>
<td>21 13.3</td>
</tr>
<tr>
<td>grounds for divorce</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5. Nothing</td>
<td>9 6.3</td>
<td>3 1.9</td>
</tr>
<tr>
<td>6. Don't know/Not applicable</td>
<td>6 4.2</td>
<td>9 6.7</td>
</tr>
<tr>
<td>TOTALS</td>
<td>142 99.9</td>
<td>158 100.0</td>
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</table>
men who rape their wives, they differed with regard to treating the man as a criminal. Women were more likely to favor mandatory counseling and/or community service work. Men were more in favor of treating marital rape as grounds for divorce but not treating the rapist as a criminal. Whereas 31.7% of the male respondents were opposed to treating the husband as a criminal, only 13.3% of the females were similarly opposed. Furthermore, men were more likely to respond that nothing should happen to men who force their wives to have sex (6.3% of the men versus 1.9% of the women).

Table 3 summarizes responses by age. Two categories were established with eighteen to thirty-five year olds considered the younger group and thirty-six to ninety-two years olds the older group. Younger people were more likely to favor imposing criminal sanctions. Whereas 29.8% of the younger respondents were in favor of either a long term in prison or a short term in a local jail, only 13.1% of the older respondents would favor these sanctions. Both groups were more likely to favor the more punitive act of a long prison sentence. Both were more likely to want to deal with a marital rapist through mandatory counseling and/or community service work than any other response (46.6% of the younger group and 50.5% of the older group). Younger people were more likely to want to treat a man who rapes his wife as a criminal. Sixteen percent thought he should not be treated as a criminal but that the act was grounds for divorce. Conversely, 26.6% of the older respondents would not want to treat husband-rapists as criminals. There was a very small difference between the groups with regard to the “nothing” re-

168. Table 3: Response by Age

<table>
<thead>
<tr>
<th>Sanction for Marital Rape</th>
<th>18-35 year olds</th>
<th>36-92 year olds</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Percent*</td>
</tr>
<tr>
<td>1. Long prison term</td>
<td>22</td>
<td>16.8</td>
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<td>2. Short jail sentence</td>
<td>17</td>
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<td>3. Mandatory counseling and/or community service work</td>
<td>61</td>
<td>46.6</td>
</tr>
<tr>
<td>4. Not treated as a criminal but grounds for divorce</td>
<td>21</td>
<td>16.0</td>
</tr>
<tr>
<td>5. Nothing</td>
<td>6</td>
<td>4.6</td>
</tr>
<tr>
<td>6. Don't know/Not applicable</td>
<td>4</td>
<td>3.1</td>
</tr>
<tr>
<td><strong>TOTALS</strong></td>
<td><strong>131</strong></td>
<td><strong>100.1</strong></td>
</tr>
</tbody>
</table>

*Percentages may be slightly more or less than 100% due to rounding.
sponse. Of the younger group, 4.6% thought nothing should happen to men who force their wives to have sex with them and 3.6% of the older group reported the same.

Finally, Table 4 reports the different responses by marital status. The data revealed that persons who have never been married were more likely to favor treating marital rape as a crime. Whereas 28.6% would favor either a long prison term or a short jail sentence, only 19.7% of the married respondents and 13.2% of the single respondents were in favor of these sanctions for dealing with marital rape. Again, all groups were most likely to think marital rapists should be required to seek counseling and/or perform community service work. Single people (all those widowed, divorced, or separated) were most likely to think marital rape should be grounds for divorce but did not believe the husband should be treated as a criminal. Never married respondents were more willing than married respondents to treat husbands who rape their wives as criminals. Approximately thirty percent of the single respondents, 22.5% of those married, and 15.78% of the never marrieds thought marital rape should definitely be grounds for divorce but that the man should not be treated as a criminal. Interestingly, the married respondents were more likely than the other two groups to think nothing should happen to men who force their wives to have sex with them.

To summarize the results, women were more likely to favor treating men who rape their wives as criminals. Men were more likely to think nothing should happen to men who force their wives to have sex with them. Younger people and people who

<table>
<thead>
<tr>
<th>Sanction for Marital Rape</th>
<th>Married</th>
<th></th>
<th>Single</th>
<th></th>
<th>Never Married</th>
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<td>1. Long prison term</td>
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<td></td>
<td></td>
</tr>
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<td>4</td>
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<tr>
<td>Percent</td>
<td>13.3</td>
<td></td>
<td>7.5</td>
<td></td>
<td>18.6</td>
<td></td>
</tr>
<tr>
<td>2. Short jail sentence</td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number</td>
<td>11</td>
<td></td>
<td>3</td>
<td></td>
<td>7</td>
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</tr>
<tr>
<td>Percent</td>
<td>6.4</td>
<td></td>
<td>5.7</td>
<td></td>
<td>10.0</td>
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<tr>
<td>3. Mandatory counseling or community service</td>
<td>84</td>
<td>48.6</td>
<td>25</td>
<td>47.2</td>
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<td>51.4</td>
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<tr>
<td>4. Not treated as a criminal but grounds for divorce</td>
<td>39</td>
<td>22.5</td>
<td>16</td>
<td>30.2</td>
<td>11</td>
<td>15.7</td>
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<tr>
<td>5. Nothing</td>
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<tr>
<td>Number</td>
<td>8</td>
<td></td>
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<tr>
<td>Percent</td>
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<td></td>
<td>3.8</td>
<td></td>
<td>2.9</td>
<td></td>
</tr>
<tr>
<td>6. Don’t know/Not apply</td>
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<td></td>
<td></td>
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</tr>
<tr>
<td>Number</td>
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<td>3</td>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Percent</td>
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<td></td>
<td>5.7</td>
<td></td>
<td>1.4</td>
<td></td>
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<tr>
<td>TOTALS</td>
<td>173</td>
<td>100.0</td>
<td>53</td>
<td>100.1</td>
<td>70</td>
<td>100.0</td>
</tr>
</tbody>
</table>

*Percentages may be slightly more or less than 100% due to rounding.
have never been married were more likely to favor imposing criminal sanctions. Older people and male respondents were more likely to respond that marital rape should be grounds for divorce but the man should not be treated as a criminal.

C. Analysis

There are several points which deserve further analysis. First, the fact that nearly all respondents were in favor of some form of state intervention when dealing with husband-rapists suggests progress with regard to criminalization of marital rape. In addition, the fact that most favor mandatory counseling may say something about the origin of the problem. This may suggest that people believe that marital rape is a family issue which demands state intervention in the form of mandatory counseling in order to get to the root of the problem.

The fact that people who were in favor of imposing criminal sanctions were more in favor of a long prison term may reflect the nationwide "get tough" movement. An alternative explanation is that the people who believe that marital rape is a criminal act want to treat it like any other rape.

It should be pointed out that fifteen of the 300 respondents failed to offer their opinion on marital rape. This could reflect the limitations of the study in the sense that the respondents were forced to choose from one of five responses without the opportunity to establish circumstances. For instance, several interviewees thought their answer would depend on the circumstances around the act, i.e., whether violence was involved, history of previous abuse, or if the parties were living together. They wanted to establish a scenario and thought each case should receive individual attention. As such, five percent of the respondents could not choose from any of the sanctions our study supplied. This suggests that there are characteristics surrounding marital rape which would cause some people to respond more or less punitively.

