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2010 General Law Issue

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LEGAL ETHICS IN THE EMPLOYMENT LAW CONTEXT: WHO IS THE CLIENT?¹

Ariana R. Levinson*

The question is: Who is the client? Many ethical decisions attorneys must make emanate from this basic question. Thus, for those employment lawyers who represent, interact with, or sue unions or corporations, it is important to understand who the client is for different purposes such as representation, the attorney-client privilege, and ex parte communications. Because Kentucky recently adopted new rules of professional conduct, this paper uses Kentucky law as a microcosm through which to think about this larger question. Kentucky’s prior rules were based on the prior version of the ABA Model Rules of Professional Conduct, still at least partially in effect in approximately twenty-two states. The current Kentucky rules mirror, almost identically in pertinent parts, the current model ABA rules known as Ethics 2000, on which approximately eighteen other states model the pertinent rules. This Article analyzes the recent change in Kentucky to permits scholars and attorneys in other states to benefit from the insights about Kentucky law.

I. INTRODUCTION

Assume that a union attorney represents the union in a grievance contesting a member’s termination. At the hearing, can the opposing counsel demand that the member disclose the content of the member’s conversations with the attorney?

Now assume that a plaintiff’s attorney represents an employee in an employment dispute with an employer corporation. If the attorney without notice to the corporation interviews a prior low level manager for the company, has the attorney committed any ethical violation?

The question involved in these scenarios is: Who is the client? More specifically, when an attorney is representing an entity, who does the attorney represent? When the attorney’s opposing counsel is representing an entity, with whom can the attorney communicate without opposing counsel’s knowledge? Many of the ethical decisions an attorney must make emanate from these basic

* Assistant Professor, University of Louisville, Louis D. Brandeis School of Law. J.D., University of Michigan Law School. The author thanks Forrest Kuhn for valuable research assistance.

¹ For those interested in reading more about the topic, see generally Sherman L. Cohn, The Organizational Client: Attorney-Client Privilege and the No-Contact Rule, 10 GEO. J. LEGAL ETHICS 739 (1997) (exploring the same issue but without focus on the labor and employment context).
questions. Understanding the client’s precise identity is essential to navigate the intricate ethical and evidentiary issues.\(^2\)

This paper uses Kentucky law as a microcosm through which to think about these larger questions. Kentucky recently revised its rules of professional conduct. Kentucky’s prior rules were based on the prior version of the ABA Model Rules of Professional Conduct. In approximately twenty-two states, all\(^3\) or some\(^4\) of the rules governing the issues discussed in this article are modeled on that version of the ABA Model Rules. And the current Kentucky rules mirror, almost identically in pertinent parts, the current ABA Model Rules, known as Ethics 2000.\(^5\) Approximately nineteen other states have adopted rules governing the issues discussed in this article that are modeled on the Ethics 2000 rules.\(^6\)

In particular, this Article focuses on the ethics rules defining who an entity attorney represents, the duty of confidentiality, the attorney-client privilege, and ex parte contacts. Part I analyzes the law governing both a corporate employer and a union attorney’s relationship to the client. Part II describes the duty of confidentiality and its relationship to the attorney-client privilege. Part III considers how far down the chain of corporate or union command the attorney-client privilege extends and addresses relevant rules of evidence and fiduciary exceptions to asserting the privilege. Part IV addresses other doctrines related to the attorney-client privilege implicated in the union context. Finally, Part V discusses the law governing ex parte communications with employees of a represented employer. Throughout, this Article raises unanswered questions and

\(^2\) This paper focuses on the legal entities of corporations and unions. Government agencies are also involved in labor and employment litigation and governed by these rules. However, the particulars of the application to governmental entities are beyond the scope of this paper. See, e.g., Ky. Bar Association on Ethics, Formal Op. KBA E-332 (1988) (regarding government counsel blanket vetoes on contact of government employees); Ky. Bar Ass’n on Ethics, Formal Op. KBA E-372 (1994) (regarding the relationship between Equal Employment Opportunity Commission and affected employee).

\(^3\) ALA. RULES OF PROF’L CONDUCT; N.M. RULES OF PROF’L CONDUCT.

\(^4\) ARIZ. RULES OF PROF’L CONDUCT; ARK. RULES OF PROF’L CONDUCT; CONN. RULES OF PROF’L CONDUCT; DEL. RULES OF PROF’L CONDUCT; FLA. RULES OF PROF’L CONDUCT; KAN. RULES OF PROF’L CONDUCT; ME. RULES OF PROF’L CONDUCT; MD. RULES OF PROF’L CONDUCT; MASS. RULES OF PROF’L CONDUCT; MISS. RULES OF PROF’L CONDUCT; MO. RULES OF PROF’L CONDUCT; MONT. RULES OF PROF’L CONDUCT; NEB. RULES OF PROF’L CONDUCT; N.J. RULES OF PROF’L CONDUCT; N.Y. RULES OF PROF’L CONDUCT; PA. RULES OF PROF’L CONDUCT; R.I. RULES OF PROF’L CONDUCT; S.C. RULES OF PROF’L CONDUCT; S.D. RULES OF PROF’L CONDUCT; VA. RULES OF PROF’L CONDUCT; W. V. RULES OF PROF’L CONDUCT; WASH. RULES OF PROF’L CONDUCT; WIS. RULES OF PROF’L CONDUCT.


\(^6\) ALASKA RULES OF PROF’L CONDUCT; COLO. RULES OF PROF’L CONDUCT; IDAHO RULES OF PROF’L CONDUCT, ILL. RULES OF PROF’L CONDUCT; IND. RULES OF PROF’L CONDUCT; LA. RULES OF PROF’L CONDUCT; MINN. RULES OF PROF’L CONDUCT; NEV. RULES OF PROF’L CONDUCT; N.H. RULES OF PROF’L CONDUCT; N.C. RULES OF PROF’L CONDUCT; N.D. RULES OF PROF’L CONDUCT; OHIO RULES OF PROF’L CONDUCT; OKLA. RULES OF PROF’L CONDUCT; OR. RULES OF PROF’L CONDUCT; S.C. RULES OF PROF’L CONDUCT; UT. RULES OF PROF’L CONDUCT; WASH. RULES OF PROF’L CONDUCT; WIS. RULES OF PROF’L CONDUCT.
poses foreseeable factual scenarios to help the reader understand the scope of the relevant Kentucky law.

II. WHO CAN CLAIM TO BE REPRESENTED?

The applicable Kentucky ethics rules and other authority illustrate the principle that an entity attorney represents the entity, rather than any particular constituent.7

A. Governing Rule

Kentucky Rules of Professional Conduct Rule 3.130(1.13)(a)8 states, “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”9 The Kentucky Supreme Court Commentary,10 Comment 1, defines the constituents of a corporation to be “[o]fficers, directors, employees and shareholders.”11 Kentucky Rule 1.13 indicates that the constituents of an unincorporated association include those persons in “positions equivalent to officers, directors, employees and shareholders.”12

The Commentary further explains that “[w]hen one of the constituents . . . communicates with the organization’s lawyer in that person’s organizational capacity, the communication is protected by Rule 1.6,”13 which requires maintaining communications in confidence.14 According to the Commentary, “[t]his does not mean, however, that constituents of an organizational client are the clients of the lawyer.”15 It further provides: “The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation . . . .”16

B. Authority that Entity Lawyer Represents Corporation, Not Its Constituents

“The law is generally settled that an attorney for a corporation does not automatically represent the corporation’s constituents in their individual

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7. E.g., KY. RULES OF PROF’L CONDUCT R. 1.13(a) (2009).
8. The Kentucky Rules of Professional Conduct Rule X will be referred to by the shorthand “Kentucky Rule” with the particular rule number throughout this paper. E.g., Kentucky Rule 1.13(a).
9. Id. (analogous to MODEL RULES OF PROF’L CONDUCT R. 1.13(a) (2002)).
10. The Kentucky Supreme Court Commentary will be referred to as “the Commentary.”
11. KY. RULES OF PROF’L CONDUCT R. 1.13(a) cmt. 1 (2009) (previously this comment was numbered 2).
12. Id.
15. See KY. RULES OF PROF’L CONDUCT R. 1.13(a) cmt. 2 (2009).
16. Id.
capacities, even on the same matters.”

In Innes v. Howell Corp., the Sixth Circuit applied Kentucky law and held that an attorney for a corporation did not represent the president of the corporation.\textsuperscript{18} The corporate attorney had investigated the president of the corporation and discovered that the president had received payments from an independent contractor, alleged to be kickbacks.\textsuperscript{19} The corporate attorney informed the parent corporation of the payments.\textsuperscript{20} The president was terminated.\textsuperscript{21}

The corporation sued the president for breach of fiduciary duty, and the president sued the corporation for wrongful discharge.\textsuperscript{22} The president also filed suit against the corporate attorney for legal malpractice.\textsuperscript{23} The jury found there was no malpractice because the corporate attorney did not represent the president.\textsuperscript{24} The Sixth Circuit affirmed the verdict.\textsuperscript{25}

The Sixth Circuit reasoned that unless there is clear consent, express or implied, to represent a constituent, the corporate attorney represents only the corporation.\textsuperscript{26} Despite the president being named in an environmental action that the corporate attorney had defended, the corporate attorney had not represented the president in his individual capacity.\textsuperscript{27} The court reasoned that “[s]imply the fact that . . . [the president] might have been subject to personal liability in the . . . litigation does not establish any legal relationship – [the corporate attorney] would have needed to take action on [the president’s] personal behalf, not just action for the general good of the corporation.”\textsuperscript{28}

Whether the president was named in the environmental action in his individual capacity or only in his official capacity is unclear.\textsuperscript{29} If it was as an individual and the corporate attorney filed an answer, does the fact that the interests of the president and corporation were not then adverse mean that the corporate counsel did so only as the attorney for the corporation?

C. Authority that Entity Lawyer Represents Union, Not Constituents or Members

There is no Kentucky or Sixth Circuit authority specifically addressing whether a union attorney represents the entity or its constituents. There is
Likewise no authority on whether a union member is a constituent or third-party. But, by analogy to Innes, a union attorney would represent only the entity under Rule 1.13.30

Most cases from other jurisdictions support this interpretation. In innumerable cases courts have held that union attorneys cannot be sued by members for breach of confidentiality or malpractice and, in fact, are immune from damage claims.31 Likewise, the majority of cases has not disqualified a union attorney in the run-of-the mill breach of duty of fair representation (“DFR”) case where a conflict of interest is asserted because of the attorney’s representation of the union in the grievance process.32

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32. Hayes v. Bakery Workers Int’l Union, No. 89-6349, 1990 U.S. App. LEXIS 16048, at *8 (6th Cir. Sept. 11, 1990) (holding that union counsel does not represent each member of the union for purposes of a conflict analysis); Hague v. United Paperworkers Int’l Union, 949 F. Supp. 979, 987 (N.D.N.Y. 1996) (holding that union attorney representing a union at arbitration hearing does not automatically have a conflict of interest with respect to grievant); Adamo v. Hotel Workers’
To avoid creating an attorney-client relationship with a union constituent (or member), the attorney should remind the constituent (or member) that the attorney is the union’s attorney whenever the constituent seems to refer to the attorney as the constituent’s own attorney. The attorney could also consider providing a grievant a writing at the outset that clearly states that the attorney is the union’s attorney. 33

D. Rules on Entity Lawyer’s Interactions with Constituents and Unrepresented Persons

The Kentucky ethics rules illustrate that, although an entity attorney represents the entity, the attorney does owe some limited duties to entity constituents and others, specifically those with whom the attorney may interact on behalf of the entity and whom are not represented. Kentucky Rule 1.13(f) states: “In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.” 34 Additionally, Kentucky Rule 4.3 provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. 35

Union, 655 F. Supp. 1129, 1129-30 (E.D. Mich. 1987) (holding that union attorney not disqualified because he represented union, not grievant, in arbitration); Griesemer v. Retail Store Employees Union, Local 1393, 482 F. Supp. 312, 314-15 (E.D. Pa. 1980) (holding that when grievant admits the union attorney represented the local union no confidential relationship developed); Evans v. Ass’n of Norwalk Sch. Adm’rs, No. CV94 0538581 S, 1995 WL 384629, at *1, *4 (Conn. Super. Ct. June 20, 1995) (denying motion to disqualify union attorney in DFR suit based, in part, on his representation during negotiations with employer over elimination of grievant’s position); Anderson, supra note 31, at 506. But see Stone v. City of Philadelphia, No. 86-1877, 1986 WL 13483, at *4-7 (E.D. Pa. Nov. 25, 1986) (disqualifying union attorney who had met with plaintiffs on one occasion and advised that their claim lacked merit and the union would not pursue it); De Cherro v. Civil Serv. Employees Ass’n, 404 N.Y.S.2d 255, 257-58 (N.Y. App. Div. 1978) (holding that where union member reasonably believed attorney who provided advice on whether he had a claim for reinstatement was his counsel, and not only union’s as an entity, attorney is disqualified in DFR suit); N.J. Supreme Court Advisory Comm. on Prof’l Ethics, Op. 362 (1977) (assuming that union attorney represented both union and grievant in arbitration).

33. If the union attorney has created an individual client relationship with a grievant or other member, then the rules governing conflict of interest between multiple clients will govern. That topic is beyond the scope of this paper. A starting point for researching conflicts between clients is MODEL RULES OF PROF’L CONDUCT R. 1.7 (2002).

34. KY. RULES OF PROF’L CONDUCT R. 1.13(f) (2009) (previously Rule 1.13(d)).

35. KY. RULES OF PROF’L CONDUCT R. 4.3 (2009). The rule currently contains additional language: “The lawyer shall not give legal advice to an unrepresented person. The lawyer may
One scholar notes that the distinction between the “entity lawyer’s duty to communicate turns on the existence of adverse interests, whereas the lawyer’s duty in other cases turns on the non-client’s apparent misunderstanding.”

### III. THE DUTY OF CONFIDENTIALITY

The Kentucky ethics rules codify the duty of confidentiality that an attorney owes to a client. Until July 15, 2009, Rule 3.1301.6(a) stated in relevant part: “A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).” The Kentucky Supreme Court Commentary, Comment 20, previously stated: “If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable.”

Effective July 15, 2009, Kentucky Rule 1.6(a) states, in relevant part: “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).” The Commentary effective July 15, 2009, Comment 11, states: “Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that . . . the information sought is protected against disclosure by the attorney-client privilege . . . .”

suggest that the unrepresented person secure counsel.” The current ABA Rule 4.3 adds: “The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.”

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37. KY. RULES OF PROF’L CONDUCT R. 1.6(a) (2008).
38. KY. RULES OF PROF’L CONDUCT R. 1.6(a) cmt. 20 (2008).
39. KY. RULES OF PROF’L CONDUCT R. 1.6(a) (2009). The new Kentucky Rule 1.6(a) is analogous to the current ABA Rule 1.6(a). MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2002).
40. KY. RULES OF PROF’L CONDUCT R. 1.6(a) cmt. 11 (2009). The professional requirement of confidentiality is broader in scope than the attorney-client evidentiary privilege and includes information learned from third parties about the client, but only the privilege allows the attorney to refuse to testify. GEOFFREY C. HAZARD JR. ET AL., THE LAW AND ETHICS OF LAWYERING 342 (Robert C. Clark et al. eds., 4th ed. 2005). See also Banner v. City of Flint, 99 F. App’x 29, 36 (6th Cir. 2004) (Even if a client had waived the attorney-client privilege, the attorney could not disclose confidential information unless he had complied with Michigan Rule 1.6. The attorney had not complied with Rule 1.6 because he had not advised the client of the advantages and disadvantages of disclosing the confidences.). The current Commentary, Comment 3, explicitly states: [1]the rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the
IV. ATTORNEY-CLIENT PRIVILEGE

One issue often faced by entity attorneys is how far down the chain of command an entity may assert the attorney-client privilege. Federal Rule of Evidence 501 merely provides for the implementation of common law privileges. One of the well-established common-law privileges is the attorney-client privilege.

A. How Far Down the Chain of Command Can a Corporation Assert the Attorney-Client Privilege?

What if the employer is defending a wage and hour claim, and its attorney gathered information from low-level employees about times that a manager had the employees clock-out but continue to work? Or what if the employer is defending a sexual harassment suit, and the attorney gathered information from low-level employees about statements made by other employees? Can the company assert the attorney-client privilege?

The seminal case defining the attorney-client privilege for entities is *Upjohn*. In *Upjohn*, the Court rejected a narrow approach to defining the client as only the top managers for purposes of the attorney-client privilege. Instead, the Court adopted a case-specific approach for determining when the attorney-client privilege applies to corporate communications.

In *Upjohn*, the general counsel of the company learned that company employees might be involved in bribing foreign officials. He consulted with outside counsel and the chairman of the board and then commenced an investigation. As part of the investigation, the chairman sent a questionnaire, prepared by the attorneys, to all the foreign and area general managers. The cover letter indicated that the questionnaire was part of the general counsel’s investigation and asked that the process be kept highly confidential.
Additionally, the general counsel conducted interviews of those who received the questionnaire and many other employees.\textsuperscript{50}

The Internal Revenue Service filed a summons to obtain the questionnaires and the general counsel’s investigation files.\textsuperscript{51} The company declined to produce the questionnaires on attorney-client privilege and other grounds.\textsuperscript{52} The Court held that Federal Rule of Evidence 501 protects the “giving of information to [a] lawyer to enable him to give sound and informed advice.”\textsuperscript{53} The Court relied on the ABA Code of Professional Responsibility, Ethical Consideration 4-1 requiring the lawyer to learn the facts of the case.\textsuperscript{54}

Applying a case specific inquiry, the Court held that a number of factors indicated that the questionnaires and records of the investigation were attorney-client privileged.\textsuperscript{55} “The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel.”\textsuperscript{56} Moreover, the matters addressed by the employees were within their corporate duties, the employees were aware the communications were for the purpose of obtaining legal advice, and the instructions indicated that the communications were highly confidential.\textsuperscript{57}

\textbf{B. Kentucky Rule of Evidence 503 and Authority}

Kentucky Rules of Evidence Rule 503 defines the “lawyer-client privilege” as giving “[a] client . . . the privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client.”\textsuperscript{58} For purposes of the privilege, a client includes a “corporation, association, or other organization or entity.”\textsuperscript{59} The protected communications can be between the client, the client’s representative, the client’s lawyer, and the lawyer’s representative or any subset of those parties.\textsuperscript{60} As other scholars have succinctly summarized, “[a] client has a privilege to refuse to disclose and prevent any

\begin{itemize}
  \item \textsuperscript{50} Id.
  \item \textsuperscript{51} Id. at 387-88.
  \item \textsuperscript{52} Id.
  \item \textsuperscript{53} Id. at 390.
  \item \textsuperscript{54} Id. at 391.
  \item \textsuperscript{55} \textit{Upjohn}, 449 U.S. at 395.
  \item \textsuperscript{56} Id. at 394.
  \item \textsuperscript{57} Id. at 394-95.
  \item \textsuperscript{58} Ky. R. Evid. 503(b). There are five listed exceptions: 1) “[f]urtherance of crime or fraud,” 2) “[c]laimants through same deceased client,” 3) “[b]reach of duty by a lawyer or client,” 4) “[d]ocument attested by a lawyer,” and 5) “[j]oint clients.” Ky. R. Evid. 503(d).
  \item \textsuperscript{59} Ky. R. Evid. 503(a)(1).
  \item \textsuperscript{60} Ky. R. Evid. 503(b). It can also be between those parties and another party concerning a matter of public interest or between lawyers representing the same client. For a discussion of the common interest privilege in the federal setting, see Broessel v. Triad Guar. Ins. Corp., 238 F.R.D. 215, 220 (W.D. Ky. 2006).
\end{itemize}
other person from disclosing: (1) confidential; (2) communications; (3) between or among the client, or prospective client, or the client’s representatives; . . . (4) an attorney, or her agents; [and] (5) made for the purpose of obtaining legal services or advice.61

A “client’s representatives” include: (1) “a person having authority to obtain professional legal services,” (2) a person having authority to act on the advice so obtained, and (3) “an employee or representative who makes or receives a confidential communication” in the course of employment, concerning the subject of the employment, and to “effectuate legal representation for the client.”62 “A communication is ‘confidential’ if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.”63 Additionally, “[t]he burden of establishing the privilege, both substantively and procedurally, is on the organization seeking the protection of the privilege.”64

1. Authority Regarding Employers Asserting the Attorney-Client Privilege

Kentucky cases have applied these definitions. For example, in Hahn v. Univ. of Louisville, a research technologist sued the University of Louisville for alleged mistreatment that she had suffered from the University’s Department of Psychology.65 At issue were four e-mails from an associate university counsel to the department’s business manager.66 One e-mail had been carbon copied to the chair of the department.67 The e-mails concerned “possible claims arising out of pending litigation” and other anticipated litigation.68 The e-mails disclosed the counsel’s legal opinion.69 Counsel did not discuss the e-mails with anyone other than the recipients and the archivist responsible for handling the type of document discovery involved.70

The business manager had received the e-mails in the course of her duties and did not discuss the documents with anyone other than counsel and possibly the department chair.71 The department chair did not remember receiving the one e-mail carbon copied to him.72 He did not recall discussing it with anyone or

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62. KY. R. EVID. 503(a)(2).
63. KY. R. EVID. 503(a)(5).
64. Brewer, supra note 36, at 765.
66. Id. at 772.
67. Id. at 773.
68. Id.
69. Id.
70. Id. The documents were requested under the Open Records Act. Id. at 772.
71. Hahn, 80 S.W.3d at 773.
72. Id.
printing it.\textsuperscript{73} But “if he had printed it, he would have directed his secretary to place it in a confidential file.”\textsuperscript{74}

The court held that the chair and business manager were representatives of the client, and that the e-mails were protected by the attorney-client privilege.\textsuperscript{75} The court reasoned that the “communications were made for the purpose of providing legal services to the University.”\textsuperscript{76} The court further reasoned that proper precautions were taken to maintain the confidentiality of the documents.\textsuperscript{77} Further, the chair and business manager were clearly employees, and the court must have reasoned that they received the messages in the course of their employment.\textsuperscript{78}

The Kentucky Supreme Court has provided more detail regarding the “course of employment” and “effectual legal services” requirements of the rule.\textsuperscript{79} Only duties specifically within the employee’s scope of responsibilities will satisfy the requirement of receiving statements in the course of employment.\textsuperscript{80} Additionally, the communication must be for legal, and not business, purposes.\textsuperscript{81} And the employee must know at the time that the purpose of the communication is to obtain legal advice.\textsuperscript{82} Moreover, a target of an investigation cannot make communications “to effectuate legal representation for the client.”\textsuperscript{83}

In \textit{Lexington Public Library}, an employee sued her former employer, the Lexington Public Library, for unlawful retaliation and constructive discharge.\textsuperscript{84} The employee claimed her supervisor had retaliated against her for filing a complaint against him.\textsuperscript{85} The employee learned that the supervisor was thereafter terminated and sought discovery of documents related to that termination.\textsuperscript{86} The library asserted that twelve such documents were attorney-client privileged.\textsuperscript{87} The trial court, after \textit{in camera} review, found that the documents were not privileged because they were generated for business, and not legal, purposes.\textsuperscript{88}

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id. at 773.
\item Id. at 775-76.
\item Id. at 776.
\item \textit{Hahn}, 80 S.W.3d at 776.
\item See id.
\item Lexington Pub. Library v. Clark, 90 S.W.3d 53, 58 (Ky. 2002).
\item Id.
\item Id. at 61.
\item Id.\textsuperscript{82}
\item Id. (citing KY. R. EVID. 503(a)(2)(B)(iii)).
\item Id. at 56.
\item \textit{Lexington Pub. Library}, 90 S.W.3d at 56.
\item Id.
\item Id. There were originally fourteen at issue, but only twelve remained at issue by time the case reached the Kentucky Court of Appeals. \textit{Id.}
\item Id.
\end{enumerate}
\end{footnotesize}
The library sought a writ of prohibition preventing disclosure of the documents. Because the writ petition was a separate civil action, not an interlocutory appeal from the underlying action, the documents were not available to the court. Instead, the court relied only on an affidavit from the library’s assistant director for training and human resources about the underlying proceeding. She had contacted one of the library’s attorneys before preparation of the documents about her “increasing concern surrounding . . . [the supervisor’s] behavior and performance.” She was concerned because he was over forty and experiencing health problems. The attorney suggested that she and another employee solicit comments and concerns about the supervisor from his co-workers.

The court held that it did not have sufficient evidence to determine whether the communications between the assistant director and her subordinates were for a business or legal purpose. The court reasoned that, while they were solicited by the assistant director in order to obtain advice from the library’s attorney, such advice could be for either a legal or a business purpose. The court also held that it did not have sufficient evidence to determine whether those communications were made within the corporate duties of the employees. The court reasoned that “[a] duty to report . . . is different from a duty to observe and evaluate.” While the communications were generated because of the assistant director’s direction of her subordinates, the communications were about the employees’ past observations of the supervisor. The employees’ duties, insofar as the record disclosed, did not encompass observing and evaluating the supervisor. The court stated that the record was “silent” as to whether any of the persons other than the assistant director and one other “knew at the time the communications were made that they were being made for the purpose of obtaining legal advice as opposed to, e.g., furnishing information . . . to be used in determining whether to terminate . . . [the supervisor’s] employment.”

Finally, the court held that a memorandum to the supervisor about his job performance and his response were not privileged. The court reasoned that the
supervisor was not a representative of the library, but rather was “the target of the investigation and [a] potential adverse litigant.” Thus, “he was not in a position to make any communication to ‘effectuate legal representation for the client.’” The court’s logic could be construed to mean that communications between a company and any potential grievant are unprotected, but it cannot yet be known whether certain circumstances might limit the holding. The court also clarified that privileged communications do not have to be made to the entity attorney. Instead, communications between employees that are forwarded to the attorney, and otherwise satisfy the rule, are also protected.

Lexington Public Library takes Upjohn further such that Kentucky entity attorneys overseeing internal investigations should be sure to make a written record informing the constituent of the attorney’s involvement and indicating the legal implications of the investigation. Additionally, Kentucky cases do not resolve what exactly constitutes a legal purpose – as opposed to a business purpose. One commentator who has surveyed cases outside of Kentucky provides the following worthwhile tips to maintain privilege status:

104. Id.
105. Id. (citing KY. R. EVID. 503(a)(2)(B)(iii)). Couldn’t every manager in Upjohn who made payments, which were alleged to be bribes, be a “target” of the investigation? Why can’t a target have information necessary to obtain effective legal representation? Cf. Greenwell v. Unified Foodservice Purchasing Coop., 22 IER Cases 1092 (Ky. Ct. App. 2005) (depublished and not for use in Kentucky courts) (holding that communications between an employee and the corporate attorney investigating another employee’s discrimination suit were privileged when employee thereafter sued the corporate employer for retaliation based on testimony during the other employee’s unemployment hearing).
107. Id.
(1) Have human resource personnel initiate, without the involvement of an attorney, an immediate investigation of any allegations of sexual harassment. 108
(2) When an in-house counsel is involved in an investigation, “carefully designate that investigative documents were prepared or reviewed in the attorney’s capacity as a legal advisor.”109
(3) Be sure corporate sexual harassment policies underscore the legal nature of the investigation if the process involves an investigation by counsel.110

2. Federal Cases Regarding Corporations Asserting the Attorney-Client Privilege 111

It appears that twenty-seven years after Upjohn the particular test used to determine when a corporation can assert the attorney-client privilege as to communications with an employee still varies from court to court. Various commentators have developed different classifications for the tests being used, but researching the law of the particular circuit in which you will be appearing is important.

108. Merrily S. Archer, Attorney-Client Privilege and Work Product Protections in an Internal Sexual Harassment Investigation, COLO. LAW., Oct. 2001, at 141, 141; see also Robinson v. Time Warner, Inc., 187 F.R.D. 144, 146 (S.D.N.Y. 1999) (holding investigation by outside counsel retained to investigate allegations of racial harassment was for a legal purpose); Brownell v. Roadway Package Sys., Inc., 185 F.R.D. 19, 24-25 (N.D.N.Y. 1999) (holding employees’ statements to employer’s attorney were “for the purpose of obtaining his legal assistance and not for the purpose of committing a tort or a crime”); Scurto v. Commonwealth Edison Co., No. 97 C 7508, 1999 WL 35311, at *4 (N.D. Ill. Jan. 11, 1999) (holding investigation of racial discrimination by an attorney under a policy that states staff counsel is responsible for legal aspects of the policy is for legal and not business purposes); Worthington v. Endee, 177 F.R.D. 113, 117 n.4 (N.D.N.Y. 1998) (questioning whether a sexual harassment investigation constitutes a confidential communication from the employees to the attorney); Peterson v. Wallace Computer Servs., Inc., 984 F. Supp. 821, 824 (D. Vt. 1997) (upholding magistrate’s determination that notes taken by human resource director during investigation of plaintiff’s allegations of sexual harassment, in anticipation of litigation, and conveyed to counsel were privileged); Harding v. Dana Transp., Inc., 914 F. Supp. 1084 (D.N.J. 1996) (holding that outside counsel’s sexual harassment investigation of facts to determine which are legally relevant “falls squarely within the ambit of the attorney-client privilege”); Hardy v. N.Y. News, Inc., 114 F.R.D. 633, 644 (S.D.N.Y. 1987) (holding that an attorney with the title of Director of Employee or Labor Relations was not acting as a legal advisor when he participated in investigations of allegations of racial discrimination); Payton v. N.J. Tpk. Auth., 691 A.2d 321, 334 (N.J. 1997) (stating that if the purpose of a sexual harassment investigation is to enforce an anti-harassment policy or comply with legal duties to investigate, it is not privileged because the purpose is not to provide legal advice or to prepare for litigation).


110. Archer, supra note 108, at 143.

111. Even more so than the federal courts, the state courts use different tests for when the attorney-client privilege applies to a communication with a constituent. Cohn, supra note 1, at 756. In fact, Illinois continues to use the control-group test rejected by Upjohn. Cohn, supra note 1, at 757. Thus, researching the law of the particular jurisdiction at issue is very important.
Professor Sherman L. Cohn has classified the tests used by the federal courts, and one of those tests, which has been used within Kentucky, is the “subject-matter test.” The Western District of Kentucky is one of the courts that uses the subject-matter approach. The court states the test as follows:

The attorney-client privilege also extends to communications made by noncontrol group employees (1) at the direction of their superiors, (2) in order to secure legal advice for the corporation, (3) about matters within the scope of the employee’s corporate duties; and (4) while the employees were aware that they were being questioned in order that the corporation could obtain legal advice.

One scholar provides samples of letters that corporate counsel can use in investigations to help ensure communications remain attorney-client privileged. These could also be adapted to the union context. Finally, it should be noted that in some jurisdictions, former employees’ communications with an entity’s counsel are covered by the attorney-client privilege if they have a continuing legal obligation to furnish information to the entity’s lawyer, but there is no Kentucky authority on point.

3. For Which Communications Can a Union Assert the Attorney-Client Privilege?

What if a union is defending a Beck case and the attorney has spoken to a volunteer union officer about dues notices? Or what if the union is defending a duty of fair representation case, and the attorney has spoken with other members about the complained about assignment of employees? Can the union assert the attorney-client privilege?

As to officers and other employees, Upjohn applies in a relatively straightforward manner. Attorney-client privilege can be asserted against union

112. Cohn, supra note 1, at 755. For an example of the functional approach, see Admiral Ins. Co. v. U.S. District Court, 881 F.2d 1486, 1492 (9th Cir. 1988).
118. Collins & Waldman, supra note 31, at 5.
members seeking to obtain attorney communications with union officers.\textsuperscript{119} Some authority supports the proposition that communications with volunteer officers also should be protected by the attorney-client privilege. “The \textit{Upjohn} principle may extend to non-employees of the business organization where the non-employee agent has ‘a significant relationship to the corporation and the corporation’s involvement in the transaction that is the subject of legal services.’”\textsuperscript{120} Indeed, Rule 503 supports such an outcome by defining a representative as “[a] person having authority to . . . act on advice thereby rendered on behalf of the client.”\textsuperscript{121} Some authority also supports the proposition that communications with members should be protected by the attorney-client privilege.\textsuperscript{122}

One scholar recommends, however, that lawyers assume “that an attorney’s communications with a non-employee agent may well not be protected by the attorney-client privilege . . . .”\textsuperscript{123} Likewise, “it cannot be assumed that attorney communications with members necessarily are privileged against disclosure to employers or others.”\textsuperscript{124} Consistent with these recommendations, if a member is present for a communication between an officer and the union attorney, that communication would not be attorney-client privileged.

4. Who May Claim the Privilege

“The privilege may be claimed by the client . . . or the successor, trustee, or similar representative of a corporation, association, or other organization . . . .”\textsuperscript{125} Exactly who, in the form of a particular person, will decide whether the corporation or union claims or waives the privilege? “Corporate law generally provides that the board of directors or a person authorized by the board to act may act for the corporation, if approval of shareholders on the particular matter is not required.”\textsuperscript{126} Generally, when management is replaced, the successor

\textsuperscript{119} Howard S. Simonoff, A Beautiful Bind: Some Ethical Considerations in Representing an Imaginary “Person” in A World of Real People 8 (Apr. 29, 2002) (unpublished manuscript on file with author).

\textsuperscript{120} Brewer, \textit{supra} note 36, at 763-64 (quoting John Sexton, \textit{A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege}, 57 N.Y.U. L. REV. 443, 487 (1982)).

\textsuperscript{121} KY. R. EVID. 503(a)(2)(A) (2009).

\textsuperscript{122} See Arcuri v. Trump Taj Mahal Assocs., 154 F.R.D. 97, 104-05, 109-10 (D.N.J. 1994) (holding attorney-client privilege applies to investigation by union attorney who interviewed various union members “to provide a basis for responding to the client’s queries”); \textit{see also} United States v. Fisher, 692 F. Supp. 488, 491 (E.D. Pa. 1988) (suggesting in dicta that the attorney-client relationship might exist for purposes of attorney-client privilege between union attorney and each of its members). Consistent with the theory that the union attorney represents only the union and not individual members, no joint attorney-client privilege will arise in the typical case. \textit{See} Anderson, \textit{supra} note 31, at 496-98 (discussing Bachner v. Air Line Pilots Ass’n, 113 F.R.D. 644, 647 (D. Alaska 1987)).

\textsuperscript{123} Brewer, \textit{supra} note 36, at 764.

\textsuperscript{124} Simonoff, \textit{supra} note 119, at 8.

\textsuperscript{125} KY. R. EVID. 503(c) (2009).

\textsuperscript{126} HAZARD, \textit{supra} note 40, at 533.
controls the privilege. One authority holds that a union’s board, but not a single board member, may waive a union’s attorney-client privilege.

There is a split over whether inadvertent disclosure automatically destroys the privilege regardless of the circumstances. A full discussion of this issue is beyond the scope of this Article, but the Sixth Circuit has stated in an unpublished opinion that “the mere fact that a breach in the chain of control has occurred is not sufficient to automatically render a document devoid of any privileged status.”

5. Fiduciary Duty Exceptions

In some circumstances, unions may be unable to assert the attorney-client privilege because of fiduciary duty exceptions. One exception to the attorney-client privilege that has been somewhat widely adopted in the corporate setting is the ability of shareholders in derivative suits to obtain otherwise attorney-client privileged communications. Applicability of the exception turns on a balancing of several factors, referred to as the “Garner factors,” and the harm to the party claiming the privilege.

The Garner factors are as follows:

1. “the number of shareholders . . . and the percentage of stock they represent;”
2. “the bona fides of the shareholders;”
3. “the nature of the shareholders’ claim and whether it is obviously colorable;”
4. “the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources;”
5. “whether . . . the shareholders’ claim is of wrongful action by the corporation” and what type of wrongful action;
6. “whether the communication[s] relate[] to past or to prospective actions;”
7. whether the communication was about the litigation;
8. “the extent to which the [particular] communication is identified . . . [or] the shareholders are blindly ‘fishing;’” and
9. “the risk [of] revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.”