The fact that several respondents wanted to establish a typical scenario when responding to the issue of marital rape is related to the literature addressing rape victims. In the area of rape in general, it has been suggested that there are characteristics which determine whether or not a rape is "legitimate." 170 "Legit-

Imacy has to do with whether a victim can successfully persuade the police that she is 'deserving' of the status of rape victim."171 Such factors as the physical condition of the victim, the amount of resistance offered by the victim, presence of a weapon, proof of penetration, the relationship between the victim and offender, and alcohol involvement are all taken into account when a woman has been raped.172 Similarly, criminal justice responses to marital rape may depend on whether or not the victim can prove she is a legitimate victim. Perhaps the closer we can get to describing a typical marital rape, the more likely people will be to favoring criminalization.

Another limitation of the study is the fact that marital rape was defined simply as "men who force their wives to have sex with them," allowing individual respondents to interpret as desired. It would be a mistake to assume all respondents interpreted the survey question the same. For example, some people may have responded that nothing should happen to men who force their wives to have sex with them because in their minds, mere force does not constitute rape of the spouse or anyone else. If the question had been worded to include physically forcing their wives, perhaps the results would have been different. Thus, left to interpret what should be done with a man who forces his wife to have sex with him, the majority of the respondents chose the middle of the road approach—mandatory counseling and/or community service work. A more thorough investigation of public perceptions would require asking for a number of responses under different circumstances. For example, how would people treat a man who rapes his wife if he is a recidivist, or if the act occurs outside of the home? What about if weapons were involved and the victim sustains injuries? These are questions which would provide valuable information with regard to how the public wants to treat a marital rapist and thus perhaps aid the legislatures in appropriate action. Responses, not only of the public, but also of the criminal justice system, are bound to vary with the characteristics of the act. The limited case law that is available also suggests that the courts are more likely to respond when specific factors are present, i.e., when the parties are separated.173

171. Id. at 342.
172. Id.
173. See Section III.B. and text accompanying notes 9596, supra.
The fact that male respondents were less likely to treat marital rape as a criminal act than were females, may suggest that men have more traditional views of the role of sex in marriage. In addition, the fact that younger people favored imposing criminal sanctions may be a good indication of the future for legislative action on marital rape. Since younger people generally represent future policies, there is hope that marital rape will be criminalized nationwide.

In conclusion, while recognizing the limitations of this study, it nonetheless seems critical to know what the public thinks about marital rape. Where state action has occurred, it has been the result of public pressure.174 Rape laws are being changed as a result of a “quiet but emotionally intensive campaign by women’s groups against what they call ‘legal rape.’” 175 Groups which are active in this campaign include the Coalition to Reform the Sex Offense Laws and the National Organization for Women. Leaders of these and various other groups lobby for marital rape bills that would abolish spousal exemption, declaring that such a bill is necessary, not only as protection of women’s rights, but also as a social statement that any forced sexual relationships are intolerable.176 The importance of this study is the fact that it has revealed that there is public support for state action in the area of marital rape.

VI. CONCLUSION

Marital rape is a very real and serious problem. Until every state recognizes that it is a criminal act, it must be given political priority. States which continue to maintain even a partial exemption, such as Kentucky,177 are encouraged to follow the trend established by the eleven states which have abolished the marital rape exemption in its entirety.178

Kentucky’s legislature was recently confronted with the opportunity to follow the trend set forth in the other states by deleting from Kentucky law any reference to marriage as a

175. Id.
176. Id.
177. See notes 73-80, supra.
178. See note 72, supra.
defense to a charge of rape. The supporters of House Bill 309, which was sponsored by Rep. Marshall Long, argued that the bill would provide Kentucky women with another way to combat domestic violence. The bill's opponents argued that marital rape should not be treated the same as rape by a stranger.

House Bill 309 was defeated by the legislature on February 23, 1988 by a vote of 49-42. The legislators who opposed the bill stated that they feared that it would lead to fabricated charges of rape. Rep. Bobby Richardson said that the bill would allow women to file false charges as a ploy to obtaining a more favorable divorce settlement. Rep. Herbie Deskins feared that the bill would put law enforcement officials into the bedroom of every home in Kentucky. As the bill's sponsor, Long dismissed such concerns and defended HB 309 by stating: "Rape is rape. Violence is violence. And a victim is a victim. It makes really no difference whether it's inside or outside of the marriage."

Apparently, the forty-nine legislators who voted against HB 309 were either unaware of, or chose to disregard, the studies documenting the widespread extent of marital rape. In addition, it would appear that these same legislators would rather adhere to the stereotypical image of women "lying in wait for such a change [in rape statutes], ready to blackmail their husbands into favorable divorce settlements or get even for some real or imagined wrong." This image of women is both detrimental and unfair because it fails to recognize that women are people—not a "horde of spiteful wenches." The fear that women will fabricate false charges is an inadequate justification for maintaining a spousal exemption. For one, the criminal justice system is presumed capable of handling false complaints. In addition, and as Rep. Long reminded House members, filing false charges is a class D felony.

180. Id.
181. Id.
182. Id.
183. Id.
184. Id.
185. D. RUSSELL AND D. FINKELHOR & K. YLLO, supra note 5.
187. Id.
188. The Courier Journal, supra note 179.
In addition to the argument that women will fabricate false charges, the other arguments which have been advanced by those who support spousal exemption from rape statutes are similarly without merit. If ours is a society which truly believes that women are individuals with separate identities and rights, then it cannot be said that when a woman marries she gives herself up to her husband who then has unrestricted access to her body. The marital rape exemption should not be used to “promote reconciliation” of a marriage that has deteriorated to the point that one spouse is demanding sex without the other spouse’s consent. Marital rape is frequently quite violent and leaves the same emotional scars on its victim as nonmarital rape. Men need to be aware that they do not have the right to control their wife’s bodily integrity.

Finally, if our goal is to promote a society where women are free to control access to their own bodies, then the repeal of any spousal exemption is essential to every woman’s guarantee of liberty and justice.

Sallee Fry Waterman
NOTES

Facing the Economic Challenges of the Eighties—the Kentucky Constitution and Hayes v. The State Property and Buildings Commission of Kentucky

I. INTRODUCTION

The volatile economic conditions of the eighties have resulted in factory and plant shutdowns across the nation. Consequently, states that are concerned with economic development are constantly struggling against each other in attempts to entice new businesses and industries to locate within their boundaries. In 1986 Kentucky became involved in a “fierce competition” with many other states to be chosen as the location of a planned Toyota assembly plant. Therefore, when it was announced that Toyota would build its first United States based automobile assembly plant in Scott County, Kentucky, Governor Martha Layne Collins and the Commonwealth made national headlines. Despite Toyota’s projections that the plant would have the capacity to produce up to 200,000 cars per year and that it would employ up to 3,000 people, the announcement was met with mixed reactions in the Commonwealth.

Some heralded the news as a major coup for both the Collins administration and the Commonwealth as a whole. However, critics of the Toyota deal argued that the financing arrangements contained in the agreement were inconsistent with certain provisions of the Kentucky Constitution.