127. See HAZARD, supra note 40, at 534.
129. Bales & Hamilton, supra note 61, at 275 n.507.
133. Anderson, supra note 31, at 511-12 (quoting Garner, 430 F.2d at 1104).
Union members have attempted to rely on *Garner* to obtain otherwise privileged documents.\(^{134}\) Several courts have held that the doctrine applies to unions because of their fiduciary relationship with members.\(^{135}\) And some courts have found that the plaintiffs proved good cause.\(^{136}\) Several courts, however, have not actually ordered the release of privileged information because weighing the *Garner* factors, modified for the union setting, has indicated no reason to do so.\(^{137}\) Whether there is a *Garner* fiduciary exception in Kentucky is unclear.\(^{138}\)

The Kentucky Supreme Court has referenced *Garner*, but has not addressed the issue.\(^{139}\)

In contrast to the *Garner* fiduciary exception, the furtherance of crime or fraud exception clearly extends to include some situations where an attorney’s conduct furthers a breach of fiduciary duty.\(^{140}\) In *Steelvest, Inc. v. Scansteel Service Center, Inc.*, the Kentucky Supreme Court held that “as a matter of law, . . . a breach of a fiduciary duty is equivalent to fraud.”\(^{141}\) In *Steelvest*, the plaintiff company sued the prior president and director for breach of fiduciary duty.\(^{142}\) The president had formulated a plan to incorporate and had incorporated

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136. Wessel v. City of Albuquerque, No. 00-00532 (ESH/AK), 2000 U.S. Dist. LEXIS 17494, at *19, *22 (D.D.C. Nov. 30, 2000) (applying exception where plaintiffs proposed to represent class of all non-members affected by allegedly deficient notice and advice concerned correction to notice, not defense against plaintiffs’ suit); Nellis, 144 F.R.D. at 72 (applying exception particularly where there is a lack of alternative source for information); Aguinaga, 112 F.R.D. at 68 (applying exception where, among other things, a high number of union members were adversely affected and the plaintiffs had high degree of need for the information); Boswell v. Int’l Bhd. of Elec. Workers, 106 L.R.R.M. (BNA) 2713 (D.N.J. 1981) (applying *Garner* to compel disclosure of opinions from union counsel relating to legality of union’s conduct toward plaintiff under Labor Management Disclosure Act); Anderson, *supra* note 31, at 513-14.
137. Cox v. Adm’r U.S. Steel & Carnegie, 17 F.3d 1386, 1415 (11th Cir. 1994) (assuming that exception could apply to suit against union, good cause not shown where only tiny percentage of members were plaintiffs and where plaintiffs were adverse to other union members) *modified*, 30 F.3d 1347 (11th Cir. 1994); Mui v. Union of Needletrades, No. 97 CIV. 7270 HB KNF, 1998 WL 915901, at *3 (S.D.N.Y. Dec. 30, 1998) (holding no good cause where plaintiffs few in number and possibility exists information may be discovered from other sources); Arcuri, 154 F.R.D. at 108-09 (holding no good cause particularly where suit would not benefit all members and number of plaintiffs was minuscule compared to number affected); Anderson, *supra* note 31, at 511.
138. Brewer, *supra* note 36, at 773 (citing Shobe v. EPI Corp., 815 S.W.2d 395, 397-98 (Ky. 1991)).
139. Brewer, *supra* note 36, at 773 (citing Shobe v. EPI Corp., 815 S.W.2d 395, 397-98 (Ky. 1991)).
141. *Id.*
142. *Id.* at 479.
a rival business during the last eleven months of his employment with the company.\textsuperscript{143} The president’s attorney had advised him in these efforts.\textsuperscript{144}

The company sought to obtain certain communications between the president and his attorney, which would otherwise be protected by the attorney-client privilege, under the crime or fraud exception.\textsuperscript{145} The court held that the attorney-client privilege could not be used to protect the communications.\textsuperscript{146} The court reasoned that the attorney presumably knew that the president’s activities “possibly constituted a breach of fiduciary duties.”\textsuperscript{147} Because the attorney, nevertheless, assisted the president in his efforts, the crime or fraud exception applied.\textsuperscript{148}

The United States District Court for the Western District of Kentucky has further explained this exception. In \textit{Invesco Institutional, Inc. v. Paas},\textsuperscript{149} an employer sued four senior employees who had left the company to work for a competitor.\textsuperscript{150} The employer asserted a claim for breach of fiduciary duty, alleging that the employees had disclosed confidential information and assisted the competitor to hire away key personnel.\textsuperscript{151} The employer attempted to discover, among other documents, otherwise attorney-client protected information from the firms of the attorney who had represented the employees in obtaining the new employment.\textsuperscript{152} The firms attempted to quash the subpoenas.\textsuperscript{153}

The employer produced enough evidence “to support a reasonable belief that \textit{in camera} review might yield evidence that establishes the applicability of the asserted exception to the privilege.”\textsuperscript{154} And the court conducted an \textit{in camera} review of the documents.\textsuperscript{155} The court held, however, that not a “single document . . . appears connected to a breach of fiduciary duty.”\textsuperscript{156} The court admonished that “[i]t must be remembered that only those communications that further the alleged breach of fiduciary duty are subject to production under the exception.”\textsuperscript{157} The court reasoned that seeking to obtain other employment did not breach any fiduciary duty.\textsuperscript{158} Because the documents dealt with obtaining
other employment but not with disclosure of confidential information, they were not “made in furtherance of the alleged breaches of fiduciary duty.”

6. Related Privileges for Communications with Union Members

In addition to the attorney-client privilege, unions may assert a negotiations or union representative privilege. First, some jurisdictions recognize the negotiation privilege, which protects as privileged statements regarding labor negotiation strategy. Additionally, disclosure of authorization cards to employers is generally prohibited, and one court has extended that privilege to include a union’s documents relating to an organizing campaign.

Second, the National Labor Relations Board, the Federal Labor Relations Authority (“FLRA”), and the New York state courts recognize that employer conduct that seeks to obtain confidential communications between union members and representatives, acting as such, is an unfair labor practice. The FLRA considers this protection an evidentiary privilege. Some arbitrators may also recognize this privilege. Other jurisdictions have expressly declined to find a privilege for communications between union members and their representatives, particularly when asserted against a non-employer party.

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159. Id.


V. EX PARTE COMMUNICATIONS

With whom may an attorney speak when the opposing counsel represents an entity? If a union is investigating a grievance, may the union attorney speak, without the consent of the employer’s attorney, to low-level employees who are union members, with low-level employees who are not union members, or with low-level management? If an employee’s attorney is investigating a potential sexual harassment suit, can the employee’s attorney speak with these employees without such consent? What if an employer or employee is suing a union? Can their attorneys speak with the union members? With union representatives who are employees but not officers?

A. Rules Regarding Ex Parte Communications

The Kentucky ethics rules are illustrative of the principles governing ex parte communications with entity constituents. Kentucky Rule 4.2 previously provided that, “[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.”166

The Commentary, Comment 2, previously stated:

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. Prior to communication with a nonmanagerial employee or agent or an organization, the lawyer should disclose the lawyer’s identity and the fact that the lawyer represents a party with a claim against the organization. See Rule 4.3. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f).167

The current Commentary, Comment 7, states in pertinent part:

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166. KY. RULES OF PROF’L CONDUCT R. 4.2 (2008). The current Kentucky Rule 4.2 is analogous to ABA Rule 4.2: “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or by a court order.”

In the case of a represented organization, this Rule prohibits communications to a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.\(^{168}\)

B. Ethics Opinion on Ex Parte Communication

KBA Opinion E-382 (July 1995) also advises that under the prior rule the prohibition on ex parte communications “applie[d] to (i) management employees, (ii) non-managerial employees whose act or omission in connection with the matter may be imputed to the organization, and (iii) employees whose statement may constitute an admission of the organization.”\(^{169}\) The prohibition does not encompass other non-management employees\(^{170}\) or an employee whose conduct does not give rise to the claim (whose acts or omissions cannot be imputed to the organization).\(^{171}\) Additionally, an employee whose statements do not relate to the scope of the employee’s employment is not an employee whose statement will constitute an admission.\(^{172}\)

The opinion provides an example for guidance. A company has four employees, a president, two loaders, and a secretary.\(^{173}\) One of the loaders injures a third party who was delivering goods to the loading dock.\(^{174}\) The other loader was working on the dock at the time, and the secretary was taking a break on the dock.\(^{175}\) The third party sues the company.\(^{176}\)

Per the opinion, the third party’s attorney may contact only the secretary.\(^{177}\) It is contemplated that the observing loader would be asked about the operation of the loading dock, a matter within the scope of his employment.\(^{178}\) On the
other hand, the secretary would not be asked about any matters within the scope of her employment. 179

With the change to the Commentary, Comment 7, effective July 15, 2009, the opinion may no longer be accurate. The president would have to “supervise[], direct[], or regularly consult[] with the organization’s lawyer” regarding the suit for communication with the president to be barred. 180 The loader who observed the incident would have to have authority to obligate the company in order for communication with the loader to be barred. 181

C. Authority Regarding Ex Parte Contacts with Current Employees

Under the prior rule, a lawyer who has conversations about matters important to the case with management constituents of an entity that the lawyer knows is represented will be disqualified, and any interview statements will be suppressed. 182 For example, in Shoney’s Inc. v. Lewis, the plaintiff sued her employer for sexual harassment. 183 Prior to filing suit, the plaintiff’s attorney contacted the employer’s vice president of human resources. 184 The vice president informed the attorney that the employer would be represented by counsel and provided counsel’s name. 185 Thereafter, the plaintiff’s attorney spoke with the employer’s counsel regarding pre-litigation settlement. 186 The employer’s counsel sent a letter confirming the conversation. 187 After receipt of the letter, plaintiff’s counsel met with and obtained statements from two of the employer’s senior managers without consent of the employer’s counsel. 188 The

179. Id. Ky. Bar Association on Ethics, Formal Op. KBA E-213 (1979), decided when the Disciplinary Rules were still in effect, concluded, “[t]herefore, if there is any question concerning the relationship of an employee to the corporation or governmental entity, it is necessary to contact the attorney of the corporation before taking any statements from the employee or from questioning any employee of the adversary corporation.” While the applicability of Rule 4.2 does not hinge on access to privileged information like the Disciplinary Rule did, it is an interesting question whether the advice to contact opposing counsel holds when an attorney is unsure about whether a non-management employee’s act can be imputed to the employer or whether the non-management employee’s statement will constitute an admission.

180. KY. RULES OF PROF’L CONDUCT R. 4.2 cmt. 7 (2009).

181. Id.

182. Shoney’s Inc. v. Lewis, 875 S.W.2d 514, 515-17 (Ky. 1994); see also Callis v. KBA, 143 S.W.3d 603 (Ky. 2004) (reprimanding attorney for ex parte contacts); Babbs v. Minton, No. 2004-CA-000332-OA, 2004 WL 1367621 (Ky. Ct. App. June 18, 2004) (unpublished and not to be cited in Kentucky courts) (holding that plaintiff’s attorney who hired an agent to contact opposing employer’s president, who was represented, must be disqualified and the record of the president’s important admissions suppressed).

183. Shoney’s, 875 S.W.2d at 514.

184. Id.

185. Id.

186. Id. at 514-15.

187. Id. at 515.

188. Id.
plaintiff then filed suit, and the employer moved to disqualify plaintiff’s attorney and his firm under Kentucky Rule 4.2.189 The Kentucky Supreme Court held that the managers of senior rank were “precisely within the group of persons provided for in the comment”190 and that Kentucky Rule 4.2 applies “both before and after formal proceedings have begun.”191 The court also held, in reliance on the authority of other jurisdictions, that the appropriate remedies were disqualification of plaintiff’s counsel and suppression of the statements wrongfully obtained.192 The court reasoned that, if not suppressed, the statements might “acquire an independent significance, such that irreparable prejudice may result.”193 Without any reasoning in support, the court also ordered the trial court to order the plaintiff’s counsel to disclose to the employer’s counsel the identity of all persons from whom statements were taken and to “refrain from any further disclosure of the substance of the statements in question.”194

In contrast, when an attorney is unaware that an entity is represented, communications with entity constituents are not cause for disqualification.195 In Humco, the plaintiff sued her employer for racial discrimination.196 Prior to filing suit, plaintiff’s counsel wrote the employer’s hospital administrator.197 The administrator responded and carbon copied the employer’s counsel.198 The plaintiff’s attorney, who did not know the employer was represented, then contacted five non-managerial employees regarding the matter.199 After suit was filed, counsel (different than that named on the administrator’s letter) entered an appearance on behalf of the employer.200 Thereafter, plaintiff’s new attorneys

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189. *Shoney’s*, 875 S.W.2d at 515.
190. *Id.* Currently, communications with a specified group of management are prohibited.
191. *Id.* at 515-16.
192. *Id.* at 516.
193. *Id.*
194. *Id.* at 517. Does the court refer to only the disclosure of the management employees’ statements or all of the statements taken? Does the court’s order imply that taking statements of any employee was inappropriate? If it was not inappropriate, why should counsel be directed not to disclose the statements in question? Can he give them to the new plaintiff’s attorney? Or is the order to disclose the identities to the employer to enable the employer to move to suppress any of those statements which were obtained by improper ex parte contacts? The dissent argued disqualification and suppression were inappropriate remedies for the attorney’s ethical failure. *Id.* at 517 (Leibson, J., dissenting). The dissent reasoned that suppression of the statements was unauthorized by the Kentucky Rules of Civil Procedure and Evidence. *Id.* The Kentucky Supreme Court also has held that when an ex parte discussion with a constituent is not prejudicial, a writ of mandamus will not issue. Univ. of Louisville v. Shake, 5 S.W.3d 107, 110 (Ky. 1999).
196. *Id.* at 918.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
(who were in possession of the prior attorney’s notes) interviewed ten former employees, some of whom were management.\(^{201}\)

The employer moved to disqualify plaintiff’s attorneys because of the interviews.\(^{202}\) The employer also requested suppression of the statements obtained.\(^{203}\) The court held that plaintiff’s attorneys had not made any inappropriate ex parte communications.\(^{204}\) As to the interviews of the current non-management employees, the court held that plaintiff’s attorney did not know at the time of the interviews that the employer was represented.\(^{205}\) The court reasoned that the employer did not advise plaintiff’s counsel that it was represented.\(^{206}\) It further reasoned that individuals often carbon copy an attorney on a letter, “but that fact alone does not establish that the attorney is representing the letter-writer.”\(^{207}\) Moreover, there were no other circumstances indicating that the employer was formally represented by the copied attorney or that the plaintiff’s attorney knew of any such representation.\(^{208}\)

Thus, any letter from an entity’s lawyer to an opposing counsel “should state explicitly in its text that the organization is represented by an attorney and provide the attorney’s name, address, and other contact information.”\(^{209}\)

### D. Authority Regarding Ex Parte Contacts with Former Employees

In many jurisdictions, an attorney may communicate with a former employee of an entity without opposing counsel’s consent, although in some, consent is required.\(^{210}\) KBA Opinion E-381 states that a lawyer may communicate with a former employee of an organization without consent or notification.\(^{211}\) The *Humco* court also held that Kentucky Rule 4.2 only limits an attorney’s right to contact current employees.\(^{212}\) The court reasoned that the “purpose of Rule 4.2 is not to ‘prevent the flow of information’” but rather to “preserve the position of the parties in an adversarial system.”\(^{213}\) The court explained that a former employee is not a “party” and is not adverse to the plaintiff.\(^{214}\) The current Commentary to Kentucky Rule 4.2, Comment 7, is consistent.\(^{215}\) In sum, an attorney making ex parte contacts with current or former constituents should be

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\(^{201}\) *Humco*, 31 S.W.3d at 918.

\(^{202}\) *Id.*

\(^{203}\) *Id.*

\(^{204}\) *Id.* at 921.

\(^{205}\) *Id.* at 919.

\(^{206}\) *Id.*

\(^{207}\) *Humco*, 31 S.W.3d at 919.

\(^{208}\) *Id.*

\(^{209}\) Brewer, *supra* note 36, at 803.

\(^{210}\) *Id.* at 801.


\(^{212}\) *Humco*, 31 S.W.3d at 920.

\(^{213}\) *Id.*

\(^{214}\) *Id.*

\(^{215}\) KY. RULES OF PROF’L CONDUCT R. 4.2 cmt. 7 (2009).
careful not to inquire into any privileged attorney-client communications. As discussed above, the privilege belongs to the entity. On the other hand, Opinion E-381 suggests that an organization can “enter into confidentiality agreements or seek protective orders against communications by former employees who have privileged information.” The opinion states that “[i]t is incumbent on the party who knows that its former employees possess privileged information to utilize confidentiality agreements and/or seek protective orders.” One scholar cautions that “it may be illegal to ask a witness not to talk voluntarily with a prosecutor or law enforcement official.”

E. Open Issue and Concluding Advice on Ex Parte Contacts

First, Kentucky courts have not addressed the issue of who has managerial responsibility under the prior rules. It might encompass supervisors or may be limited to the control group. An example of an employment case where a court held that managerial means “officers, directors, and managing agents” is Shealy v. Laidlaw Bros. One employment case in the Western District of Michigan, Massa v. Eaton, has addressed the issue of who has managerial responsibility and held that ex parte interviews with any managerial level employee, not only those in the control group, are forbidden.

Under the current Commentary to Kentucky Rule 4.2, Comment 7, the issue will be who “supervises, directs or regularly consults with the organization’s lawyer concerning the matter.” While the supreme court’s intent likely was to narrow the class of persons with whom communication is prohibited, the language is not clear as to whether “supervise” and “direct” are modified by the phrase “concerning the matter.”

KBA Opinion E-382 implies that anyone speaking about matters within the scope of employment makes statements that may constitute an admission. This is consistent with the meaning of an evidentiary admission, which can be contradicted or impeached. An evidentiary admission generally refers to a statement made by a party. Often an opposing party introduces such a statement.

216. Garrett Hodes, Ex Parte Contacts with Organizational Employees in Missouri, 54 J. Mo. B. 83, 86 (1998).
217. Id.
220. Brewer, supra note 36, at 805.
221. Cohn, supra note 1, at 771-72.
225. Id.
227. Cohn, supra note 1, at 778.
as adverse evidence against the party. The party, however, can introduce other evidence to undermine the admission.

Consistent with the evidentiary interpretation of admissions, some courts in other jurisdictions hold that an attorney may communicate ex parte with a constituent who is not a manager and whose conduct will not be imputed to the employer.\(^{228}\) But the attorney cannot use the statements gathered as admissions.\(^{229}\) These courts reason that lawyers must choose between communicating with employees ex parte or using gathered statements as admissions.\(^{230}\)

Some courts interpret admission differently to mean only a binding admission, in the sense that it takes the issue “out of the case.”\(^{231}\) The current Commentary to Kentucky Rule 4.2, Comment 7, clarifies that only contact with a person who can make a binding admission will be prohibited.\(^{232}\)

One professor has identified seven different tests, one of which is the prior ABA Model Rule upon which Kentucky’s prior Rule 4.2 was based, in use in different jurisdictions.\(^{233}\) This means it is imperative to research the law in the jurisdiction at issue before making any ex parte contacts. These tests are:

1. While it is not likely, some jurisdictions, including some federal district courts, do impose a complete ban on communications with an entity’s employees.\(^{234}\)
2. Other jurisdictions, including some federal district courts, ban either communications with the control group or with “officers, directors, and managing agents.”\(^{235}\)
3. Some jurisdictions, including some federal district courts, support “a ban on ex parte communications with all current employees about matters within the scope of their employment.”\(^{236}\)
4. Some jurisdictions, including some federal district courts, use a case-by-case balancing approach.\(^{237}\) An employment case where this approach was used is Mompoint v. Lotus Development Corp.\(^{238}\)

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229. Id.
230. Sally E. Barker, Application of ABA Model Rules 4.2 and 4.3 to Union and Plaintiff’s Employment Law Counsel’s Communications with Adverse Parties 8 (Feb. 19, 2002)(unpublished manuscript on file with author); see, e.g., Orlowski, 937 F. Supp. at 730.
231. Cohn, supra note 1, at 778; see, e.g., Niesig v. Team I, 558 N.E.2d 1030, 1035 (N.Y. 1990).
232. KY. RULES OF PROF’L CONDUCT R. 4.2 cmt. 7 (2009).
234. Id. at 810-14.
235. Id. at 814-16.
236. Id. at 816.
237. Id. at 816-18.
(5) Some jurisdictions use a “managing-speaking agent test.” Under this test, ex parte communications are only prohibited with those parties who have “the legal authority to ‘bind’ the corporation in a legal evidentiary sense.”