The critics’ major concern was the package of inducements offered by Kentucky to Toyota. They argued that this offer would have a direct cost to the state estimated at between 125 million and 268 million dollars. The total package included: state financing of comprehensive worker training programs; highway improvements; assisting Toyota in securing foreign trade zone status;

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2. Id. at 798.
3. Id.
assisting with rezoning and other related matters; and a promise to convey a 1600-acre project site in Scott County which the Commonwealth would acquire and develop for $35 million.\textsuperscript{4} The money needed to acquire and develop the site was to be generated by revenue bonds issued by the State Property and Buildings Commission.\textsuperscript{5} The funds necessary to pay the debt service, principal, and interest on the bonds was to be provided by appropriations from the General Funds of the Commonwealth on a biennial basis as an expense item of the Commerce Cabinet.\textsuperscript{6} The vehicle by which this offer was made possible was Senate Bill (SB) 361\textsuperscript{7} which was enacted by the General Assembly in 1986. The Bill was an addition to the Property and Building Commissions statute.\textsuperscript{8} It allows the Kentucky Commerce Cabinet to use tax increment financing for the location of industries within the state. Therefore, the state possesses legislative authority to perform or finance almost every step necessary for an industry to locate and begin operation in Kentucky.\textsuperscript{9}

The sections of the Kentucky Revised Statutes which SB 361 amended or created and the financial package promised to the Toyota Motors Corporation by the Commonwealth of Kentucky were the focus of a declaratory judgment action which was brought in the Franklin County Circuit Court. The court was asked to determine whether SB 361, the Toyota project, and the financing thereof was consistent with Sections-3, 49, 50, 51, 59, 60, 171 and 177 of the Kentucky Constitution. The trial court approved the constitutionality of the financing arrangement and an appeal to the Kentucky Supreme Court followed.\textsuperscript{10} This note examines the supreme court's ultimate decision in Hayes v. State Property and Building Commission of Kentucky.

The parties of record in the case included: Larry Hayes, State Budget Director; R. Scott Plain, a special \textit{amicus curiae} appointed to represent the public pursuant to the rules of the Kentucky

\textsuperscript{4} Id.
\textsuperscript{5} Id.
\textsuperscript{6} Id.
\textsuperscript{8} KY. REV. STAT. ANN. §§ 56.440-56.514 (Baldwin 1986).
\textsuperscript{10} Hayes v. State Property and Bldg. Comm'n, 731 S.W.2d 797 (Ky. 1987).
Supreme Court in such cases; two private citizens who were permitted to intervene in order to challenge the constitutionality of the legislation; the State Property and Buildings Commission and other constitutional and cabinet officers. However, recognizing that the parties of record were not the only parties who would be affected by the outcome of the case, the court stated:

In a practical sense, the parties who have a real interest are the people of this Commonwealth who have a right to a determination of whether the executive and the legislature have acted within the limitations of their constitutional power, the executive and legislative branches of government who sponsored and enacted the legislation, and Toyota, the industry induced to come to this Commonwealth.11

The Kentucky Supreme Court, in a four to three decision, affirmed the lower court's decision that SB 361, adopted by the Kentucky General Assembly during the courting of the Toyota corporation, and the final package of inducements offered to Toyota, were consistent with Sections 3, 49, 50, 51, 59, 60, 171, and 177 of the Kentucky Constitution.

II. BACKGROUND

The economy of the Commonwealth has traditionally been associated with agriculture, coal mining, and horse racing. Therefore, the inducement package offered to Toyota represented the state's first attempt at improving economic conditions through competitively negotiating with, and successfully inducing, a large, multinational corporation to locate a plant within the state. Although the Toyota project is the first of its kind in Kentucky, the tension between the state's constitution and economic development has existed since the present constitution was ratified in 1891.12

The political and economic conditions present in the Commonwealth at the time the constitution was ratified had an enormous impact on the outcome of the Constitutional Convention. Kentucky was a farming state, with eighty percent of its citizens

11. Id. at 799.
12. Since its original constitution was adopted in 1792, Kentucky has had three constitutional conventions to revise the original. The first took place in 1799; the second in 1849; and the last in 1890-91. The constitution has since been amended 27 times. See Tobergte, supra note 9, at 21 n.1.
involved in agriculture and the people of Kentucky were “fearful” of big business and industry, particularly the railroad companies. The fear of big business and a general mistrust of legislatures resulted from local government’s unsuccessful attempts at public/private partnerships with the railroads. These partnerships were encouraged by legislatures who were prohibited by state constitutions from lending state credit to the railroads; therefore, these legislatures encouraged local governments to extend public assistance to the companies to offset their construction costs. When these companies abandoned their lines, the result was financial disaster for many of the local entities which had entered the joint ventures. Therefore, Kentucky reacted by enacting constitutional provisions designed to limit public assistance to private enterprise, and to place strong regulations on corporations.

A number of the reactionary provisions, which were adopted in Kentucky’s ratified constitution, were central to the controversy in Hayes. The constitutional provisions called into question were Section Three which prohibits grants of “exclusive, separate public emoluments or privileges” to any person except in consideration of public services; Section Forty-nine and Fifty which limit the legislature’s power to financially obligate future generations without the permission of the people obtained by means of a direct vote; Section Fifty-one which prohibits legislation that involves more than one subject in the title; Section Fifty-nine which prohibits “special legislation”; Section 171 which provides that taxes shall be levied and collected only for public purposes and that taxes must be uniform; and, finally, Section 177 which prohibits the lending of state credit.

III. THE COURT’S OPINION AND REASONING

The court, in an opinion written by Justice Wintersheimer, acknowledged that certain general principles of law were appli-

14. Tobertge, supra note 9, at 21 n.2.
15. Id. at 21.
16. Id.
17. Ky. Const. § 3.
cable in the case and addressed these before turning to the specific constitutional provisions involved.\textsuperscript{23} The court initially recognized that duly adopted legislation is entitled to a presumption of validity\textsuperscript{24} and that "all statutes shall be liberally construed" in order to "promote their objects and carry out the intent of the legislature..."\textsuperscript{25} The court pointed out that it is within the General Assembly's power to enact laws which are not expressly or impliedly prohibited by the Kentucky Constitution or the United States Constitution.\textsuperscript{26} The court indicated that in this case,

the legislature working in conjunction with the executive, determined that it was proper to attempt to alleviate unemployment and develop economic strength in the state through the financing of an industrial development project pursuant to the act which constitutes the affectation of a proper public purpose.\textsuperscript{27}

The court refused to act as a "super legislature" by reviewing the wisdom of the legislative and executive action.\textsuperscript{28} According to the court, its only function was to interpret the acts of the executive and legislative branches of government in light of the constitution, existing legal precedents, and the legislation itself.\textsuperscript{29}

The court went on to examine each constitutional section challenged in the action and determined, in each instance, that the circuit court did not commit reversible error in finding that SB 361 was constitutional.\textsuperscript{30}

Section 177 of the Kentucky Constitution prohibits the extension of the Commonwealth's credit or the making of a donation to any private corporation or individual.\textsuperscript{31} However, the court stated that Section 177 is not offended when the expenditure of public funds has, as its purpose, the effectuation of a valid public purpose.\textsuperscript{32} To reach this conclusion, the court followed the rea-

\begin{enumerate}
\item[23.] Hayes, 731 S.W.2d at 798.
\item[24.] Id. at 799.
\item[25.] Id. See also KY. REV. STAT. ANN. § 446.080 (Baldwin 1985).
\item[26.] Id.
\item[27.] Id.
\item[28.] Id. See Dalton v. State Property and Bldg. Comm'n, 304 S.W.2d 342 (Ky. 1957) (wisdom or expediency of enactments of the legislature is not for the courts to pass on).
\item[29.] Hayes, 731 S.W.2d at 798.
\item[30.] Id. at 799.
\item[31.] KY. CONST. § 177.
\item[32.] Hayes, 731 S.W.2d at 799. See also Industrial Dev. Auth. v. Eastern Ky. Regional Planning Comm'n, 332 S.W.2d 274 (Ky. 1960) (in determining whether an appropriation is
soning of the Virginia Supreme Court in the case of *Almond v. Day*.\(^{33}\)