(6) Some jurisdictions use the test established by the version of Model Rule 4.2 previously in effect in Kentucky. See the issues discussed above in sub-sections G & H for potential differences between jurisdictions using this rule.

(7) Finally, some jurisdictions use a test similar to the following: ex parte contacts are prohibited with “employees whose acts or omissions in the matter under inquiry are binding on the corporation . . . or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel.”

Finally, the following useful tips concerning ex parte contacts, which were previously proposed by another scholar, are offered for entity lawyers:

(1) Disclose your identity, that you are counsel for the organization’s adversary, and the purpose of the interview.

(2) Be clear that the interview is voluntary and that the interviewee may seek counsel, whether individual or the entity’s counsel.

(3) Make sure the employee is not individually represented already.

(4) Refrain from asking about communications with the entity’s counsel.

(5) Conclude the interview if it becomes apparent that the employee is one with whom ex parte contact is prohibited.

(6) If substantial uncertainty exists as to whether the employee is a party for purposes of ex parte contacts, attempt to resolve the issue with opposing counsel or seek court approval for the contact.

Morrison v. Brandeis Univ., 125 F.R.D. 14, 18, 18 n.1 (D. Mass. 1989) (stating that Mompoint was decided under exception for court authorization of ex parte contacts with represented party).

239. Lidge, supra note 233, at 834.

240. Lidge, supra note 233, at 834 (quoting Wright v. Group Health Hosp., 691 P.2d 564, 569 (Wash. 1984)).

241. KY. RULES OF PROF’L CONDUCT R. 4.2 (2008). Some other jurisdictions have already adopted the more recent changes to ABA Model Rule 4.2 that are currently in effect in Kentucky.


244. Id. at 1305-06.

245. Id. at 1306.

246. Id.

247. Id.

248. Id. at 1307.
VI. CONCLUSION

An attorney who understands who the client is when representing an entity will be less likely to breach confidentiality or commit malpractice. An attorney who understands who the opposing counsel’s client is will be more likely to obtain useful information and to avoid disqualification. Thus, when an attorney thinks about who the client is, it enhances the attorney’s ability to serve the client and ensures that attorneys act responsibly and ethically.
WHAT'S SIC UTERE FOR THE GOOSE: THE PUBLIC NATURE OF THE RIGHT TO USE AND ENJOY PROPERTY SUGGESTS A UTILITARIAN APPROACH TO NUISANCE CASES

Louis W. Hensler III∗

This essay addresses recurring issues that arise when two or more occupiers of real property use their property in ways that conflict.1 The real property owner’s interest in using and enjoying property as the owner pleases is almost universally regarded as one of the important “sticks” in the bundle of property interests held by the real property owner. But this important interest in using and enjoying property frequently conflicts with the interests of other property owners to use and enjoy their property. It is worth noting here that the interest in using and enjoying property is distinct from the right to possess property exclusively,2 a right protected by the law of trespass.3 In contrast, the common law of nuisance, not trespass, resolves conflicts between neighboring uses of land. The interest protected by the law of nuisance is quite different from that protected by trespass – it is a more positive interest, not merely the negative right to be free from intrusion, but the positive interest in using the property in a way that seems productive or pleasant to the owner.

Owners may use land in many ways. For example, the owner may improve the land and use it as a residence. Or the land may be used for recreation. Land can also serve commercial purposes. All of these potential uses are encompassed within the owner’s interest in using and enjoying the property. Because real property is useful, it has market value, and the relationship between the market value of land and its usefulness for one or more of these varied possible purposes is quite close. The market value of land will be greater if it is intrinsically more useful than other land. For example, land that borders a pleasant body of water is

∗ Associate Professor, Regent University School of Law; B.A., Bob Jones University, 1985; J.D. University of Chicago Law School, 1988. I wish to thank Darcy Hall, Scott Adams, Tyrone Taylor and Jeremy Spitzer for their very helpful research and editorial assistance. I also acknowledge the invaluable reference assistance provided by William Magee. I am grateful to both the American Center for Law and Justice and Regent University for their financial support. Finally, I wish to acknowledge the insight into the law of nuisance that I gleaned from my interactions with the students in my Spring 2007 nuisance law seminar at Regent University School of Law.

1. See RESTATEMENT (SECOND) OF TORTS § 825 cmt. c (1979). The scope of this essay is limited to those circumstances in which a defendant knows, at least to a substantial certainty, that his chosen use of his property will interfere, to some extent, with his neighbor’s use of her property. In other words, accidental interferences with a neighbor’s use and enjoyment of real property are beyond the scope of this essay. Also beyond the scope of this essay are merely temporary interferences with use and enjoyment of property. Thus, this essay focuses only on inconsistent ongoing uses of neighboring properties.


intrinsically useful for recreation and is therefore highly valued by the market. Similarly, the market value of land may turn on its proximity to natural resources that are critical to certain industrial enterprises. Perhaps the most important factor in the market value of most pieces of real property is ease of access, for if the land cannot be readily accessed by people, it is not very useful for any human purpose. Market value has long been considered one aspect of the property owner’s use and enjoyment. Therefore, destroying potential future uses of land, which will inevitably negatively affect the market value of the land, is considered an interference with the owner’s interest in the land’s use and enjoyment – a nuisance.4

As already noted, the interests of various property owners in using and enjoying their property can, and often do, conflict. While this observation is not novel, it does make the interest in using and enjoying property distinctive. Not all sticks in the property owner’s bundle of interests share this complication of potential conflict with neighboring uses. For example, one property owner’s right to exclusive possession of his property never conflicts with the same right of another property owner to the exclusive possession of a separate piece of property. Parties may disagree over who properly holds the right of possession, but once the proper holders of the right to exclusive possession of various tracts of land are identified, each property owner can exercise her right of exclusive possession to the fullest possible degree without ever conflicting with another property owner’s similar right of exclusive possession.

In this way, trespass is unlike nuisance. Trespass always can be avoided by each property owner exercising only her own right of possession. Therefore, a trespass always is actionable. The interest in exclusive possession of property is purely private. Nuisance is different – a property owner’s exercising her own interest in using and enjoying her property might unavoidably interfere with another property owner’s interest in using and enjoying his property, creating a nuisance. This is what is meant by the phrase “the public nature of the right to use and enjoy property” in the title of this essay – neighboring interests in the use and enjoyment of property are necessarily correlative, not absolute like the private right to exclusive possession. A property owner simply cannot possibly go about using and enjoying his property without that use and enjoyment implicating the similar interest of his neighbors. For this reason, nuisance is not as easily avoided as trespass, and, therefore, unlike trespass, not all interferences with the interest in using and enjoying property (nuisances) are actionable.5

Because courts often do not fully appreciate the implications of this aspect of the interest in using and enjoying property and its fundamental difference from other more absolute interests, such as the right to exclude, those courts often fail

4. See id. § 821D cmt. b.
5. For example, interference with plaintiff’s “hypersensitive” use of property is not necessarily actionable. See id. § 821D cmt. d.
to apply a consistent approach to recurring nuisance issues. Even though the interest in use and enjoyment of property is not, like the trespass interest in exclusive possession, an absolute right that can always be exercised to the fullest possible extent without ever interfering with the interest of another, courts nevertheless frequently view nuisance cases as analogous to cases of trespass, with one property owner infringing the absolute rights of another. The court proceeds as though it need merely identify who is the infringer and who is the “infringe” and then protect the infringe absolutely. But nuisance scenarios often involve not identifying which property owner is the infringer of another’s absolute right, but rather appropriately adjusting inconsistent exercises of two legitimate interests in using and enjoying neighboring properties.

Treatment of conflicts between neighboring uses of property was long dominated at common law by the maxim *sic utere tuo ut alienum non laedas* (so use your own property as not to injure your neighbor’s). This maxim resembles the “golden rule,” one of the most famous teachings attributed to Jesus: “And as ye would that men should do to you, do ye also to them likewise.” Following the golden rule can be difficult for the owner of real property. One property owner may love to play music on her deck while her neighbor cherishes the sound of silence in his back yard. The music lover cannot fully enjoy her property unless she makes some sound. The silence lover cannot fully enjoy his property if his neighbor makes music. The real property owner who would follow the “golden rule” must take into account her neighbors’ interests when deciding how to use her own property. This, of course, is easier said than done – if it were easy, the teaching of the golden rule would not be as profound as it is.

Because the property owner’s interest in the use and enjoyment of property necessarily impacts the similar interest of neighboring property owners, the interest in use and enjoyment is inherently public. And only a utilitarian approach to cases of conflicting uses of property allows a satisfactory adjustment, the utilitarian approach outlined by Jesus in the golden rule. John Stuart Mill explained the connection between utilitarianism and the golden rule:

> [T]he happiness which forms the utilitarian standard of what is right in conduct, is not the agent’s own happiness, but that of all concerned. As between his own happiness and that of others, utilitarianism requires him to be as strictly impartial as a disinterested and benevolent spectator. In the golden rule of Jesus of Nazareth, we read the complete spirit of the ethics of utility. To do as you would be done by, and to love your neighbor as yourself, constitute the ideal perfection of utilitarian morality.

While there is some surface similarity between the golden rule and the *sic utere* maxim, the golden rule is significantly different from *sic utere*. The golden

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7. JOHN STUART MILL, UTILITARIANISM 64 (Roger Crisp ed., 1998).
rule may be difficult to follow, but following the literal *sic utere* maxim might present an even greater challenge. Complying with the *sic utere* maxim is so challenging because it frequently comes into tension with the property owner’s traditional interest in the use and enjoyment of property – it sometimes simply is not possible for all property owners to pursue their legitimate interests in use and enjoyment of property without impinging on a neighbor’s similar interest.

In this way, applying a utilitarian standard, such as the golden rule, would be more workable than the traditional *sic utere* maxim, which is based in the idea that property rights are absolute. *Sic utere* was problematic because its literal application frequently would require property owners to refrain from very productive uses of their property simply because those uses would inevitably conflict, sometimes in a relatively trivial way, with a neighbor’s chosen use. The golden rule, on the other hand, would permit all property owners to pursue their chosen property use, so long as they treated their neighbors as they would like to be treated. This idea went largely unrecognized for centuries until Ronald Coase and the law and economics movement elaborated it a few decades ago.8

The thesis of this essay is that most of the difficulties generated by conflicting exercises of the interest in using and enjoying property can be fairly and efficiently mediated by holding all users of property strictly liable when their volitional acts cause a diminution in market value of their neighbor’s property. Recovery then should be limited to that diminution in market value. This approach would leave all property owners free to use and enjoy their property as they see fit and would simultaneously force them to follow the golden rule (not the *sic utere* maxim) – property users would be forced to consider the impact of their chosen use and enjoyment on their neighbors. The desirability of this approach flows from the public nature of the interest in the use and enjoyment of property – because the use and enjoyment of real property is inherently public, it simply will not do to treat it as the exercise of an absolute private right.

This essay first builds up the historical understanding of the property owner’s interest in using and enjoying property in the Western legal tradition. The traces of two conflicting historical versions of the interest in use and enjoyment will be observed. In the second part of this essay, I will relate these two visions of the interest in using and enjoying property to the development of the law of nuisance in Anglo-American law. Then, in the third part, I will attempt to demonstrate the relative superiority of a utilitarian approach to nuisance law in the light of a better understanding of the fundamental nature of the interest in using and enjoying property as a relative or public interest rather than an absolute private right. The fourth part of the essay analyzes several recurring nuisance issues in the light of this understanding of the interest in use and enjoyment of property.

8. See *infra* notes 144-45 and accompanying text.
I. THE GRADUAL TRIUMPH OF ABSOLUTE PRIVATE PROPERTY RIGHTS

Two contrapuntal natural law themes appear in the earliest traditions concerning property rights in the West.9 One natural law theme is that justice demands equality of interest in property.10 The opposing theme is that strong private property rights are necessary to human flourishing, including the development of virtue.11 The battle between these themes reaches back to the classical era, when Aristotle rejected Plato’s idea that property should be owned in common.12 While the Aristotelian conception of private property rights as necessary to the full development of human virtue always has been present in the Western tradition, the opposing conception of property rights – that justice demands equality – gained a strong foothold among Roman philosophers, along with the idea that private property is “natural.”13 But with the Christianization of the West, a strong antipathy toward private property came to dominate Western literature for centuries.14

A. The Earth Belongs to Humankind in Common

Any complete understanding of attitudes toward private property in the West must begin at that same place that all leading Western property theorists from the time of Constantine until the late eighteenth century began – with the account of the creation of the world in the book of Genesis.15 Genesis recounts that, upon God’s completion of a series of creative “days,” culminating in the creation of humankind on the sixth “day” of creation,16 God proclaimed a blessing on man, the pinnacle of God’s creation:

Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth. And God said, Behold, I have given you every herb bearing seed, which is upon the earth.

10. Id. at 10.
12. ARISTOTLE, POLITICS, 87-91 (Benjamin Jowett trans., Random House 1943)(350 B.C.). Lactantius, who has been called "the Christian Cicero," echoed Aristotle in the late third century. See CHARLES NORRIS CHOCHRANE, CHRISTIANITY AND CLASSICAL CULTURE 191 (1980). In Book Three of Lactantius’ Divine Institutes, which are particularly important as a window into the Constantinian era, Lactantius wrote that “the ownership of property is the material of virtue and vice.” Lactantius, Divine Institutes, Book 3, in FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT 48, 49 (Oliver O’Donovan & Joan Lockwood O’Donovan eds., 1999) [hereinafter IRENAEUS TO GROTIUS]. For an excellent summary of the ideas of Aristotle and Plato concerning private property, see SCHLATTER, supra note 9, at 9-20.
13. SCHLATTER, supra note 9, at 21-32.
14. See SCHLATTER, supra note 9, at 33-46.
face of all the earth, and every tree, in the which is the fruit of a tree yielding seed; to you it shall be for meat.17

Practically all writers on the subject of property rights in the West for more than fifteen hundred years – from the third century through the eighteenth – started their analyses of property rights with this passage from Genesis. What did the writer of Genesis (Moses, by tradition)18 mean when he wrote that God gave humans “dominion” over the rest of creation? The dominant interpretation of this passage for centuries, beginning at least with the early church Fathers, was that, at the moment God created humankind, He gave the entire creation to humankind in common.19 This view of the entire world belonging by gift to all people in common is somewhat hostile to a very strong version of private property rights. After all, if the earth belongs to all people in common by virtue of a common gift from the earth’s Creator, why should a few people carve out pieces of that common gift for their own exclusive use and enjoyment?

The Fathers of the early Christian church taught that private property rights were not among the precepts of natural law.20 An early example of this hostile attitude toward natural rights of private property can be seen in the fourth century writings of Ambrose, who is generally considered one of the “Eight Great Doctors . . . of the Undivided Church.”21 Ambrose taught that private ownership of property was not part of God’s natural created order, but rather was the result of humankind’s sinful greed:

Nature’s bounty is universal, for the common use of all. God has so ordained the law of universal generation that there is common food for all and that the earth is a kind of common possession. Nature, therefore, is the source of common right; it was greed that created private right.22

John Chrysostom, a contemporary of Ambrose and “one of the greatest of the Greek [Church] Fathers,”23 articulated a nearly identical view:

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18. Many scholars dispute the tradition of Moses as the author of Genesis and contend that Genesis was written by various authors. For present purposes, the precise human authorship of Genesis is unimportant.
19. SCHLATTER, supra note 9, at 36-37.
20. SCHLATTER, supra note 9, at 36.
21. James E. Keifer, Ambrose of Milan, Bishop and Doctor, http://justus.anglican.org/resources/bio/300.html (last visited May 6, 2010). The exalted title “Doctor of the Church” has been conferred by the pope on only four saints of the Western Church (Ambrose, Augustine, Jerome, and Gregory I) and four saints of the Eastern Church (Chrysostom, Basil the Great, Gregory of Nazianzus, and Athanasius of Alexandria).
22. Ambrose of Milan, The Duties of Clergy, Book 1, in IRENÆUS TO GROTIUS, supra note 12, at 84.
Take note, then, of God’s dispensation! To humble mankind, in the first place, he has made some things common: the sun, the air, the earth and the water, the heaven, the sea, the light and the stars, are available equally to all as brothers. . . . But once someone tries to alienate something to make it his own, contention is introduced; as though nature itself were outraged, that when God would rally us from every quarter, we compete to split off and separate by appropriating things and calling them “mine” and “thine.” That is when there is strife and unpleasantness. Where this does not happen, no strife or competition is generated . . . . We find our necessities provided for us in common; yet even in the smallest things we fail to preserve the principle of commonality. The reason God left those things free for us all, in fact, was to teach us to hold these things in common as well. Yet for all that we are taught nothing.24

“To the [early church] Fathers the only natural condition [with regard to property] is that of common ownership and individual use. The world was made for the common benefit of mankind, that all should receive from it what they require.”25

B. Private Property as a Necessary Evil

While the church Fathers never accepted private property as natural, they did, perhaps somewhat grudgingly, come to accept private ownership of property as a necessary conventional accommodation to human greed: “They admit . . . that human nature being what it is, greedy, avaricious, and vicious, it is impossible for men to live normally under the condition of common ownership.”26 This view persisted through the Middle Ages. In the twelfth century, Gratian penned the Decretum, the first great compilation of canon law, in which he explicitly adopted the idea that common ownership is natural and private property is a mere human convention.27 Not long thereafter, Rufinus the Canonist wrote his Summa Decretorum, which is “reputed to be the first comprehensive and detailed commentary on Gratian’s . . . textbook of ecclesiastical law. . . .”28 Keeping faith with Gratian, Rufinus noted that “by natural law all things are held in common,”29 but that private property is a creation of “customary” or “statute” law.30 Rufinus squared this “legality” of private property ownership with the

24. John Chrysostom, The Twelfth Homily on 1 Timothy, in IRENÆUS TO GROTIIUS, supra note 12, at 101, 102-03.
26. Id. at 125-26.
27. SCHLATTER, supra note 9, at 40-42.
28. IRENÆUS TO GROTIIUS, supra note 12, at 297.
29. Rufinus the Canonist, Summa Decretorum, Part I, in IRENÆUS TO GROTIIUS, supra note 12, at 303.
30. Id.
following quotation attributed to Gratian: “[B]y injustice one person claimed this thing for himself, another that.”

Thus, “private property was first brought about through some people’s burning avarice; later, however, given long-standing use and legalization, it was judged irreproachable” and passed into “customary” law. Thus, Rufinus tended to legitimate private property rights even in the face of his strong statement that all property is by natural law held in common.

About the same time, St. Bonaventure penned an exceptionally interesting discussion of the natural rights of private property ownership in the context of the Papal Revolution in his Defence of Mendicants. In his “theological and legal clarification of the practice of absolute poverty,” Bonaventure argued that some “private property,” in an important sense, never really loses its communal character:

[A]nything capable of sustaining natural existence, though it be somebody’s private property, may belong to someone who is in the most urgent need of it. This kind of community of goods cannot be renounced. It derives from the right that naturally belongs to man as God’s image and noblest creature, on whose behalf all other things on earth were made.

Thus, Bonaventure advocated a kind of inalienable property right of necessity. God gave all the earth to all people in common. Despite the later dividing of this common gift into the private property of various individuals, each retained a natural law interest, in cases of necessity, in using whatever was needed to sustain life. The natural right of common ownership, in cases of necessity, was seen as trumping the merely conventional human rights of private property:

Private property . . . cannot override the natural right of a man to obtain what he needs from the abundance of that which the earth brings forth. This is what the Fathers mean when they call the maintenance of the needy an act of justice, not of mercy: for it is justice to give to a man

31. Id.
32. Id.
33. See SCHLATTER, supra note 9, at 43-44.
34. IRENAEUS TO GROTIANUS, supra note 12, at 309.
35. IRENAEUS TO GROTIANUS, supra note 12, at 310.
36. Bonaventure, A Defence of the Mendicants, in IRENAEUS TO GROTIANUS, supra note 12, at 317.
37. This concept is reminiscent of Old Testament Israel’s concept of jubilee, Leviticus 25, whereby real property was not completely alienable. The owners of real property could sell only the use of the property for a period of years. Every fifty years, all real property would revert to its original owners. Moreover, for that one year of jubilee, everyone, especially the poor, was permitted to take and enjoy the fruit of all land as needed. This concept was explicitly designed to remind all real property “owners” that they did not own the land absolutely. Rather, the land was owned by God, who permitted them to use the property on His terms as His tenants.
that which is his own, and the needy have a moral right to what they require.38

Thus, “the medieval world generally conceived of private ownership as limited by social obligations.”39 So, while writers in early Christendom grudgingly accepted the concept of private property as a necessary evil, they did not accept the absolute right of the private property owner.

C. The Gradual Elevation of Private Property Rights

The scholastics, including the greatest of them all, St. Thomas Aquinas, also were skeptical of absolute natural property rights, but their rediscovery of Aristotle along with their new worldview brought about by “changes on the ground” led them to transition to a more friendly posture toward private property ownership.40 Richard Schlatter aptly contrasted the world in which the early church Fathers lived and wrote with that inhabited by the scholastics:

The earlier medieval theory was no longer appropriate for the all-embracing and powerful Church of the thirteenth century. The Augustinian tradition, into which that theory fitted, had been built up in the days when the Roman Empire was collapsing and when the Church was still waging uncertain battle with heathens and heretics. That the institutions of this world, such as property, were not according to nature, were necessary but evil conventions, did not conflict with the actual experience of the Fathers. But the Church of the thirteenth century took another view of a world in which every man was a Christian, where order and civilization, partly at least through the influence of the Church itself, had been recovered and sanctified, and where the Papal Monarchy was the richest and most powerful of worldly authorities. The institutions of the world were now the institutions of the Church, and the Augustinian differentiation of the terrestrial city and the city of God no longer fitted the facts. Thus it was that St. Thomas Aquinas, with the help of Aristotle, came to think that property and the political authority which protected it were not necessary evils but natural and good.41

Schlatter’s insight is keen, but he may have overstated Aquinas’ affinity for private property rights a bit. While the attitude shift in favor of private property that Schlatter described is perceptible, it was not a sudden U-turn. Citing Aristotle for the idea that placing real property under cultivation makes it natural

38. Carlyle, supra note 25, at 126.
40. See SCHLATTER, supra note 9, at 47-48.
41. SCHLATTER, supra note 9, at 47-48.
to consider the property as belonging to the cultivator, Aquinas argued for private property on three bases: to provide incentive for care of property, to promote order, and to promote peace. Thus, while Aquinas accepted the right of private property, he still accepted it as a practical necessity based on existing conditions, not necessarily as a part of natural law under all circumstances. In other words, it may be “natural” under postlapsarian human conditions for property to be privately “owned,” but under other, more ideal conditions, common ownership might be “natural.” Aquinas also recognized a duty on the part of the property owner to be “ready to share . . . with others in case of necessity,” and he saw no right of property in that which was not needed by the “owner” but was needed by the poor. Distribution of property from the natural common stock to the ownership of private individuals was, according to Aquinas, within the domain of positive law, not natural law. Thus, private property rights were not entirely the natural good that Aristotle envisioned, but rather an instrumental good – a mere means to other beneficial ends.

The earliest extant English authorities gave property rights to those who in fact first took possession of the property. Henrici de Bracton, a thirteenth century cleric and jurist, created what was, perhaps, the first systematic discussion of English property rights. “[Bracton] was ‘well versed in church canon law, Roman law and the common law’" and has been called “the chief architect of the common law during its formative period.” Bracton starts with the idea that things in their natural state are owned by no one in particular and

42. Thomas Aquinas, *From Summa Theologie 2a2ae.57-122 (On Justice), in IRENÆUS TO GROTIUS*, supra note 12, at 356.
43. Id. at 358.
45. Aquinas, supra note 42, at 358.
46. See O’Rahilly, supra note 44, at 345.
47. Aquinas, supra note 42, at 358.
48. Aquinas, supra note 42, at 358.
52. Id. at 121-22.
naturally become “property” when they are reduced to possession or “occupied.”53

Another step in the elevation of private property rights was taken by John Quidort (John of Paris), whose principal work was part of the “protracted” turn-of-the-fourteenth-century dispute between King Philip IV of France and Pope Boniface VIII.54 To appreciate fully the arguments made during this period of the later Middle Ages, the context of this controversy must be kept in mind:

[M]ost of the political theory of the later Middle Ages was concerned with the problem of the relation of the secular and the spiritual powers. At the end of the thirteenth century the struggle between the two had crystallized around the question of property: Pope Boniface VIII and Philip the Fair of France were disputing whether or not the king had the right to tax the property of the French clergy.55

It was in this context that John of Paris, perhaps the most able defender of King Philip’s position, made the following assertion:

[Private] property is not granted to the community as a whole as is ecclesiastical property, but is acquired by individual people through their own skill, labour and diligence, and individuals, as individuals, have right and power over it and valid lordship; each person may order his own and dispose, administer, hold or alienate it as he wishes, so long as he causes no injury to anyone else since he is lord.56

But this right and power of the owner over private property was subject to “the common need and welfare” of the country57 – private possessions might need to be shared as “common property.”58

The struggles between the Popes and secular powers continued into the fourteenth century, when a new slant was introduced into the instrumental justification of private property. Not only was private property viewed to be necessary to give incentives to labor, but also came to be viewed as a protection against depredation by the state. William of Ockham taught that while humankind was living in the state of innocence before man’s Fall into sin, property was not “owned” – all were free to use common property because God gave to the entire human race the limited right to appropriate property by use.59 He maintained that only with the growing up of avarice upon the introduction of sin into the world at the Fall did private property rights become necessary.60

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53. See BRACTON, supra note 50.
54. IRENAEUS TO GROTIUS, supra note 12, at 397.
55. SCHLATTER, supra note 9, at 58.
57. Id. at 404.
58. Id.
59. William of Ockham, A Short Discourse on the Tyrannical Ascendancy of the Pope, Book 3, in IRENAEUS TO GROTIUS, supra note 12, at 474.
60. Id.
According to William of Ockham, in a sinful world, the right of private property is necessary to cabin the avaricious hoarding of property and to provide an incentive against the slothful neglect of property’s productive use.\textsuperscript{61} This idea of the right of private property providing an incentive to productive use appears likewise in the work of William of Ockham’s Eastern contemporary, Nicolas Cabasilas:\textsuperscript{62}

For if no one is master of his own possessions but rulers may make what use they will of them, then at the very mention of the word “community,” everyone will have to fall a-trembling in fear for their possessions. Who, then, – what craftsman, farmer, merchant – will take the trouble to make money, knowing that everything he earns will go to other people?\textsuperscript{63}

Cabasilas here appears to anticipate Adam Smith’s “invisible hand.”\textsuperscript{64} He is skeptical of rulers seizing property for the “common good,” suggesting instead that the “common good” is best served by permitting the natural productive incentive or private property rights to take their course.\textsuperscript{65}

Similarly, John Wycliffe’s mid-fourteenth century teachings echoed and expanded upon William of Ockham’s. Wycliffe taught that man’s exercise of “dominion” over the earth pursuant to the direction of the Creator does not require the recognition of private property.\textsuperscript{66} Rather, according to Wycliffe, “property was a device to deal with sin, the sin of lords, perhaps, or at least of those who would not communicate their goods.”\textsuperscript{67}

Another step in the progressive acceptance of absolute private property rights roughly coincided with the Protestant Reformation.\textsuperscript{68} Among the reformers to address private property rights, the writings of Philipp Melanchthon\textsuperscript{69} may have been the most thorough. A true son of the Reformation, Melanchthon tended to buttress his support for private property with Scriptural proof texts rather than relying merely on reason.\textsuperscript{70} “He was willing to argue that private property was reasonable; but he always clinched the argument by quoting, ‘Thou shalt not steal.’”\textsuperscript{71} For example, in his theological treatise, \textit{Loci Communes}, Melanchthon

\begin{itemize}
\item \textsuperscript{61} Id.\textsuperscript{62} Id. at 476.\textsuperscript{63} Nicolas Cabasilas, \textit{From Rulers’ Illegal Outrages against Sacred Property, in Irenaeus to Grotius, supra} note 12, at 481.\textsuperscript{64} Adam Smith’s famous use of the term “invisible hand” is a reference to “distributive justice” and its attempt “to produce benefits for the whole of society.” \textit{Craig Smith, Adam Smith’s Political Philosophy: The Invisible Hand and Spontaneous Order} 13 (2006).\textsuperscript{65} See Cabasilas, \textit{supra} note 63, at 481.\textsuperscript{66} John Wycliffe, \textit{Divine Lordship, in Irenaeus to Grotius, supra} note 12, at 487-88.\textsuperscript{67} Id. at 487.\textsuperscript{68} See \textit{Schlatter, supra} note 9, at 77-123.\textsuperscript{69} See \textit{Irenaeus to Grotius, supra} note 12, at 650-52.\textsuperscript{70} See \textit{Irenaeus to Grotius, supra} note 12, at 650-52.\textsuperscript{71} \textit{Schlatter, supra} note 9, at 94.
\end{itemize}
blasted the argument of monks and Anabaptists against owning private property: “These opinions of the Anabaptists and monks are erroneous and false. The seventh commandment, ‘You shall not steal,’ shows that it is right, and a divine order, to have property.”

D. Seventeenth Century: Private Property as Natural Moral Right

The early seventeenth century Dutch lawyer and philosopher, Hugo Grotius, began his account of private property, as those who came before him had, with a world in which there was no private property – all things were owned in common because all of creation was given by God to all people in common. But once scarcity produced conflicts among people’s desires, private property entered through the mechanism of possession. Grotius employed Cicero’s oft-cited metaphor of the theater: The seats are common property, yet every spectator claims that which he occupies, for the time being, as his own. Thus, all have a certain “property” interest in that which they, at the moment, possess. Grotius’ thinking amounted to the idea that first in time was ordinarily first in right.

Grotius notes that some things, such as the sea, cannot be reduced to private possession and therefore cannot be owned. Thus, while Grotius clearly took the view that private property rights obtained through possession were in some sense supported by “natural law,” he appears to have viewed private property as an instrumental good, not a natural good – so long as there was no scarcity of resources, there was no need for private property. For the same reason, there is no private property in the sea – there is plenty of “sea” to go around.

Having concluded that private property was a creature of necessity, Grotius had no problem recognizing limits on property rights consistent with the

72. Philip Melanchthon, Loci Communes (1555), in IRENÆUS TO GROTIUS, supra note 12, at 659.
74. GROTIUS, supra note 73, at 186-90.
75. GROTIUS, supra note 73, at 186.
76. GROTIUS, supra note 73, at 186.
77. See SCHLATTER, supra note 9, at 130-31 (stating that, under Grotius’s theory “[t]he institution of property was an agreement among men legalizing what each had already grabbed, without any right to do so, and granting, for the future, a formal right of ownership to the first grabber). Id.
78. SCHLATTER, supra note 9, at 190-91.
79. See SCHLATTER, supra note 9, at 190-91.
80. GROTIUS, supra note 73, at 190-91. In modern economic terms, the point here is that the “value” of exclusive use of a particular instance of an abundant resource is zero. See RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 33-34 (3d ed. 1986).
purposes of their creation.81 Therefore, the defense of “necessity” is an exception to the property owner’s rights82 – in a time of necessity, private property reverts to its “natural” state of being held in common.83 Thus, Grotius’ view of the property right was not the absolute and natural right, but rather a necessary and potentially temporary division of scarce resources.84 Grotius turned out to be a transitional figure in the development of the idea of property rights in the West.85 While Grotius may not have succeeded completely in “making property a natural right,”86 he did have a profound influence on later seventeenth century thinkers who further developed Grotius’ work into a more full-blown theory of natural property right.87 “Whether it was that many men read Grotius, or that he set down what was already obvious to his contemporaries, his theory of property was expounded again and again in the course of the century.”88

The real turning point in the elevation of the right of private property in Anglo-American law may have come at the end of the seventeenth century with the work of John Locke. Like Bracton and Grotius (and later Blackstone), Locke started with the idea that at the creation of the world, God gave all things to all people to be held in common.89 Locke also noted the importance of the fact that when God created the earth and gave it to all people in common, God told people to “subdue” the earth and to have “dominion” over the animals.90 Locke took as a point of departure his idea that people have a natural private property right in at least one part of creation – their own bodies.91 Locke divided creation in two – people and the rest of creation.92 Unlike the rest of creation, people were not part of the common stock of “goods” held in common by all.93 Each person owned his own body from the beginning.94 From this assumption of self-ownership, Locke extrapolated that each had a right to the production of his own body – each man’s labor was exclusively his own.95 When a man’s labor, which he owns, mixes with some part of the common stock of nature, which is held in common, the laborer gains a property right in the product of the mixture.96 Thus, Locke sought to ground the right of private property in something more than mere
possession or agreement. A person could own whatever his labor could make his, limited by his ability to use (no person could naturally own more than he could use). ... "Everywhere in his discussion of property and labour, Locke makes clear that he is speaking of the state of nature and not of civilized societies."98

Interestingly, Locke rejected Grotius’ idea that there can be no private property in an item of which there is plenty to go around.99 Because Locke grounded the right of private property in personal labor, not on scarcity, he argued that a person’s property right in what has mixed with his labor is strengthened by the fact that the appropriation from the common stock has left plenty, and just as good, for the rest of humankind.100 Like Grotius, Locke saw a role for scarcity in natural property rights – a plentiful common stock made individual appropriation for private consumption from that stock justified, or at least justifiable.101 Moreover, Locke saw a natural limit in the accumulation of private property – a person could justly use his labor to accumulate from the common stock only as much as he could use without waste, and he could not gain a property interest in more than he could use.102 Locke also argued that property in actual civil society is largely conventional – people have tacitly agreed to the unequal accumulation of property through the voluntary use of money, without which no such unequal accumulation would be possible.103

In Locke, we see a step in the English mindset away from the idea that people own property by permissions of the Creator through possession, but only tentatively, and toward the idea that people own property because they have earned and therefore naturally deserve it. This basis for private property rights seems better suited to support “absolute” rights of property than the earlier basis of the accident of first possession.

American common law, including the law of private property rights, rests upon the work of Sir William Blackstone.104 Like several of his predecessors, Blackstone wrote of a time of “primeval simplicity”105 in which all things were held in common and only became “property” in any meaningful sense when reduced to possession.106 Blackstone appears to have taken a fairly instrumental view of private property rights – he attributed the right to own the “substance” of property, rather than the mere right to use property, to the need to avoid

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97. LOCKE, supra note 73, § 31.
98. SCHLATTER, supra note 9, at 156.
99. See LOCKE, supra note 73, § 33.
100. LOCKE, supra note 73, § 33.
101. LOCKE, supra note 73, § 33.
102. LOCKE, supra note 73, § 46.
103. LOCKE, supra note 73, § 50.
104. See BRAUCH, supra note 51, at 37.
105. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *3.
106. Blackstone illustrated this point with Cicero’s “the world is like a theater” analogy, previously employed by Grotius. Id. at *4.
“innumerable tumults.” 107 Blackstone put it bluntly – “necessity begat property.” 108 Blackstone’s stated concern that people would fight over things were it not for property rights 109 parallels Grotius’ idea that private property was the child of scarcity. 110 Shades of Aristotle also are discernible in Blackstone’s note that people would have no incentive to create valuable property if they could not secure the benefit of that property: “[N]o man would be at the trouble to provide either [habitation or raiment], so long as he had only an usufructuary property in them, which was to cease the instant that he quitted possession . . .:” 111 Blackstone also appears to have accepted Locke’s idea that “bodily labour, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein.” 112

The early American gloss on the English law of private property took a turn toward the absolute rights of the property owner as early American commentators challenged fundamental conceptions of the property owner’s interest in private property. For example, in St. George Tucker’s influential American edition of Blackstone, although it is not clear whether Tucker really understood what Blackstone was saying, the editor explicitly disagreed with the idea that the permanent ownership of property, as opposed to the bare right of use, was merely a civil, not a natural right. 113 Similarly, James Kent, sometimes called “America’s Blackstone,” 114 rejected the idea that people ever lived in a simple state when all things were held in common. 115 According to Kent, God never intended man to live in such a state – “[t]he sense of property is inherent in the human breast.” 116

By the late nineteenth century, this new, stronger, view of property rights had become dominant in America. Professor Robert Bone has labeled this newly-

107. Id.
108. Id. at *8.
109. Id. at *4.
110. See Grotius, supra notes 74-76, and accompanying text.
111. BLACKSTONE, supra note 105, at *4.
112. BLACKSTONE, supra note 105, at *5.
113. Tucker incorrectly implied that Blackstone’s view would mean that without the mere civil right protecting property, there would be no moral obligation to refrain from invading another’s property. Rather, Blackstone would see no moral obligation, apart from mere civil law, to respect the “ownership” of “property” that is possessed by no person. See 2 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 11 n.* (Philadelphia, Birch & Small 1803).
115. See 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 255-56 (photo. reprint 1971) (1826). Kent attributed this view, which he believed to be erroneous, to the fanciful musings of Roman poets, historians and philosophers.
116. Id. at 256.
dominant view of property rights the “absolute dominion model.”117 Professor Bone identified three beliefs about property rights that are foundational to this view: “(1) that the right was natural, not positive; (2) that it belonged to individuals, not to groups; and (3) that it was independent of any relation between the right-holder and others, or, in the language of the period, that it was ‘absolute,’ not ‘relative.’”118

II. THE EVOLUTION OF NUISANCE DOCTRINE

Because the law of nuisance mediates disputes relating to the use and enjoyment of real property, the prevailing view of private property rights at any given time will inevitably affect courts’ treatment of the tort of nuisance. At early common law, because the basic property interest was seen, not as a right to absolute dominion over the thing itself, but rather as the right to seize and use material given by God to all people to be held in common as a plentiful common stock, the early law of nuisance focused almost entirely on the reduction of the “property” to possession.119 First in time was first in right.120 If one seized some real property and built a house on that property, another was not permitted to build a house right next to it so as to cut off the light to the first house.121 The first builder was authorized by God to seize and make use of the soil and sun. When the first builder seized and used a plot of soil, that use did not prejudice the opportunity of others, for there was still plenty of other land, just as good, left in the common stock to be seized and used by those coming later. The old “coming to nuisance” defense evidences early nuisance law’s favoring the first possessor.