The issue in *Almond* was whether the investment of Virginia Supplemental Retirement System Funds in certain securities violated the "credit clause" of the Virginia Constitution.\(^{34}\) The "credit clause" of the Virginia Constitution is similar to Section 177 of the Kentucky Constitution, in that each provides that "the credit of the State ... shall [not] be, directly or indirectly ... granted to or in aid of any person, association, or corporation, nor shall the State ... subscribe to or become interested in the stock or obligations of any company, association, or corporation ..."\(^{35}\)

The Virginia Supreme Court reasoned that when the underlying purpose of a transaction and the financial obligation incurred are for the state's benefit, there is no lending of credit.\(^{36}\) Therefore, the court determined that the fact that others may incidentally profit when the state incurs indebtedness for its own profit is not enough to bring a transaction within the scope of the "credit clause."\(^{37}\) Taking the *Almond* reasoning one step further, the Kentucky Supreme Court concluded that the relief of unemployment resulting from completion of the Toyota project, is a public purpose that would justify the outlay of public funds.\(^{38}\)

In addition to the public purpose requirements, Section 177 was written to prevent transactions which might result in future liabilities against the general tax revenues of the Commonwealth for a public purpose, the test is in the end, not in the means); and Kentucky Livestock Breeder's Assn. v. Hager, 120 Ky. 125, 85 S.W. 738 (Ky. 1905) (state fair was a public purpose for which legislature could appropriate state revenues).

\(^{33}\) 197 Va. 782, 91 S.E.2d 660 (1956).

\(^{34}\) Va. Const. § 185.

\(^{35}\) *Id.* Accord Ky. Const. § 177 ("the credit of the Commonwealth shall not be given, pledged or loaned to any individual, company, corporation or association ... nor shall the Commonwealth become an owner or stockholder in ... any company, association or corporation....")

\(^{36}\) *Almond*, 197 Va. at ____, 91 S.E.2d at 667.

\(^{37}\) Id.

\(^{38}\) *Hayes*, 731 S.W.2d at 800. The court indicated that Industrial Dev. Auth. v. Eastern Ky. Regional Planning Comm'n, 332 S.W.2d 274 (Ky. 1960) clearly established the principle that relief of unemployment constitutes a public purpose. There the court held that an act which provided that local development agencies could obtain financial assistance in the form of loans for industrial building projects and industrial subdivision projects with the aim of fostering industrial development and reducing unemployment in the state did not violate Kentucky Constitution Section 171.
and thus limit future legislatures' ability to use the funds as they deemed appropriate.\textsuperscript{39} The Kentucky Supreme Court noted that in its earlier decisions, it had always found assurances "that the legislature would provide for funding in future appropriations"\textsuperscript{40} to be offensive to the constitution. However, in the case of SB 361, the legislation did not commit any future funds to the Toyota project. Rather, Toyota was "clearly at the mercy of the Kentucky legislature"\textsuperscript{41} since the financial arrangements of the bill required the Commerce Cabinet to include a request for an appropriation in its biennial budget to pay for the bond service and there was no guarantee that the General Assembly would act on such a request.\textsuperscript{42}

The court next examined Sections 3 and 171, which it viewed as being complimentary to Section 177. Section Three prohibits separate privileges except in consideration of public services,\textsuperscript{43} while Section 171 provides that taxes shall be collected and levied only for public purposes.\textsuperscript{44} The court overcame the service/purpose distinction by pointing out that if the purposes served by an action are public purposes for which tax revenues may be levied under Section 171, then the manner of the use and the expenditure is also proper under Section Three.\textsuperscript{45} The important point, according to the court, is whether the purpose is public and not whether the agency through which it is dispensed is public.\textsuperscript{46} "The public service provided here," stated the court, "is reduction of unemployment which would not occur but for the inducement to locate here and is a direct benefit to the people of this state which they should not be deprived of by any hypertechnical interpretation of the letter of the Constitution."\textsuperscript{47}

The court then examined Sections 49 and 50 which strictly limits the legislature's power to financially obligate future legislatures without obtaining the permission of the people by means

\textsuperscript{39} Hayes, 731 S.W.2d at 800.
\textsuperscript{40} Id. See also McGuffey v. Hall, 557 S.W.2d 401 (Ky. 1977), and Greer v. Kentucky Health and Geriatrics Authority, 467 S.W.2d 340 (Ky. 1971).
\textsuperscript{41} Hayes, 731 S.W.2d at 800.
\textsuperscript{42} Id.
\textsuperscript{43} KY. CONST. § 3.
\textsuperscript{44} KY. CONST. § 171.
\textsuperscript{45} Hayes, 731 S.W.2d at 801.
\textsuperscript{46} Id.
\textsuperscript{47} Id. at 802.
of a direct vote. The court pointed out that the state can incur
debt by issuing either general obligation bonds or revenue bonds. The
general obligation bonds are payable out of state revenues, and
are backed by the full faith and credit of the Commonwealth. They
must be voted on by the people. Revenue bonds are
secured by the project being financed and are not backed by the
Commonwealth. According to the court, “serial” leases have traditionally been
used to avoid conflict with Sections 49 and 50. Under a “serial”
lease plan, revenue bonds are issued to finance construction of a
public improvement which in turn is leased by the state. The
lease payments made by the State serve to retire the bonds. The
lease periods run for two years and are automatically re-
newed until the bonds are retired, unless notice of cancellation
is given. The court noted that Kentucky courts have consistently held
that financing projects, similar to the Toyota project, do not
constitute a debt within the meaning of Sections 49 and 50. The
rationale advanced in these cases is that no debt has been created
since the financial obligations of the Commonwealth are limited
to a two-year period, and the General Assembly appropriates
general fund revenue for debt service accruing only during that
two-year period.
The court pointed out that the Toyota bonds have basically
the same security as all other bond issues in Kentucky, there
being no lien or security interest of the financed project, and it
being secured only by the revenues from the biennial financing
agreement, subject to the decision of future legislatures to ap-
appropriate any debt service.

48. Id.
49. Id.
50. Id.
51. Id.
52. Id.
53. Id.
54. Id.
55. Id. at 803.
56. Id. See also Blythe v. Transportation Cabinet, 660 S.W.2d 668 (Ky. 1983); Turnpike
Authority of Ky. v. Wall, 336 S.W.2d 551 (Ky. 1960); Waller v. Georgetown Bd. of Educ.,
209 Ky. 726, 273 S.W. 498 (1925).
57. Hayes, 731 S.W.2d at 803.
58. Id. For an examination of the development of the revenue bond concept, see Blythe
The court dealt briefly with Section Fifty-one, which prohibits legislation involving more than one subject or having more than one subject in the title. The court said that the title of legislation need only furnish general notification of the general subject in the act. The court found that SB 361 met this standard.

Finally, the court examined SB 361 in conjunction with Section Fifty-nine, which prohibits special legislation. According to the court, the purpose of this section is to prevent special privileges, favoritism, and discrimination in order to promote equality under the law. Since SB 361 authorizes the state to provide for valid public purposes, such as the elimination of unemployment by financing industrial development projects for the use of industrial entities, the court concluded that it was not "special legislation" under Section Fifty-nine because the law is not available solely for Toyota, but can be utilized by "any industrial entity which agrees to construct and install a facility which satisfies the standards provided by the Buildings Commission and otherwise meets the requirements of the act."

Three justices dissented, arguing that SB 361 violated the challenged sections of the Kentucky Constitution. Though each wrote a separate opinion in order to address the constitutional sections involved, they all indicated that the court's interpretation of the constitution was too liberal, and advocated a narrower reading. It was the dissenting justices' view that the court had effectively caved in to "non-judicial arguments" in order to uphold the legislation. According to Justice Leibson, "[p]ressure on the judiciary to find some way around the constitution in the name of political expediency has proved to be overwhelming."
IV. Analysis

The Commonwealth of Kentucky is experiencing a period of economic transition. Kentucky could not have remained the rural state that it was in the 1890s and cope with the economic challenges of today’s economy.