A. The Sic Utere Maxim

In the seventeenth century, Sir Edward Coke reported the landmark William Aldred’s Case,122 which articulated the maxim “sic utere tuo ut alienum non laedas (so use your own property as not to injure your neighbors).”123 This maxim became the “rule” oft-recited in the enforcement of a form of private nuisance doctrine whereby landowners were strictly prohibited from using their property in a way that would interfere with the pre-existing property interests of their neighbors.124 In accordance with the sic utere maxim, courts and prominent

118. Id. at 1116-1117.
119. See Grotius, supra notes 74-76, and accompanying text.
120. Grotius, supra notes 74-76, and accompanying text.
123. Coquillette, supra note 50, at 776.
124. See Coquillette, supra note 50, at 776.
commentators long tended to view the nuisance problem as a question of which property owner was the interferor, whose use of property must be curtailed, and which was the interferee, whose interest must prevail.

But strict application of sic utere was problematic in the context of an absolute right possessed by all owners to use their property as they chose. It would be literally impossible to use one’s property so as never to give any offense to any neighbor. Therefore, sic utere would stand in the way of many attractive property uses if those uses happened to interfere to any degree with a neighbor’s chosen use. Probably because of its impracticability, the sic utere rule was never strictly and uniformly applied. Rather, courts adopted several distinct doctrines to temper the harshest effects of sic utere.

For example, courts applied doctrines such as the “locality” rule or the hypersensitive plaintiff defense to soften the impact of sic utere. The idea behind the locality rule is to exempt from nuisance law a certain prevailing background level of mutual interference in a particular locality, e.g., persistent smog. No property user can hold any other user responsible for contributing to the smog. All have to take the prevailing condition of the locality as a given. Similarly, the hypersensitive plaintiff defense allowed a user of property to avoid responsibility for any interference that his property use might cause to his neighbor if the interference was a result of the neighbor’s “hypersensitive use” of property. In other words, if defendant’s use would not interfere with the use of an ordinary neighbor, then defendant was permitted to continue the use without liability, even if that use interfered with a neighbor’s hypersensitive use. Other courts found liability but declined to grant the usual injunction remedy in such situations. This softened the blow of sic utere, by permitting the “interfering” user to continue the use so long as he paid damages to the neighbor whose property use was impaired. But none of these palliatives was satisfactory because none addressed the fundamental jurisprudential flaw in the prevailing nuisance doctrine of the time – the failure to recognize that sic utere should be a two-way street.

The fundamental flaw in courts’ pre-twentieth century nuisance jurisprudence under the sic utere doctrine was not that the sic utere concept was too absolute and required tempering in the interest of the society at large. Rather, the flaw in nuisance jurisprudence under sic utere was that the concept was not applied thoroughly. The duty to consider the effects of one’s use of property on surrounding property owners was enforced against industrial users of property

125. See infra notes 270-78 and accompanying text.
126. See infra notes 270-78 and accompanying text.
127. See infra notes 270-78 and accompanying text.
128. See infra notes 266-69 and accompanying text.
129. See infra notes 266-69 and accompanying text.
131. Id.
and sometimes against other second-coming users of property, but not against residential or first-coming users.

B. The Rise of Utilitarianism

Frustrated by the inability to reconcile the traditional one-way application of *sic utere* with the newly-dominant absolute natural rights concepts of property ownership, academics, followed by the courts, eventually started to abandon the natural rights view altogether in favor of a more utilitarian approach\(^{132}\) whereby courts tried to find a reasonable balance of uses. This shifting view of the nature of property rights is reflected in the 1939 Restatement of Torts nuisance provisions.\(^{133}\) The drafters of the Comments to the Restatement explicitly noted the key insight that any right to be free from interference with use and enjoyment cannot be absolute:

> Not every substantial non-trespassory invasion of a person's interest in the use and enjoyment of land is actionable, even where such person is the owner of the land in fee simple absolute and another's conduct is the sole and direct cause of the invasion. Life in organized society, and especially in populous communities, involves an unavoidable clash of individual interests. Practically all human activities, unless carried on in a wilderness, interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms.\(^{134}\)

Therefore, the Restatement grounded the nuisance cause of action not necessarily in the defendant’s violation of a natural absolute property right, but rather in defendant’s failure to meet a utilitarian standard of reasonableness of use.\(^{135}\) The First Restatement balanced the utility of the actor's conduct against the gravity of the harm that it generated for neighbors.\(^{136}\) This balancing was done from the objective point of view of the community as a whole, not only from the point of view of the parties. This shift essentially made nuisance law a public regulatory doctrine instead of a rule for the private redress for harm to private property owners. The court would determine on a case-by-case basis, not whether defendant had harmed plaintiff, but rather whether defendant’s conduct was sufficiently meritorious from the community’s point of view to justify requiring plaintiff to put up with the resulting ill-effects. Nuisance law was no


\(^{133}\) See RESTATEMENT OF TORTS §§ 822-37 (1939).

\(^{134}\) Id. § 822 cmt. j.


\(^{136}\) RESTATEMENT OF TORTS § 826.
longer a mechanism for righting a particular sort of wrong wrought upon a property owner – it was now a mechanism for ad hoc land use control. Thus, the text of the Restatement threw out the baby of a corrective justice basis of nuisance law with the bath water of the imperfect application of corrective justice principles.

A utilitarian approach to tort law has long been closely connected with the concept of economic efficiency – the tort utilitarian pursues a tort regime that will produce the greatest good for the greatest number. Advocates of this view assume that people are self-interested. Rational self-interested people, if they were choosing a rule in the abstract (without knowing who will be benefited or harmed by a particular rule in fact), would choose that regime that maximized overall utility, without regard to distributional concerns. This concept of choosing in the abstract is commonly called choosing “from behind the veil of ignorance.” When the decision-maker chooses a rule that maximizes total utility, he thereby maximizes the decision-maker’s own expected outcome. The efficient regime in the nuisance context is that regime that minimizes the total of “nuisance” costs generated by actors, the costs of preventing, avoiding or minimizing such nuisance costs, and the “administrative” costs of any mechanism employed to seek the minimization of such costs.137

The key to achieving this economic efficiency is the treatment of so-called “externalities.” Activity produces utility (or it would not be undertaken by a rational actor), but activity also can produce disutility. When one actor’s (presumably rational) conduct produces disutility that falls on another, that disutility is an “externality” because the burden of the disutility is born by someone other than the rational actor whose conduct generates the disutility.138 Because the burden of the disutility does not fall on the actor who produces it, the rational actor who generates the disutility is not disciplined by self-interest to avoid that disutility, if possible.139 How to force actors to take such

138. Use of the term “externality” in this general sense was popularized early on in James M. Buchanan & Wm. Craig Stubblebine, Externality, 29 ECONOMICA 371 (1962).
139. Here I speak only of negative externalities, not positive externalities. A positive externality is when an actor’s choice has positive spillover consequences for others. See Richard A. Epstein, Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase, 36 J.L. & ECON. 553, 558-59 (1993) (describing negative and positive externalities). An example might be a property owner who builds a beautiful architectural or landscaping wonder on his property, which creation enhances the entire neighborhood, raising property values all around. First, because the rational actor is generating external utility rather than disutility, he has at least an opportunity to reap some of the benefit from the external utility generating activity through ex ante bargaining. This opportunity is not perfect because of the transactions costs involved in such bargaining. A second, related, implication of the voluntary nature of positive externalities is that the actor who generates them will only do so if the utility created by the activity, even apart from the positive externalities, outweighs any cost of the activity. So while the rational actor may not be able to capture all of the benefits of his conduct, at least the conduct will be chosen only if it generates a net gain for society. Positive externalities can result in choices that are less than pareto
“externalities” into account when deciding whether and how to act is a common problem faced by economic analysts of law. The trick, according to many law and economics scholars, is to employ rules that encourage the parties to adopt the result that would have been chosen by a decision-maker who owned both competing uses: “If a single firm owned all the investments affected by a particular decision, it would choose that deployment of resources which would result in the most efficient use of all the firm’s resources.” Because the “single owner” would both enjoy all of the utility and bear all of the disutility generated by her property use choices, such a decision-maker would have the incentive to maximize total utility.

Professor R. H. Coase contributed what is frequently seen as the seminal work in the incipient academic shift in attitude toward nuisance disputes from a natural rights perspective to a utilitarian perspective. Coase’s novel observation was that when one’s use of property has harmful effects on other property owners (a classical case of externality), the resulting problem is a reciprocal one:

The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A?

Coase’s insight is crucial, for once it is recognized that nuisance cases are not about one party interfering with the rights of another, but rather about adjusting the conflicting rights of two parties to produce a just (or efficient) result, then the proper approach to nuisance cases takes on an entirely different look. One optimal, but at least all choices will be pareto positive. (A pareto superior or pareto optimal outcome would mean that at least one person in the world is better off and nobody is worse off. A pareto positive or potentially pareto optimal outcome means those who gain by an outcome gain enough to be able to compensate any who lose by the outcome. See generally Posner, supra note 80, at 12-13.). Negative externalities do not have this redeeming pareto positive feature.

140. See Ellickson, supra note 137, at 687 (describing the problem of externalities).
141. William F. Baxter & Lillian R. Altree, Legal Aspects of Airport Noise, 15 J.L. & ECON. 1, 2-3 (1972). Of course, if there are no transaction costs, the legal rule will not affect the efficient use of properties since the parties will bargain, without cost, to the efficient result. Some commentators have suggested that this outcome might be common in the nuisance context. See Louis Kaplow & Steven Shavell, Property Rules Versus Liability Rules: An Economic Analysis, 109 HARV. L. REV. 713, 754 (1996) (expressing the suspicion that “in the nuisance context, bargaining can often help to solve problems if they are not addressed well by legal rules” so that “the legal approach adopted for the resolution of nuisances may matter less than in many other situations”).
142. See Baxter & Altree, supra note 141, at 3 (noting that under the unified ownership theory, “[the self-interest of any particular person within the firm would not be bound to any particular assets of the firm but to the firm’s overall well-being”).
144. Id. at 2.
surprising aspect of thinking in the way that Coase has suggested is that, at least with regard to nuisance cases, utilitarians may do a better job of corrective justice than traditional pursuers of that end. “Justice” may mean that all users of property should follow the “golden rule” (sic utere properly understood) by taking into account the effect of their own property use on users of surrounding properties and to take those potential effects into account when deciding when, where, and how to start their own operations. Users of property are forced to take those effects (externalities) into account when those users are held responsible for the natural consequences of their own volitional acts. In other words, at least one vision of justice would suggest that legal rules should force users of land to, at least at the decision-making stage, “internalize” all of the costs of their proposed land use, treating costs imposed on surrounding land owners as though those costs would be borne by the volitional actor whose conduct will generate the costs.

Holding actors responsible for the impact of their volitional change in land use on market values of neighboring parcels of land would largely accomplish this purpose and would eliminate some recurring and perplexing nuisance law issues. Professor Robert Ellickson proposed the following rule very much like the one that I am advocating: “[I]f a physical change on B’s property results in a diminution of the value of A’s property, B should have to compensate A for that loss.”¹⁴⁵ But for reasons that are not entirely clear, at least not to me, Professor Ellickson concludes that this simple rule would be less than ideally efficient, and so he proposes to limit liability to those changes in land use that are “perceived as unneighborly according to contemporary community standards.”¹⁴⁶ Such a “neighborliness” standard certainly could be used to cut down the group of activities that would qualify for remedy as a nuisance, but what is not so clear is how that reduced definition of nuisance would be “efficient.” Cutting down the number of scenarios that warrant compensation does not necessarily produce efficiency. The cheapest rule of all, from an administrative perspective, is laissez faire, but everyone seems to understand that such a rule would be inefficient because it would do nothing to control the externality problem. A rule of laissez faire would permit parties to impose some of the costs of their activities on their neighbors, which would lead to an inefficiently high level of the insufficiently deterred externality-creating activity.

Similarly, the “neighborliness” standard is inferior to the market impact standard that I propose both in terms of fairness and efficiency. The “neighborliness” standard would be inefficient, not only because it would inadequately deter externality-producing conduct, but also because it is vague. Clear rules allow parties to predict the consequences of their choices, and choose accordingly. But what does “neighborly” mean, anyway? If a particular change

¹⁴⁶. Ellickson, supra note 137, at 732.
in land use is perceived as “unneighborly according to contemporary community standards,” one would expect the market values of surrounding properties to drop. After all, who wants to live next to an unneighborly neighbor? Measuring “unneighborliness” via actual impact on market value seems more objective and more efficient than the rule that Professor Ellickson ultimately proposes. Ellickson’s proposed standard might work if “neighborly” conduct is defined as conduct that takes externalities into account. A good neighbor does not impose excessive costs on neighbors just because the conduct producing those externalities can be characterized as “normal.” The simplest, fairest, and most efficient standard for determining which changes in land use should lead to liability is to impose liability for those changes that negatively impact the market value of surrounding parcels – Professor Ellickson’s original standard had it right in the first place, before his “neighborliness” refinement.

III. THE RELATIVE SUPERIORITY OF UTILITARIAN NUISANCE THEORY

The rise of the utilitarian view of nuisance law generated some resistance. Even though Professor Richard Epstein has since embraced utilitarianism, at least in the nuisance context, 147 in 1979 he provided what probably still is the definitive contemporary defense of a corrective justice rationale underlying the law of nuisance. 148 But Epstein’s corrective justice approach was doomed to failure because it failed to appreciate the public nature of the interest protected by the law of nuisance.

A. The Owner’s Interest in Use and Enjoyment Cannot be Absolute

1. Nuisance Is Not Analogous to Battery

Epstein conceived the nuisance inquiry in four steps. The first step in Epstein’s analysis was to ask whether plaintiff has a protected legal interest. 149 Epstein started his consideration of this question with an analogy to the law of battery. 150 In describing the foundation of battery law, Epstein made the Lockean argument that there could be no tort of battery unless people owned their own bodies in some meaningful sense. 151 As Epstein put it,

\[ A \text{ is not entitled to recover [against } B \text{ on a battery theory] . . . if } A \text{ has no proprietary claim to his own person. If the body of an individual is } \]

147. See supra note 132 and accompanying text.
149. Id. at 50.
150. Id.
151. Id.
unowned, then what A wants to describe as an assault and battery is . . . indistinguishable legally from B’s kicking a clod of unclaimed dirt.152

Epstein reasoned that, just as there is no battery cause of action unless plaintiff has some legally protected interest in his own body, which interest we understand as “ownership,” so there can be no cause of action relating to intermeddling with personal or real property unless the plaintiff has some sort of “ownership” interest in the property.153 Whether the plaintiff has a protected legal interest is answered by positive property law.

A possible criticism of this first step in the analysis is that it misconceives the nature of the interest protected by the tort of nuisance. Epstein draws an analogy between nuisance and battery, but battery already has a tort law analogue relating to property – trespass. Just as battery protects the plaintiff’s right to be free from unwanted touching, so trespass protects the property owner’s right to exclude – to be free from unwanted touching of defendant’s property. But nuisance protects something else, not merely the right to be free from unwanted physical presences on plaintiff’s property – nuisance protects the owner’s interest in using and enjoying property. A better (better than battery) analogue to nuisance might be the tort of false imprisonment. Both false imprisonment and nuisance protect the plaintiff’s positive interest, not merely the negative interest in being free from unwanted touching. The interests protected by both the false imprisonment tort and nuisance law can be impaired by defendant’s conduct even without any physical invasion of plaintiff’s body or property. So while Epstein probably was right that plaintiff must have a legally recognized interest in property to recover in nuisance, it does not necessarily follow that the protected right to exclude defines the scope of the protected interest in the use and enjoyment of property. There is more than one stick in the property owner’s bundle of interests, and not all of them can be protected absolutely.

2. Private v. Public Interest

In a sense, the property owner’s interest in the use and enjoyment of her property is not truly a private interest at all. It has long been understood that some things, such as the sea, are not presently amenable to private ownership.154 For other resources, such as land, “it is relatively easy to define individual

152. Id.
153. Id. at 50-51.
154. See supra note 78 and accompanying text. The idea that the sea cannot be reduced to private property is commonly traced back at least to Justinian, who classified such things as the sea and air as naturally “common” property, not susceptible of private ownership. See Richard A. Epstein, On the Optimal Mix of Private and Common Property, in PROPERTY RIGHTS 17, 24 (Ellen Frankel Paul et al. eds., 1994). But the concept clearly predated Justinian since it was published by Chrysostom at least a century before Justinian. See supra note 24 and accompanying text.
property rights.”

But the ease of defining private property rights with respect to land does not extend to every interest in property ownership. Of course, the right to exclude is easy to define and police, but the owner’s interest in use and enjoyment is not so. Perhaps the relative difficulty of policing the interest in use and enjoyment is due to the fact that the use and enjoyment of real property frequently implicates certain associated resources such as air and water, the private ownership of which cannot as easily be defined. If one property owner “pollutes” the air surrounding his property with fumes or noise, it is impossible to cabin that “pollution” within property “owned” by the “polluter.” Because of this difficulty, Anglo-American law has traditionally treated ownership interest in resources like air, water and wildlife “as limited common rights,” not private rights. As such, these resources generally are available for public use so long as no one individual’s use unreasonably interferes with use by others. The interest in the use and enjoyment of land is more like this public right to use air or water than like the right to exclude.

3. Use and Enjoyment Is a Privilege, Not a Right

Professor Henry Smith recently (and helpfully) suggested a Hohfeldian analysis of nuisance interests. Professor Hohfeld famously grouped jural relations in a scheme of opposites and correlatives. Hohfeld distinguished among rights, privileges, powers and immunities. For present purposes, I will focus on rights and privileges. The Hohfeldian conception of a “right” is best understood by considering its Hohfeldian correlative – “duty.” A right held by a property owner entails a correlative duty by others to respect the right: “[I]f X has a right against Y that he shall stay off the former’s land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place.” The property owner’s interest in exclusive possession can be convincingly characterized as a right – it is absolute and entails the duty on others to respect the owner’s right of exclusive possession.