Kentucky legislators have generally recognized the need for change, and have passed legislation to facilitate economic growth and development within the state. In 1972, the General Assembly adopted the Kentucky Business Corporation Act, designed to make Kentucky corporate law more competitive with that of other states and to provide Kentucky with a corporate statute “more responsive to the demands of the modern corporate world.” In 1982, the General Assembly enacted the Kentucky Enterprise Zone Program, which was modified in 1986. The Enterprise Zone Program is a means of encouraging new economic activity in economically depressed areas of the Commonwealth through “reduced taxes and the removal of unnecessary governmental barriers to the production and earning of wages and profits and the creation of economic growth.”

Senate Bill 361 may be seen as a natural progression in a series of steps taken by the legislature to curb unemployment in the Commonwealth by promulgating legislation designed to encourage economic growth and development. Here, the General Assembly has recognized the competitiveness that exists between states that are attempting to induce businesses to locate within their boundaries, and through SB 361, has made it advantageous for businesses to choose to locate in Kentucky.

In light of the General Assembly’s liberal construction of the Kentucky Constitution, and the economic challenges the Commonwealth must deal with in the 1980s and beyond, the Kentucky Supreme Court’s holding in Hayes does not seem out of line.

68. KY. REV. STAT. ANN. 271A (Baldwin 1972).
71. KY. REV. STAT. ANN. 154.650 (Baldwin 1986).
72. The Kentucky Supreme Court noted in Hayes that at the time the Toyota resolution was adopted by the State Property and Buildings Commission, the national unemployment rate was 6.8% while the unemployment rate in Kentucky was above 10%.
Traditionally, Kentucky courts have “favorably interpreted the constitution in the area of economic development.”73 Hayes is consistent with this.

The court’s examination of the state unemployment rate, the number of jobs that would be created within the plant, the revenue that would be generated both in the form of wages and tax dollars, and the spin-off effect creating more development in the geographic vicinity of the Toyota plant, may be viewed not as a concession to non-judicial arguments, but rather as a consideration of the economic factors of the 1980s in conjunction with an 1890’s constitution. Under the court’s liberal interpretation of the constitution (supported by Kentucky case law,74 and a similar interpretation of the Virginia Constitution by the Virginia Supreme Court75), Sections 177, 3 and 171 of the Kentucky Constitution are not violated when the legislation in question has, as its purpose, a valid public purpose.76 The economic considerations examined by the court were merely factors used to determine whether SB 361 could effectuate that public purpose.

The three dissenting opinions should not be discounted. The four-three decision illustrates the problems inherent in having an 1890’s constitution in a 1980’s economy. Future decisions on the constitutionality of legislation affecting economic development could turn upon whether the majority of the court advocates a liberal or strict interpretation of the Kentucky Constitution.

V. CONCLUSION

Senate Bill 361 is an innovative example of the Commonwealth’s commitment to economic growth and development. The Hayes decision, resulting from a reasonable interpretation of the Kentucky Constitution, confirms that commitment. Had the court held otherwise, the legislative intent to lure major industries to Kentucky by providing a comprehensive package of inducements would have been thwarted.77 The Kentucky Supreme Court’s
holding that SB 361 is consistent with the Kentucky Constitution, is in line with traditional legislative and judicial interpretations of the constitution, and is reflective of the differences between the economic considerations present in the 1980s and those that existed at the time the constitution was ratified.

Kelly Beers Rouse
The Seat Belt Defense in Kentucky: *Wemyss v. Coleman*

I. INTRODUCTION

Numerous actions have been brought by plaintiffs seeking damages for injuries which they have sustained in automobile accidents. These accidents result from the negligence of either the driver of the car in which they were a passenger, or the negligence of the driver of another car. In many of these cases, the defendants have sought to exculpate themselves from liability by arguing that the injured plaintiff contributed to his own injury by failing to wear an available seat belt. This is commonly called the "seat belt defense."

One of the earliest reported cases dealing with the issue of whether failure to use a seat belt could be asserted as contributory negligence on the occupant's part, was the 1966 South Carolina decision, *Sams v. Sams*. In *Sams* the court held that it was error to strike from the answer a specification of contributory negligence on the occupant's part for riding in an automobile without wearing an available seat belt.

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6. Id.
Although the defense has been available in a few jurisdictions, it was not until the case of *Wemyss v. Coleman*, that the Supreme Court of Kentucky addressed the issue. In *Wemyss*, the Supreme Court of Kentucky held that while there is no statutory duty requiring an occupant of an automobile to wear a seat belt, if a victim's failure to wear a seat belt was a contributing factor to the cause of the injuries or enhanced the claimant's injuries, the defendant was then entitled to have the question of contributory fault submitted to the jury. The court, however, held that specific reference to the "seat belt defense" was not required. The jury instructions must merely state that the plaintiff has a general duty to exercise ordinary care for his own safety.

The purpose of this Note is to assert that the *Wemyss* court deviated from permissible judicial decision-making and instead engaged in judicial legislating by ruling on what is essentially a public policy matter. Furthermore, the court undermined traditional tort law theory by inappropriately applying the avoidable consequences doctrine to the case at hand.

II. BACKGROUND

A. The Seat Belt Defense

The issue of whether the failure of an occupant of an automobile to use an available seat belt can be asserted as contributory negligence has been addressed by a number of courts. The decisions among the jurisdictions have widely varied. A few jurisdictions hold that failure to wear a seat belt is not contributory negligence so as to bar recovery for injuries suffered by

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8. 729 S.W.2d 174 (Ky. 1987).
9. Id. at 179.
10. Id. at 181.
11. See infra notes 18-21 and accompanying text.
an occupant of an automobile. Conversely, other jurisdictions have held that such a failure is contributory negligence and will bar recovery. A few jurisdictions have held that the nonuse of a seat belt may be considered in mitigation, while others allow the nonuse of an available seat belt to be introduced into evidence to show comparative fault. As previously noted, Kentucky discussed this issue for the first time in *Wemyss v. Coleman*.

B. Established Tort Law Principles

1. The Avoidable Consequences Doctrine

The avoidable consequences doctrine is defined in the *Restatement (Second) of Torts*, as “one injured by the tort of another is not entitled to recover damages for any that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort.”

The *Restatement* set forth an example which further illustrates the doctrine. The example states that “A strikes B, causing a slight wound on B’s hand. B unreasonably delays in taking antiseptic measures and the wound becomes infected. B is entitled to damages only for the pain, and other damages that B would have suffered if he had used reasonable care.”

The doctrine is compared to the contributory negligence doctrine in *Prosser and Keeton on Torts*. Prosser states that the distinction between the avoidable consequences doctrine and the doctrine of contributory negligence “is that contributory negligence is negligence of the plaintiff before any damages . . . .”

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17. 729 S.W.2d 174 (1987).
19. *Id.*
rule of avoidable consequences comes into play after a legal wrong has occurred, but while some damages may still be averted, and bars recovery only for such damages."21

2. The Tortfeasor Takes the Claimant as He Finds Him

The long established principle, that a tortfeasor takes the claimant as he finds him, deals with the issue of proximate cause. The doctrine holds that one who negligently inflicts personal injury upon another should be held liable for all the injury that follows and the tortfeasor is not entitled to a setoff against the claimant's damages.22

C. The Uniform Comparative Fault Act

Due to the recent adoption of comparative fault by the federal government and a majority of the states, a special committee was formed to consider the potential problems created by the conversion from a contributory negligence jurisdiction to a jurisdiction that adopts the comparative fault principle.23

In an effort to provide uniformity and to deal with the potential problems, the committee authored specific provisions which were approved in 1977 by the National Conference of Commissioners on Uniform State Laws. Collectively, these provisions are referred to as the Uniform Comparative Fault Act (UCFA).24

The jurisdictions which have adopted the Act include Iowa and Washington.25 The Kentucky legislature to date has not adopted the Act, however, in Wemyss, the Kentucky Supreme Court felt compelled to adopt Section One of the Act in its decision.26

D. Kentucky Adopts the Comparative Fault Doctrine

In Hilen v. Hayes27 when the Kentucky Supreme Court adopted the doctrine of comparative fault, it rejected the law in Kentucky as it had stood for over one hundred years.28 In Hilen, the

21. Id. at 458.
22. Wemyss, 729 S.W.2d at 178. See PROSSER supra note 20, at 290-300.
23. THE UNIFORM COMPARATIVE FAULT ACT, prefatory note.
24. Id. historical note.
25. Id. Table of Jurisdictions wherein Act has been adopted.
26. Wemyss, 729 S.W.2d at 178.
27. 673 S.W.2d 713 (Ky. 1984).
28. Id. at 720.
claimant was injured in an automobile accident. The driver's negligent operation of the vehicle was not at issue, rather the issue concerned whether the claimant, as a passenger in the defendant's vehicle, failed to exercise reasonable care for her own safety by riding with a person whom she knew to be intoxicated. The traditional rule in Kentucky had been that negligence on the part of the claimant, which contributed to her own injury should result in a complete bar to any recovery. In *Hilen*, Justice Liebson, speaking for the court, rejected this rule and adopted the doctrine of comparative fault, therefore, allowing responsibility for the injury to be allocated between the parties in proportion to their relative fault. The court's opinion points out that the comparative fault system is fair because "it calls for liability for any particular injury in direct proportion to fault. It eliminates a windfall for either claimant or defendant as presently exists in our all-or-nothing situation." 

In addition to adopting the comparative fault system, the court, in reaching its decision, relied upon Section Two of the Uniform Comparative Fault Act, despite the fact that the Kentucky legislature had not adopted the Act for use in the Commonwealth.

In *Reda Pump, A Division of TRW, Inc. v. Finck*, the issue before the Kentucky Supreme Court was whether in a product liability action, governed by the Kentucky Product Liability Act, the contributory negligence of a claimant constituted an absolute bar to recovery of damages, and if so, was the Act constitutional.

Despite its decision in *Hilen*, the *Reda* court applied the "plain meaning rule" to the Kentucky Product Liability Act and answered both questions affirmatively.

29. *Id.* at 714 and 720.
30. *Id.* at 718.
31. *Id.* at 720. For a discussion of the UCFA see *supra* text accompanying notes 23-26.
32. 713 S.W.2d 818 (Ky. 1986).
33. *Id.* at 819.
34. The pertinent portion of the Kentucky Product Liability Act provides:

   In any product liability action, if the plaintiff failed to exercise ordinary care in the circumstances in his use of the product, and such failure was a substantial cause of the occurrence that caused injury ... to the plaintiff, the defendant shall not be liable whether or not said defendant was at fault or the product was defective.

   KY. REV. STAT. ANN. § 411.320(3) (Baldwin 1986).
In *Blair v. Eblen*, the Kentucky Supreme Court applied the avoidable consequences doctrine in a negligence action. In Blair the claimant was injured in an industrial accident and subsequently went to a hospital for treatment. An infection developed after the treatment and the plaintiff went to another physician. The plaintiff eventually had to have his thumb amputated. He later claimed that the hospital physician was negligent in his treatment. There was evidence that the plaintiff, because of a low pain threshold, failed to exercise his hand as he was told and this contributed to the resulting amputation. The court held that this evidence was sufficient to raise the issue of contributory negligence. In so holding, the court emphasized that the conduct of the plaintiff occurred after his hand had been permanently injured.

III. WEMYSS V. COLEMAN

A. Facts

On October 7, 1981, Shelby Jean Coleman was injured in an automobile accident while riding in a van owned and operated by her husband. The accident occurred when Joey Griffin, driving a vehicle owned by Allen Wemyss, struck the Colemans' vehicle from the rear. Due to the collision, Mrs. Coleman's head snapped back, striking an icebox located behind the passenger seat. At the time of the accident, Mrs. Coleman was not wearing the seat belt with which the passenger seat was equipped.

Mrs. Coleman brought suit in the Simpson County Circuit Court claiming negligence on the part of the defendants, Griffin and Wemyss. Mrs. Coleman's prayer for relief included damages for mental and physical suffering, reasonable medical expenses, future medical expenses, permanent impairment of her power to earn money, and lost wages. The jury found in favor of Mrs. Coleman and awarded her damages in the amount of $24,050.72.

During the trial, the circuit court granted Mrs. Coleman's motion to exclude evidence that she was not wearing her seat

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36. 461 S.W.2d 370 (Ky. 1970).
37. Id. at 371, 372.
38. All facts are taken from the court's version, *Wemyss*, 729 S.W.2d at 175-76.
40. Wemyss, 729 S.W.2d at 175-76.
belt at the time of the accident. The defendants appealed the court's ruling regarding the exclusion of evidence pertaining to the seat belt defense, and the Kentucky Court of Appeals affirmed the lower court's exclusion. The defendants then petitioned the Kentucky Supreme Court for discretionary review to consider four issues. For the purpose of this Note, only the first and second issues are relevant:

1) Was it error for the court to exclude relevant evidence offered to prove that Mrs. Coleman's injuries would have been substantially less had she fastened her seat belt?

2) Was it error for the court to refuse to instruct the jury on the seat belt defense?

B. Holding

In Wemyss, the court was presented with policy arguments for and against the required use of seat belts. The court dismissed these arguments as irrelevant to its ultimate decision, stating that the issue before the court was not whether the court believed that the law should require an occupant of an automobile to wear seat belts. Rather the issue was merely evidentiary—specifically, "did the defendants offer evidence against Coleman to prove contributory fault which was improperly excluded?"

After dismissing the policy arguments, the court began its analysis by citing its earlier decision in Hilen v. Hayes. In Hilen, the court rejected the law in Kentucky as it had stood for over

41. After the verdict, the trial court held that Wemyss and Griffin were entitled to a set off against the plaintiff's judgment in the amount of $10,000.00 to reflect the amount available to her under her insurance policy with State Farm Insurance Co. Mrs. Coleman was then permitted to file an amended complaint to join State Farm as a defendant to recover the available amounts she was entitled to under her policy. Mrs. Coleman cross-appealed on the set off ruling. Id. at 176.

42. Id. at 176.

43. Wemyss v. Coleman, No. 85-CA-1645-MR and No. 85-CA-1794-MR.

44. Id. at 10. The Court of Appeals affirmed in part, reversed in part. In reversing the court held that the $10,000.00 set off allowance for State Farm was improper.

45. Wemyss, 729 S.W.2d at 176. The other two issues not addressed in this note addressed the set off ruling and the amended complaint filed by Mrs. Coleman.

46. Id. at 176.

47. Id. at 177.

48. Id.

49. 673 S.W.2d 713 (Ky. 1984). For a discussion of the Hilen decision see supra text accompanying notes 27-31.
one hundred years—namely, that contributory negligence on the part of the claimant was an absolute bar to recovery. In its place, the principle of comparative negligence, was adopted by the court.