Unlike a right, which is the correlative of a duty, “a privilege is the opposite of a duty, and the correlative of a ‘no-right.’” Hohfeld’s concept of a privilege

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156. Id.
157. Id.
158. Id. at 272.
160. See WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 12 (David Campbell & Philip Thomas eds., Ashgate Publ’g Co. 2001) (1919).
161. See id.
162. See id. at 13.
163. Id.
164. Id. at 14.
fits more naturally the property owner’s interest in using and enjoying property because others have no absolute duty to respect the owner’s interest. Under a Hohfeldian analysis, if X had a right to use and enjoy his property as he saw fit, then Y would be under a duty not to interfere with the exercise of that right. But if X has merely a privilege to use and enjoy this property, then Y has “no right” either to use X’s property or to prevent X’s use and enjoyment of his own property. Therefore, if an owner does not have the resources to use her property as she would like, nobody has a duty to provide those resources because she does not have a “right” to use her property. She merely has a privilege to use her property. Because the interests in use and enjoyment, unlike interests in exclusive possession, unavoidably conflict sometimes, they cannot be rights – the absolute right of two neighbors, X and Y, to use and enjoy their property as they see fit, would entail correlative and potentially conflicting duties of X and Y not to interfere with the other’s use and enjoyment.

Returning to an example used earlier, if property owner A loves to use her backyard as an outdoor music hall, and if B, her neighbor, loves to use his backyard as a silent retreat, it would be impossible for both to simultaneously exercise a “right” to use and enjoy their property as they chose while fulfilling the correlative “duty” to respect the neighbor’s right. The interest in use and enjoyment must be more limited than a Hohfeldian “right.” The property owner’s interest in using and enjoying property must be a privilege. Epstein’s analysis does not take account of this distinction between the nature of a right and the nature of a privilege and instead treats the property owner’s interests in exclusive possession and use and enjoyment both as rights.

The second question in Epstein’s nuisance analysis was whether defendant has invaded plaintiff’s protected interest. For Epstein, “invasion” was the paradigm of nuisance liability (and perhaps of all liability in tort). He saw the invasion question as a physical one – has there been a literal intrusion into plaintiff’s property, even if only by particles or some other minimally tangible substance? Epstein rejected and labeled as “causal nihilism” Coase’s observation that land use disputes are reciprocal. Epstein criticized Coase’s point by noting that the cause of a land use dispute frequently can be characterized as “reciprocal” only by ignoring the parties’ arguments that existing law gave them the “right” to use their property in the way that they did.

The problem, of course, with Epstein’s critique of Coase’s observation is that whatever pre-existing legal “right” plaintiff may have to use her property free from any interference by her neighbors, the same “right” is held by the defendant landowner. All property owners have the “right” to use their property as they see

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165. Epstein, supra note 148, at 53.
166. Epstein, supra note 148, at 53.
167. Epstein, supra note 148, at 58.
168. Epstein, supra note 148, at 58.
fit, or none do. Epstein’s critique of Coase depended on Epstein’s own central thesis that property owners possess only the absolute legal right to be free from all physical “invasions” by others. However, as noted above, the property owner’s interest in using and enjoying property is a positive and relative privilege, not an absolute negative right, like the right of exclusive possession. And, of course, all property owners cannot possess such a Hohfeldian “right” since such rights would irreconcilably conflict. To adjust the inevitable conflict between such absolute rights would be impossible. Epstein’s own argument depended on his shift away from the nuisance concept and toward the trespass concept. Unlike the property owners’ interests in being free from nuisances, the property owners’ rights to be free from trespasses never conflict. Focusing on trespass rather than nuisance allowed Epstein to characterize the nuisance conflict in the old “A interferes with B” way of looking at things rather than the more accurate understanding of nuisance conflicts as essentially reciprocal.

In practice, Epstein’s paradigm of the property owner’s absolute right to be free from all physical invasions breaks down. He applied his “no invasion” standard to four troublesome recurring scenarios in the law of nuisance – views, light, funeral homes/cemeteries, and aesthetic nuisances. Epstein started by accepting other similar scenarios – “noises, smells, gases, and the like” – as invasions and therefore nuisances. These cases “need not detain us,” Epstein declared, for “[t]hey are universally held to be actionable as nuisances, consistent with the general position taken [in this (Epstein’s) article].” Epstein then went on to distinguish cases involving views, or as Epstein put it, “the blocking of a view.” Epstein argued (perhaps correctly) that the first builder in an area cannot have a protected property interest in the particular view from that spot, for if the first builder can claim that the second builder has impaired his right to an unobstructed view, what is to prevent the second builder from claiming that the first builder’s house violated the second builder’s right to an unobstructed view? As Epstein put it:

[T]he uniform protection of all views commits us to a set of entitlements that makes it impossible for anyone to use the land from which he might choose to look. Either all can build, or none can build; but no one can insist that he alone can build. The choice seems clear.

Precisely so. Everyone cannot have a “right” to her view, for such rights would inevitably conflict. The interest in a view must be something other than a right – it must be a privilege.

170. Epstein, supra note 148, at 60.
171. Epstein, supra note 148, at 60.
172. Epstein, supra note 148, at 60.
Epstein’s argument proved too much, for there is no principled way to distinguish the case of views from other nuisance cases (noises and smells) that Epstein accepted as consistent with his “invasion” paradigm. Nobody claims that every placement of a visible item on defendant’s property is a nuisance. Just as not every sound that defendant makes is a nuisance and just as every smell that defendant emits is not necessarily a nuisance, not all visible items erected by defendant are nuisances. Epstein demonstrated only that no property owner can claim the right to be absolutely free of all interference from neighbors, but nobody ever claimed that he could – that is not the nature of the interest protected by the law of nuisance. The difficult question in a nuisance case is which interferences are nuisances and which are not. Epstein’s “invasion” touchstone would sweep into the potential nuisance category many minor intrusions that would not historically have been considered nuisances and would exclude from consideration some intrusions that perhaps should be considered nuisances.

Epstein tried to distinguish linguistically between an interference that is a nuisance and an interference that is not by referring to the case of the view as the “blocking of a view.” The reader is to understand from the word “blocking” that one who merely blocks does not invade, whereas one who interferes with his neighbor’s use of property by emitting smells or noises does in fact generate something that makes its way onto plaintiff’s property. But the distinction is nonsense. It would be just as easy to call the noise and smells “blocking.” A interferes with his neighbor’s use of property by emitting smells that “block” the fresh air smell that existed there before. Or the noise made by A “blocks” the sound of silence previously enjoyed by B. In all three cases, A does more than merely “block” what B had before enjoyed. A actually substitutes something else – another sound, another smell, or another view. This substitution of another view for the pre-existing view is a meaningful “invasion,” at least as meaningful as the “invasion” via the substitution of an offensive noise or smell.

Of course we know that the case involving smells involves the travel of particles from A’s property to B’s, and perhaps the case of noises involves the travel of sound waves, but the case of views likewise involves the travel of light onto B’s property after it is reflected off what A has placed on his property. The world is awash in sound, light and particulate matter from various sources. Trees falling in the forest generate sound waves, but those sound waves offend only if there is an ear to perceive them. Noises and smells look like invasions because they are unavoidably given some impetus by A’s activity and have an impact on the ear or nose of B, which ear or nose is located on B’s property. Likewise, A’s building a house, or a twenty foot high fence, or a pile of junk on his property unavoidably reflects light onto B’s property where it impacts B’s eye with potentially offensive effect. Epstein did not explain why A’s imposition of noises and smells on his neighbor is an invasion while the imposition of sights is not.

175. Epstein, supra note 148, at 60.
This is not surprising in the light of Epstein’s misconception of the nature of nuisance liability in step one of his analysis. Nuisance is not about the right to exclude – it is about the right to use and enjoy property free from certain offensive interferences. Those offenses require an eye, ear, or nose to perceive them, and those eyes, ears, and noses are located on plaintiff’s property. Therefore, to the extent that “invasion” is important to a nuisance analysis, all cases of “offense” of a person on plaintiff’s property involve an “invasion.” Epstein’s point was that to the extent A’s use of property interferes with B’s use of property merely because A’s use offends B or others in the locale (thus driving down the market value of B’s property), then the real damage is entirely internal to B. As demonstrated above, Epstein cannot distinguish between physical invasions and non-invasions – that distinction does not hold up. But Epstein nevertheless tried to distinguish between mere “aesthetic” harm and more objective harm inflicted on B by A. But this distinction breaks down, too, as Epstein himself almost acknowledged: “Certain activities are described as aesthetic nuisances even though they fit snugly into the contours of the conventional nuisance actions. Cases for noise and for odors could be described as aesthetic cases, but this characteristic adds nothing to the invasion theory.”

In fact, all activity generates sounds that “invade” the properties of neighbors. But such invasions are treated as torts only when they are “offensive.” The aesthetic interference, not the invasion, is unavoidably at the heart of nuisance law.

In the third part of his article, Epstein acknowledged that “utilitarian constraints” sometimes must alter the result that would obtain in nuisance cases under his view of a pure corrective justice system of nuisance liability. Epstein explored these utilitarian constraints in the context of three different nuisance rules: “a) live and let live; b) the locality rule; and c) extra-sensitive plaintiff.”

Under traditional approaches to nuisance, certain low level interferences with quiet use and enjoyment must be tolerated as the price to be paid for living in a civilized society. Epstein labeled this rule “live and let live.” This live and let live approach is contrary to the pure form of Epstein’s ideal corrective justice rationale for nuisance law, under which the property owner has the absolute right to be free from nuisance-creating invasions from her neighbors’ activities, no matter the level of those invasions. Yet, the live and let live rule might, according to Epstein, be justified on utilitarian grounds.

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176. Epstein, supra note 148, at 65.
177. See Epstein, supra note 148, at 74.
178. Epstein, supra note 148, at 82.
179. See Campbell v. Seaman, infra note 303 and accompanying text.
180. Epstein, supra note 148, at 82.
181. Epstein, supra note 148, at 82-87.
182. Epstein, supra note 148, at 82-87.
Epstein criticized as a misapplication of the live and let live rule the result in the case of *Andreae v. Selfridge & Co.* Epstein argued that "allowing the defendant a partial justification in *Andreae* worked a major and impermissible redistribution of wealth . . ., for there is no remote likelihood, let alone real prospect, that the plaintiff would at some future time inflict an uncompensated harm of equal severity upon the defendant." In other words, the losses imposed by plaintiff on defendant and those imposed by defendant on plaintiff are non-reciprocal – because plaintiff’s construction came first, defendant had no ongoing business to be interrupted by any construction activities by the plaintiff, but defendant’s extensive construction activities did interrupt plaintiff’s ongoing business.

Epstein’s analysis does not take into account all of the losses occasioned by plaintiff’s activity. If plaintiff were permitted, as the first builder, to recover damages for lost profits occasioned by later development of surrounding parcels of land, then the losses imposed by plaintiff’s initial decision to build may well be substantial. For example, before plaintiff built its hotel, the values of the surrounding landowners’ parcels of property likely lay primarily in their potential for future commercial development. But if, by developing her own property first,

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184. *Andreae*, 3 All E.R. at 255.
185. Id.
186. Id. at 267-68.
187. Id. at 256.
188. Id.
189. Id. at 265.
190. *Andreae*, 3 All E.R. at 269.
191. Epstein, supra note 148, at 87.
192. As Epstein put it, when discussing the “blocking” of views “[e]ither all can build, or none can build; but no one can insist that he alone can build. The choice seems clear.” See Epstein, supra note 148, at 61.
plaintiff were permitted to burden the surrounding landowners’ attempts to develop their parcels with financial responsibility for the effect of that development on plaintiff’s ongoing operation, plaintiff has, by building first, seized a substantial portion of the value of the surrounding parcels, parcels that plaintiff does not own. Such a result would not comport with corrective justice.

From a corrective justice (and economic efficiency) perspective, each landowner should be held responsible for the consequences of her own development decisions. If defendant must compensate plaintiff for plaintiff’s lost business due to defendant’s construction activities, corrective justice would demand that plaintiff compensate defendant for the value seized by plaintiff when plaintiff chose to build in the first place. To articulate the same principle in economic efficiency terms, if defendant is forced to take into account externalities generated by its construction activities through a rule that holds defendant liable for plaintiff’s losses during defendant’s construction, then plaintiff must be forced to consider the external effect of its initial decision to build on the value of surrounding parcels of undeveloped land. So Epstein’s analysis was incomplete. He was concerned that the court’s failure to compensate plaintiff fully for its lost business would work a “redistribution of wealth” from plaintiff to defendant, and he was correct, as far as his analysis went – defendant’s decision to undertake substantial construction activities probably did have a negative effect on the market value of plaintiff’s property. Plaintiff’s property probably was worth somewhat more the day before defendant started building than it was on the day that defendant committed to a construction program that would temporarily disrupt plaintiff’s business.193 But Epstein’s version of “corrective justice” would work a large “redistribution of wealth” to the first builder from surrounding property owners by refusing to take into account the effect of plaintiff’s first decision to build on the values of surrounding properties.

The inadequacy of this version of corrective justice is illustrated by the fact that, while Epstein would have forced defendant to compensate plaintiff for all lost business due to noise and dust created by defendant’s temporary construction operation, Epstein would have allowed defendant to impose, without liability, the much greater harm of permanently impairing plaintiff’s business by ruining the view and blocking the sun by building a skyscraper next door to plaintiff’s hotel. Epstein would label the temporary disruption an “invasion” and the permanent impairment a “non-invasion,”194 but, as demonstrated above, there is no

193. This is not necessarily the case. It is at least conceivable that there would be expected synergies between plaintiff’s business and defendant’s that would make plaintiff’s property value rise upon defendant’s commitment to build, despite the necessary temporary interruption of plaintiff’s business. For purposes of this analysis, I will entertain the reasonable assumption that no such synergies were to be expected – after all, one would not expect plaintiff to complain unless his ox were being gored by defendant’s construction.

194. See Epstein, supra note 148, at 86-87.
principled distinction between the two. Both are costs imposed by defendant on his neighbors.

Epstein criticized the “locality rule” as inconsistent with his invasion-based version of corrective justice. The idea behind the locality rule is that whether an activity constitutes an actionable nuisance is a relative question, not an absolute one. An activity might be an unreasonable interference with the neighbors’ quiet use and enjoyment of their property in locality A while the same activity might not unreasonably interfere with the neighbors in locality B. Epstein saw this rule as intolerable because invasion is not a relative concept – defendant’s activity either physically invades the neighbor’s property, or it does not – the nature of the locality would have nothing to do with it. But because Epstein did not acknowledge that many nuisance harms, including many that he accepted, are based on offense to plaintiff’s aesthetic sensibilities, neither did he acknowledge that differing sensibilities can result in the same activity being a nuisance in one instance and not a nuisance in another. If all the neighbors in defendant’s community enjoy (or at least are not bothered in any way by) the smell of the hog farm or the sound of the airport or the glow of neon lights, then there is no harm and no nuisance from such activities. But what may be enjoyable, or perhaps unnoticed, in one context can be an intolerable annoyance in another. Despite his critique, Epstein nevertheless accepted the locality rule as a necessary utilitarian constraint on nuisance law – the transactions costs to remedying all of the myriad wrongs and cross-wrongs in an area dominated by industry would be unwarranted, especially in light of what Epstein called “implicit in-kind compensation” for the losses. Finally, under Epstein’s pure version of corrective justice, the “extra-sensitive” plaintiff who suffers a disproportionate harm from defendant’s invasionary conduct would recover fully for the losses suffered by plaintiff. Epstein found it difficult to square this doctrine with his corrective justice vision.

The point here is not that utilitarianism is right and that corrective justice is wrong. In fact, I think that a utilitarian nuisance rule would serve the end of corrective justice quite well. The point here is that the prevailing corrective justice approach to nuisance disputes, which seeks to vindicate the plaintiff property owner’s absolute property right, is fundamentally incoherent because the nature of the interest vindicated by the tort of nuisance cannot be an absolute private interest – it is common and public. Following Coase’s fundamental insight into the reciprocal nature of nuisance conflicts, utilitarian scholars have avoided the incoherence of prevailing corrective justice approaches by seeing nuisance disputes as an opportunity to adjust conflicting interests. In the next

195. See Epstein, supra note 148, at 87.
196. See Epstein, supra note 148, at 90.
197. See Epstein, supra note 148, at 90-94.
198. See Epstein, supra note 148, at 90-94.
part, I will demonstrate how this clearer understanding of the nature of nuisance disputes helps to resolve some recurring nuisance law issues.

IV. A CRITICAL ANALYSIS OF SOME RECURRING NUISANCE ISSUES

A. Injunction v. Damages

Until relatively recently, one of the distinctive features of nuisance litigation was the injunction as the almost universal remedy – damages might be available as well, but the prevailing nuisance plaintiff long had the option of insisting that the defendant stop what he was doing. The injunction remedy first appeared in Roman equity courts, in the form of an interdict by the **praetor** to ensure that the rights of the parties were protected in the face of potentially inflexible application of law. This equitable Roman concept had a significant influence on English law. But at early common law, injunctions in nuisance cases, and other cases, were quite rare. The exceptionally influential Lord Coke generally opposed injunctions. An early example of the rejection of the injunction remedy can be seen in *Attorney-General v. Nichol*, where Lord Eldon, who became Chancellor approximately twenty years after the death of Blackstone, wrote:

> The foundation of this jurisdiction, interfering by injunction, is that head of mischief, alluded to by Lord Hardwicke, that sort of material injury to the comfort of the existence of those, who dwell in the neighbouring house, requiring the application of a power to prevent, as well as remedy, an evil, for which damages, more or less, would be given in an action at Law.

Eldon went on to deny the requested injunctive relief in a case where a man had built a wall twenty feet high, for the purpose of blocking the light in a neighboring hospital. But the injunction as a nuisance remedy gradually came to be used more and more frequently until it became the presumptive remedy. As one scholar put it

199. The presumptive injunction has been called into question more recently, with the **Boomer** case leading the way. See infra notes 233-42 and accompanying text.


201. Id. at 701-10.


203. **JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE** 56 (1835).


205. Id. at 1013.

206. Id. at 1012-14.

207. See Rosenthal, supra note 202, at 35. Not surprisingly, the shift from the sparing use of the injunction to injunction as the presumptive nuisance remedy roughly corresponded with the gradual acceptance of the absolute right of private property. *See supra* notes 9-118 and accompanying text.
in 1927, “The jurisdiction [i.e., issuing injunctions] was formerly exercised sparingly and with caution, but it is now fully established.” For more than a hundred years now, the prevailing rule has been that, for a continuing nuisance, injunction is the ordinary remedy. However, there frequently has been an undercurrent of dissatisfaction with the automatic injunction remedy, which sometimes seems to be too drastic, particularly where defendant’s activity involves a large capital investment that would be negated by the injunction and when the activity might be very important to the local economy. In such circumstances, the presumptive injunction remedy has been somewhat eroded in recent years.