The court in Wemyss, concluded that, because it had adopted, in Hilen the formula for determining comparative negligence as set forth in Section Two of the Uniform Comparative Fault Act, it should for the sake of consistency, adopt the definition of fault as utilized in Section One of that Act.

The court also emphasized the fact that within the official comment to Section One of the UCFA, the example of the negligent failure to fasten a seat belt, was used to explain the term "unreasonable failure to avoid an injury, or to mitigate damages," and that according to the comment such a failure would constitute contributory fault.

The court in Wemyss agreed with the appellee (Coleman) that her negligence played no part in the automobile accident, and that a tortfeasor takes the claimant as he finds him. However, the court stated that the latter premise was inapplicable. The court did not explain its reason for reaching this conclusion. Rather, it simply stated that this "is a different principle from the concept of 'unreasonable failure to avoid an injury or to mitigate damages.'"

The court agreed with the appellants, (Wemyss and Griffin), that the concept of "antecedent negligence, covered in the UCFA by the term, 'unreasonable failure to avoid an injury,' falls in the same class of conduct as the doctrine of avoidable consequence, covered in the UCFA as 'unreasonable failure to ... mitigate damages.'" In agreeing with the appellants, the court held that it had long recognized the doctrine of avoidable consequences.

50. Id. at 720.
51. Id.
52. Wemyss, 729 S.W.2d at 177.
53. Id.
54. Id.
55. Id. at 178.
56. Id.
57. Id.
58. Id.
59. Id. The court cited one of its own decisions to explain the doctrine. Blair v. Eblen, 461 S.W.2d 370 (Ky. 1970). The court stated that it had recognized that the doctrine of
and that the doctrine serves to mitigate damages. The court held that this principle should apply to the case at hand because, although the appellee's conduct was not the legal cause of the accident, Coleman's failure to wear a seat belt could be shown to have enhanced her own injuries and, therefore, could constitute a negligent failure to exercise ordinary care for herself under the circumstances.

The court recognized that its adoption of the UCFA conflicted with its decision in *Reda Pump Co. v. Finck*, but the court distinguished that case from the present on the grounds that the decision in *Reda*, stemmed from the language of a statute, whereas in the present case the court held that there was no conflicting statute. In so holding, the court reasoned that the Kentucky statute relating to seat belts was not applicable to the case at hand because it only applies to children forty inches in height or less, and the statute is silent as to the legal duty of adults to utilize a seat belt restraint. The statute reads in relevant part:

KRS 189.125(2) Any resident parent or legal guardian of a child, forty inches (40") in height or less, when transporting his child in a motor vehicle owned by that parent or guardian operated on the roadways, streets and highways of this state, shall have such child properly secured in a child restraint system of a type meeting federal motor vehicle safety standards.

(5) failure to wear a child passenger restraint shall not be considered as contributory negligence, nor shall such failure to wear said passenger restraint system be admissible as evidence in the trial of any civil action.

(6) KRS 189.990 and 189.993 to the contrary notwithstanding, there shall be no penalty for the violation of this section. No peace officer

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avoidable consequences, unlike contributory negligence, "serves to mitigate the damages ... to the extent the patient's injury was aggravated ... by his own negligence." *Blair*, 461 S.W.2d at 372.

60. Id. at 178.
61. Id.
62. 713 S.W.2d 818 (KY. 1986).
63. In *Reda*, the issue was whether the contributory negligence of a claimant constitutes an absolute bar to recovery of damages in a products liability action. The statutes the court referred to were K.R.S. 411.300 - 411.350 regarding products liability actions. *Reda*, 713 S.W.2d at 819.
64. *Wemyss*, 729 S.W.2d at 178.
shall issue a uniform citation or any other citation, other than a warning, for a violation of this section nor shall any arrest be permitted for violation of this section.

The court held that the silence of the Kentucky Legislature, as to the legal duty to use a seat belt, cannot be construed as an expression of policy for or against the use of an available seat belt. The court further held that because there is no statutory duty to wear a seat belt in Kentucky, it could not declare that such a duty does in fact exist. However, the court held that if the defendant introduces competent and relevant evidence that the plaintiff's failure to use a seat belt contributed to his injury and that contribution was a substantial factor in causing the claimant's injuries, or enhanced his injuries, the defendant is then entitled to have the question of contributory fault submitted to the jury.

Finally, the court held because there is no breach of a statutory duty to wear a seat belt, the instruction to the jury should "provide only the bare bones of the question for jury determination, leaving the 'skeleton' to 'be flushed out by counsel on closing argument.'"

Applying this "bare bones" principle to the seat belt defense, the court held that a proper instruction cannot specifically refer to a seat belt defense, but will only state the general duty to exercise ordinary care for one's own safety. The court then reversed the trial court and the court of appeals' decision regarding the seat belt defense and remanded the case to the trial court.

IV. ANALYSIS

There is no doubt that this decision is significant. Negligent defendants will now have the opportunity to submit evidence of a claimant's failure to wear a seat belt and, thus, allocate the percentage of total fault between the plaintiff and defendant. It

66. Id.
67. Wemyss, 729 S.W.2d at 178.
68. Id. at 179.
69. Id. at 181 (quoting Rogers v. Kasden, 612 S.W.2d 133, 136 (Ky. 1981)) (emphasis original).
70. Id.
71. Id. at 182.
is still too early to see how much this decision will affect jury awards in these type of cases in the Commonwealth.

There are numerous statistical studies addressing the issue of the required use of seat belts by occupants of an automobile. The debates for and against the use of seat belts range from the adamant argument that a person injured in an automobile accident could have avoided serious injuries had he been wearing a seat belt to the equally strong argument that a person's injuries would have been less serious had he not worn a seat belt.

Ad hoc studies of the effect of mandatory seat belt laws have suggested that in states which have adopted such laws, severe injuries and fatalities have been reduced. For example, after New Jersey and New York adopted mandatory seat belt use laws (the first two states to do so), researchers from the Highway Loss Data Institute assessed their effect on insurance losses. In the study, the researchers found that the frequencies of claims in both states were five to seven percent lower after implementation of the laws as compared to frequencies for corresponding time periods before the laws.

It may reasonably appear from these studies that seat belt laws are helpful and need to be adopted by all the states. Further, these studies and the court's decision in Wemyss, appear to confirm the argument made by the appellant that failure to use a seat belt is a failure to exercise ordinary care for one's own safety. However, until the Kentucky Legislature decides the same is true, evidence regarding a claimant's failure to use a seat belt should not be submitted in a civil trial in order to show contributory fault on the part of the claimant.

73. Id.
74. Annotation, Non Use of Automobile Seatbelts as Evidence of Comparative Negligence, 95 A.L.R.3D 239 (1979).
76. See supra note 74.
78. Highway Loss Data Institute, comparing automobile insurance losses since 1972, p. 16 (Anne Fleming, 1987).
The court's decision in *Wemyss* is flawed because it undermines the established tort law principle that a tortfeasor takes the claimant as he finds him; further, the court inappropriately applied the avoidable consequences doctrine. Lastly, the court's most flagrant flaw was its usurpation of legislative prerogative.

The long established principle that a tortfeasor takes his claimant as he finds him and, thus, is not entitled to a setoff against the amount of the plaintiff's damages was cast aside by the court in *Wemyss* as not applicable. The court agreed that the concept is still a viable principle of tort theory, but said it was "a different principle from the concept of 'unreasonable failure to avoid an injury ... or to mitigate damages.'"80

The court's statement that these two principles are different was correct; however, the problem in *Wemyss* was that the court applied the avoidable consequences principle instead of the doctrine that the tortfeasor takes the claimant as he finds him. The court gave no reason why the latter principle was inapplicable in the case at hand. Rather, the court, after casting this principle aside, focused on the definition of the term 'avoidable consequences' as set forth in the *Uniform Comparative Fault Act*, and, more specifically, to the Act's example of the seat belt defense.81 By applying the avoidable consequences doctrine in this case, the court ignored the fact that the doctrine has traditionally been applied only to post-accident conduct.82

Plainly the application of the avoidable consequences doctrine comes "after the commission of the tort,"83 and thus, one can readily see that the avoidable consequences doctrine is not applicable in the case at hand. Clearly, in *Wemyss*, the plaintiff did nothing subsequent to the accident to enhance her own injuries.

As can be seen by the above, and as the court points out by its decision in *Wemyss*,84 the principles of avoidable consequences, and the tortfeasor taking the claimant as he finds him, are completely different principles. However, contrary to the court's holding, the principle most appropriate for the case at hand was the latter.

79. *Wemyss*, 729 S.W.2d at 178.
80. Id.
82. *Prosser, supra* note 20, at 458.
83. *Restatement (Second) of Torts* § 918 (1964).
84. *Wemyss*, 729 S.W.2d at 178.
An essential element of Mrs. Coleman's cause of action for negligence is that there must be a connection between the act of the defendant and the injury which she suffered. This connection is usually referred to by the courts in terms of "proximate cause." In Wemyss the defendant's, negligent operation of the automobile was the proximate cause of Mrs. Coleman's injuries.

The doctrine related to the issue of proximate cause, that the tortfeasor takes the claimant as he finds him, states that "a defendant who is negligent must take existing circumstances as they are, [and is] liable for all its natural and proximate consequences." Since Mrs. Coleman's failure to use a seat belt in no way caused or contributed to the cause of the accident, the court should have applied this long established principle to the case at hand and thus denied the defendants the use of the evidence bearing on the nonuse of an available seat belt by Mrs. Coleman.

Furthermore, the court's use of the UCFA's definition of fault and with it the example contained within the Act's comment was an inappropriate "adoption" of an "act" by the judicial branch of the government. The court claimed in Wemyss that it felt compelled to adopt Section One of the Act for the sake of consistency because it had relied on the Act in its previous decision in Hilen v. Hayes. This leads to the inevitable question—In what kind of other situation will the court "adopt" additional sections of the UCFA for the "sake of consistency?" Is it not more appropriate to leave it up to the legislature, which has the proper fact finding tools available to it, to adopt this "Uniform Act?" As Justice Vance wrote in his dissenting opinion in Hilen v. Hayes:

The proposed UCFA has not been adopted in Kentucky.... Its denomination as a Uniform Act indicates it is intended for consideration as a legislative enactment. As such it would be subjected to legislative hearings concerning its application to a vast number of situations which may arise under the concept of comparative negligence.

Justice Vance went on to point out that the court does not have the benefit of such hearings and it is inappropriate for the court "to go beyond a decision of the matter at hand."
The final and most flagrant flaw of the court's decision in Wemyss is its usurpation of legislative prerogative.

The court began its analysis by dismissing the public policy arguments as not the issue before the court. The problem with this flippant dismissal is that this is, in fact, a public policy matter and, thus, in order to make a well informed, justifiable decision on the issue, public policy must be addressed. As the court pointed out in Reda Pump, public policy matters have traditionally been decided by the legislative branch of the government.

The court in Wemyss dealt with the Kentucky legislature's actions in this matter by holding that, the silence on the legislature's part cannot be construed "as a legislative expression of public policy for or against the use of a seat belt restraint."

However, the Kentucky Legislature has not been totally silent on the matter. Kentucky Revised Statute 189.125, in section 2, establishes a duty for any parent of a child who is forty inches in height or less to have the child properly secured in a child restraint system. Furthermore, the Act in section 5 states that the failure to wear such a restraint shall not be considered as contributory negligence, nor shall the failure to wear the restraint system as mandated by the Act, be admissible as evidence in a civil trial.

The court in its decision discussed subsections 2 and 6 of the Act; however, the court ignored subsection 5 which provides that a "failure to wear a child passenger restraint shall not be considered as contributory negligence, nor shall such failure to wear the restraint be admissible as evidence in the trial of any civil action."

The court's failure to discuss section 5 of the Act better enabled it to hold that no conflicting statute prevented it from adopting a portion of the UCFA. The court's decision would have been more consistent with precedent if the court would have addressed Section 5 of the Act and applied its rationale in Reda Pump to

90. Wemyss, 729 S.W.2d at 177.
91. Reda, 713 S.W.2d at 821.
92. Wemyss, 729 S.W.2d at 177.
95. Wemyss, 729 S.W.2d at 174.
96. Reda Pump, 713 S.W.2d at 818.
the case at hand. As stated earlier, the court in *Reda Pump* applied the "plain meaning rule" to the Kentucky Product Liability Act and held that in a product liability action, the contributory negligence of a claimant constitutes an absolute bar to recovery.\(^{97}\) Clearly a different decision would have been handed down by the court in *Wemyss* had it applied the "plain meaning rule" to KRS 189.125.

The plain meaning of KRS 189.125 reveals that the Legislature clearly intended that the failure to wear an available restraint system should not be used as evidence to show negligence. Thus, if Mrs. Coleman would have been accompanied by a child forty inches in height or less, who was not properly restrained in conformance with KRS 189.125, and the child had also been injured, evidence of the failure to properly secure the child would not be admissible to show negligence as to the child. Yet, according to *Wemyss*, evidence that Mrs. Coleman was not wearing a seat belt is admissible. This hardly provides "consistency" in the law. A reasonable conclusion would be to hold that since the legislature has spoken as to who shall be required to wear a seat belt restraint, the omission as to an adult's duty was not inadvertent. That is, since the Legislature has failed to act as to "adult" occupants, (or anyone over forty inches in height), then, it is reasonable to conclude that it does not want the failure to use a seat belt to be construed as negligence.

Furthermore, the Legislature has clearly shown that even if its silence could not be construed as a legislative expression of the policy for wearing a seat belt, it did not intend such evidence to be used in a civil action. It is patently unfair to allow evidence to be submitted with respect to an adult's nonuse of an available seat belt when no statutory duty to do so is imposed, while the failure to wear restraints is not admissible for those members of the class in which there is, in fact, a statutory duty to wear such restraints.

### V. Conclusion

To be sure, there are valid arguments supporting the mandatory use of seat belts, and furthermore, the failure to use an available seat belt could be easily considered a failure to exercise

\(^{97}\) *Id.* at 820, 821.
the general duty of care for one's own safety. However, the solution is not to create a duty to wear a seat belt by judicial fiat. The determinations of the usefulness of seat belts and the penalties for failure to wear such is not easily determined. It is a public policy issue that needs to be addressed by a body with the resources available to it to make an informed decision. The judiciary is not such a body. Rather, it should be left up to the Legislature.

As Judge McDonald, of the Kentucky Court of Appeals, stated when addressing this case: 98

[W]e could easily say that the failure to use a seat belt is a failure to exercise ordinary care for one's own safety. [However], [a]s the legislature has spoken on most other matters concerning vehicles, ... we believe the legislature is the appropriate body to determine whether there is a duty to wear a seat belt and the consequences for the breach thereof. 99

Colleen P. Lewis

99. Id. at 4, 6.