This debate over the merits of an injunction remedy versus damages alone is driven by the rationale for the private nuisance cause of action. Under an absolute property rights view, the property owner has an absolute entitlement to quiet use and enjoyment of his property, but the emerging utilitarian view would adopt rules designed to promote the greatest good for the greatest number. By the early twentieth century, the absolute property rights view was dominant. The right to quiet use and enjoyment of one’s real property was thought to be a natural right. This dominant absolute property right rationale suggests an automatic injunction remedy. If the property owner has an absolute moral right to the quiet use and enjoyment of “his” property, then he arguably should have the right to call on the state to enjoin another’s interference with that absolute moral right.

But utilitarians have reason to be more skeptical of the automatic injunction. Coase explained that under ideal circumstances of no transactions costs, the precise legal rules adopted by a society would not matter from an efficiency standpoint because rational actors would quickly (and, Coase assumed, without cost) exchange their entitlements until the pareto optimal result was reached. Of course, we do not live in an ideal world. Transactions are costly. The utilitarian would argue that when the “transactions” costs of negotiating a voluntary settlement are likely to be prohibitively high, courts have become more willing to determine the measure of damages resulting from the defendant’s activity and to force the defendant to pay that sum instead of enjoining the defendant’s activities and letting the parties bargain over a settlement sum. This often occurs where the plaintiff and the defendant are forced to negotiate with each other over a broad range of possible positive results – the problem of

209. Bone, supra note 117, at 1123.
211. Coase, supra note 143, at 2-8.
bilateral monopoly described most famously by Judge Richard Posner.\textsuperscript{213} Note the difference between this approach and the automatic injunction approach. In the automatic injunction approach, plaintiff retains the absolute property right to preclude other property owners from engaging in offensive activities. Under the more flexible utilitarian approach, defendant property owners have the same privilege that plaintiff property owners possess – the privilege to engage in socially beneficial activities, even if they impose costs on others, so long as defendants are willing to pay for the costs imposed. The Restatement adopts what amounts to a utilitarian approach, allowing money damages in lieu of injunction where the “utility” of defendant’s activity outweighs the harm to plaintiff.\textsuperscript{214}

This transition between corrective justice and utilitarianism is illustrated by a couple of relatively contemporary cases. In \textit{Pendoley v. Ferreira}, plaintiffs sought to enjoin the Ferreiras from operating a nearby “piggery.”\textsuperscript{215} The area of the piggery at issue was transitioning from rural to a more residential suburb.\textsuperscript{216} The Ferreiras had started the piggery almost fifteen years earlier on a parcel of land that was relatively small, “about 25 acres.”\textsuperscript{217} The court found that the Ferreiras were “good hog farmers”\textsuperscript{218} who “had made an honest effort”\textsuperscript{219} and had “not been negligent.”\textsuperscript{220} For reasons that the court did not explain, but that are easy to imagine, the piggery at first was no great bother to the nearby residents.\textsuperscript{221} Eventually, though, as the scope of their pig farming business and the density of the surrounding population both grew greatly, “the stench emanating from the Ferreira piggery – despite the due care of the defendants – became a nuisance.”\textsuperscript{222}

The trial court awarded damages to plaintiffs of $2,665.88 and, more importantly, “permanently enjoined the Ferreiras from operating their piggery . . . to cause a stench to emanate therefrom which materially interferes with the reasonable enjoyment of the property of a large number of people living in the vicinity . . . .”\textsuperscript{223} The court found as a fact that forcing the piggery to move would cost defendants about $75,000.\textsuperscript{224} In holding that an injunction must issue nonetheless, the court appeared to be working under the belief that a property owner had an absolute right to certain things, including the right to be free from

\textsuperscript{213} See e.g. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW, 29-54 (1987).
\textsuperscript{214} See RESTATEMENT (SECOND) OF TORTS § 826 cmt. e.
\textsuperscript{215} Id. at 144.
\textsuperscript{216} Id.
\textsuperscript{217} Id.
\textsuperscript{218} Id.
\textsuperscript{219} Id.
\textsuperscript{220} Id.
\textsuperscript{221} Id.
\textsuperscript{222} Pendoley, 187 N.E.2d at 144.
\textsuperscript{223} Id.
\textsuperscript{224} Id. at 143.
the natural stench of a pig farm. Therefore, a mere damages remedy would not
do. In the terminology made famous by Professors Calebresi and Melamed\(^\text{225}\),
the court gave the “entitlement” to the plaintiffs and enforced that entitlement
with a property rule.

Why did the court give the entitlement to the plaintiffs? The court noted that
“[t]he dollar loss to the plaintiffs is much smaller than that of the Ferreiras.”\(^\text{226}\)
Nevertheless, the court upheld the injunction because “the injury [to the
plaintiffs] affects their residences and their reasonable enjoyment of them.”\(^\text{227}\)
Citing Restatement of Torts § 941, the court noted that it “is appropriate, on usual
equitable principles, to take into account the damage to the Ferreiras compared to
the benefit to the plaintiffs in determining the type and scope of the relief to be
granted,”\(^\text{228}\) but it declined to give this consideration conclusive weight. The
court favored the residential use over the defendants’ mere “economic” use of
property: “In considering the form and extent of the injunction, we give
substantial weight to the fact that the injury to the Ferreiras is economic, whereas
the material interference with the rights of the plaintiffs is in the day to day use
and comfort of the places where they live.”\(^\text{229}\)

The court’s opinion is puzzling in at least one way – while the court
concluded that the loss to the defendants clearly was greater than the damage
suffered by the plaintiffs, the court nevertheless upheld the injunction based, at
least in part, upon the inconvenience and cost that would attend forcing plaintiffs
to move to avoid the nuisance.\(^\text{230}\) It is unclear whether the court took these
potential costs into account when determining that the loss to the defendants
would be greater than the loss to the plaintiffs. Perhaps a more thorough way to
analyze the relative hardships to the parties would be to compare two arithmetical
remainders. First, the court might have considered the remainder of the market
value of the piggery as a going concern (including goodwill and other
intangibles) minus the lesser market value of the piggery subject to the
injunction. The trial court had placed this figure at $75,000.\(^\text{231}\) To this remainder
the court might compare the remainder of the combined market value of
plaintiffs’ properties without the piggery less their market value with the piggery
next door. If that sum were substantially less than $75,000, then it is hard to
imagine why enjoining the piggery made sense\(^\text{232}\) particularly where the piggery

\(^{225}\) See Calabresi & Melamed, \textit{supra} note 212, at 1089-90.
\(^{226}\) \textit{Pendoley}, 187 N.E.2d at 145.
\(^{227}\) \textit{Id}.
\(^{228}\) \textit{Id} at 145-46.
\(^{229}\) \textit{Id} at 146.
\(^{230}\) \textit{See id}.
\(^{231}\) \textit{Id} at 145.
\(^{232}\) My analysis assumes that the alternative of damages was available. If the only possible
remedy is injunction, it is easy to imagine why the court might have granted the injunction even if
the diminished market value of the piggery subject to the injunction were less than the combined
dimensions of market value of the surrounding houses if the piggery were not enjoined. That
was there first. The plaintiffs essentially benefited from any depression in market value from the piggery operations when they acquired their properties, and would reap a windfall when their property values rose in response to the enforcement of the injunction. The court avoided the need for such a rigorous analysis through the simple expedient of favoring the residential use.

Or perhaps the court’s estimate of the loss to plaintiffs understates their damages after all. The court pointed out that “it may be inferred that [the piggery] presents an unreasonable deterrent to the normal growth of the area.”233 In other words, the harm being caused by the piggery may well extend beyond the harm to the immediate plaintiffs because the piggery may generally depress the desirability (and market value) of the entire surrounding area. Taking all of this harm into account, perhaps the entire depressive effect of the piggery on the surrounding neighborhood outweighed the $75,000 loss to the piggery, justifying forcing the piggery to move. In any event, Pendoley stands as a relatively late example of a court enforcing through an injunction a plaintiff’s absolute right to be free from substantial interference with the right to enjoy a residence, without regard to the cost of imposing that injunction.

A very different result obtained a relatively short time later in probably the most famous nuisance case of all time: Boomer v. Atlantic Cement Co.234 Probably no nuisance case has sparked more scholarly commentary than Boomer.235 The defendant in Boomer operated a cement plant.236 Neighboring land owners brought an action for injunction and damages complaining of the plant’s dirt, smoke, and vibration.237 The trial court found that the plant was a nuisance and awarded damages but denied an injunction.238 Similar to the analysis of the Pendoley court, the appellate court in Boomer noted first that “[t]he total damage to plaintiffs' properties is . . . relatively small in comparison with the value of defendant's operation and with the consequences of the injunction which plaintiffs seek.”239

In an interesting twist, the Boomer trial court tried to facilitate voluntary settlement by finding as a matter of fact what each plaintiff’s permanent damages would be. Thus the court determined:

reason can be summed up in one word – precedent. If the owners of the piggery should have anticipated the residential encroachment and so should never have built their piggery there in the first place, it might make sense to enjoin the piggery to lay down a precedent that will give future putative piggery operators an incentive to consider the costs of its operation on potential future neighbors. See Wittman, supra note 49, at 566-67.

233. Pendoley, 187 N.E.2d at 146.
235. A Shepard’s summary of Boomer indicates that it has been cited in over four hundred fifty law review articles.
236. Boomer, 257 N.E.2d at 871.
237. Id.
238. Id.
239. Id. at 872.
the amount of permanent damage attributable to each plaintiff, for the
guidance of the parties in the event both sides stipulated to the payment
and acceptance of such permanent damage as a settlement of all the
controversies among the parties. The total of permanent damages to all
plaintiffs thus found was $185,000.240

Assuming that this figure is correct, the court probably was right that the cost
of moving the plant would significantly outweigh this harm. The appellate court
noted that the plant had cost more than $45,000,000 and employed more than 300
people, and therefore refused to grant plaintiffs’ request for injunction.241 The
effect of this ruling was to permit a defendant to establish and continue a
nuisance-producing activity so long as the cost of developing the plant outweighs
the harm done. A vigorous dissent in Boomer argued that “the majority is, in
effect, licensing a continuing wrong. It is the same as saying to the cement
company, you may continue to do harm to your neighbors so long as you pay a
fee for it.”242 The court explicitly considered the impact of its decision on future
polluters’ incentives to reduce pollution and concluded that “the risk of being
required to pay permanent damages to injured property owners by cement plant
owners would itself be a reasonable effective spur to research for improved
techniques to minimize nuisance.”243

The Boomer approach is quite different from the traditional injunction
remedy. In fact, I think that the Boomer court’s limitation on the injunction
remedy did not go far enough. Under the approach that I am advocating here, an
injunction remedy never would be warranted. Rather, all property owners would
have the privilege to use their property as they please. Along with that privilege
would come the responsibility to make good through the payment of damages
any effect of the property owner’s use on the market value of surrounding
parcels. In the piggery case, instead of enjoining the hog farm, the court would
require the hog farmers at the initiation of their activity, and at each increase in
their activity, to compensate their neighbors for any impact of their changed
activity on the market values of the surrounding parcels. This would give the pig
farmers the incentive to take into account the effect of their activities on their
neighbors.

240. Id. at 873.
241. See id.
243. Id. at 873. The court here appears to have overlooked the fact that once the plant has the
right to pollute going forward, at least that plant no longer has an incentive to invest in cost-
justified pollution-reducing innovations. Perhaps a better solution would have been to allow serial
lawsuits to continue unless and until the parties reach a suitable voluntary arrangement.
B. Coming to Nuisance

*Spur Industries, Inc. v. Del E. Webb Development Co.* was a case of “coming to nuisance,” where the active defendant’s interfering activity is in place first, usually in some remote area, and later development “comes to the nuisance,” creating the interference between land uses. In *Spur Industries*, for the first time in Anglo-American law, the court divided the question of whether defendant had interfered with plaintiff’s right to use and enjoy property from the question of who should be responsible for the remedy. The trial court in *Spur Industries* had enjoined defendant’s operation of a cattle feedlot. The surrounding area had been a rural farming area at the turn of the twentieth century. The feedlot operation started in 1956 and expanded while plaintiff’s residential real estate development took shape. Eventually, the real estate development grew so close to the expanded feedlot operation that the odors from the feedlot interfered with the use of the developed homes as residences. The *Spur Industries* court found that defendant’s “feedlot management and . . . housekeeping practices” were good, but nevertheless resulted in a nuisance. Since the interference was substantial, the appellate court affirmed a permanent injunction against the feedlot operations.

The court, though, fashioned the injunction in an unprecedented way, noting that “Spur is required to move not because of any wrongdoing on the part of Spur, but because of a proper and legitimate regard of the courts for the rights and interests of the public,” and that “Del Webb, on the other hand, is entitled to the relief prayed for (a permanent injunction), not because Webb is blameless, but because of the damage to the people who have been encouraged to purchase homes in Sun City.” Therefore, the court concluded that “[i]t does not equitably or legally follow . . . that Webb, being entitled to the injunction, is then free of any liability to Spur if Webb has in fact been the cause of the damage Spur has sustained.” In observing that the developer had “taken advantage of the lesser land values” in choosing a location for the housing development, the court was perhaps hinting that, to the extent defendant’s decision to operate a feedlot in the undeveloped area that it chose imposed costs on its neighbors by depressing the market values of surrounding tracts, the plaintiff here was a beneficiary of those depressive effects, not a victim. Even if the presence of the feedlot tended to depress the market value of the surrounding undeveloped land

245. *Id.* at 701.
246. *Id.* at 703.
247. *Id.* at 704.
248. *Id.*
249. *Id.* at 705.
251. *Id.* at 708.
252. *Id.*
253. *Id.*
by making it less suitable for some uses, when plaintiff bought the land with the
feedlot already in place, plaintiff benefited from any such price depression. To
permit a developer to buy undeveloped land at a discount due to the presence of a
feedlot and then force the feedlot to move (at its own cost) would create a
perverse incentive. Such result would make feedlots magnets for developers
looking to buy cheap land. If the developer is to benefit from the presence of the
feedlot by way of a depressed purchase price for land, then the developer must
accept the cost of moving the feedlot if plaintiff’s development makes the
movement of that feedlot necessary. The Spur court suggested that, in these
circumstances, it makes sense for the party who “came to the nuisance” to pay
the cost of eliminating the interference.254

Ideally, the rule in cases of “coming to nuisance” would give both property
users – the user setting up the first use and the later coming neighbor – the
incentive to take into account the interests of the other when deciding how to
proceed. The first user of property in an area must be forced to consider the
impact of his use on the interests of present and future surrounding neighbors.
The point here is to force users of property to consider whether they “should” be
the first to make use of vacant land instead of giving them an incentive to race to
be first in fact.255 The later coming neighbor must be forced to consider the
effect of his proposed use on the already existing use. Both of these users should
be required to consider the impact of their anticipated actions on the market value
of the properties of their existing and anticipated neighbors. A party’s decision
to engage in a use of property should be judged based upon the impact of the
proposed change in use on the market value of the neighboring properties, as
those properties exist at the time the decision is made. This provides an objective
measure of impact that gives every party the incentive to know and take account
of their own unique, subjective sensitivities and preferences, which cannot be
efficiently learned by others.

Judged with these ends in view, giving absolute preference to the property
use that was first is problematic, as is completely ignoring which use came first.
Completely ignoring which use came first gives later users of surrounding
property no incentive to consider sunk capital costs when deciding where to
conduct their operations. For example, if a residential developer can just as
easily and profitably build a housing development on either parcel $A$ or parcel $B$,
efficiency (and the golden rule) would demand that in choosing between those
parcels, the developer should take into account that an existing user already has
sunk capital into building a cattle feed lot near parcel $A$, which feedlot is
inconsistent with use of parcel $A$ as a housing development. If priority in time is
ignored completely, the later user has no incentive to take into account the sunk

254.  Id. at 707-08.
255.  See Wittman, supra note 49, at 567-68.
costs of prior uses.\textsuperscript{256} To the contrary, the developer may even have a perverse incentive to locate near the existing cattle feedlot. Assuming that the existence of the feedlot is inconsistent with a significant number of important neighboring uses of property, then the existence of the feedlot will, at some point, have a depressive effect on the values of surrounding properties. A late coming developer who purchases property next to a feedlot will purchase that property at a discount due to the very fact that the property is unsuitable for the use intended by the developer. Assuming that the depressive effect of the feedlot by the time that development grows to its doorstep outweighs the cost of moving the feedlot to a more remote location, the ideal rule would require the developer to pay for the cost of the move, less the depression in the market of the undeveloped land. This rule would give the feedlot operator the incentive to consider the depressive effects of its operation on its neighbors and would force developers (and other later coming users) to take into account the costs of their development on existing uses in the area. These are precisely the incentives that would operate on a unified owner of all of the neighboring parcels, and this is what the golden rule would dictate.

Problems also arise if priority of use always is given dispositive weight, as it was at early common law. Such a rule could create incentives to inefficient strategic behavior by potential users of property in an attempt to reap the legal benefits of being first.\textsuperscript{257} Such strategic behavior can be deterred by discounting any future recovery of the costs of a necessary move by the depressive effect on the value of surrounding parcels of property at the time of the decision to open the feedlot.

Professor Edward Rabin has criticized the coming to nuisance doctrine, arguing that the date upon which plaintiff or defendant took ownership of her property is “irrelevant.”\textsuperscript{258} Of course, Rabin is correct that the point in time in which defendant acquired ownership is irrelevant – it is defendant’s decision to use the property that prompts the need to assess the effect of that use on neighbors. But the timing of plaintiff’s ownership still should be a relevant consideration. Parties take their properties as they find them. If plaintiff purchases a parcel next to an existing offensive use, plaintiff likely purchased that parcel at a discount relative to alternative otherwise comparable parcels. If so, neither justice nor efficiency requires that plaintiff receive the windfall of a payment on top of the discount already enjoyed. Professor Rabin, along with the drafters of the Restatement, was concerned that applying the “coming to nuisance” doctrine would permit the defendant to “arrogate to himself a good

\textsuperscript{256} See Wittman, supra note 49, at 558.
\textsuperscript{257} See Wittman, supra note 49, at 558.
deal of the value of the adjoining land"\textsuperscript{259} by making an early offensive use of land in a remote but likely to be developed area. But this need not be the case. Defendants should be responsible for any negative effect imposed by their use of their own property on the market values of their neighbors’ properties, and this effect should be judged at the time of defendant’s decision to use his property. For example, in the \textit{Spur} case, the relevant point in time would be when defendant started the feedlot – this is the point at which defendant should be required to consider the effect of his actions on his neighbors. If the new or expanded feedlot has an overall effect of reducing the market value of surrounding land, then defendant should be responsible to compensate the surrounding landowners.

But if the feedlot is started in a remote area, the effect on the market value of surrounding tracts is likely to be negligible, or even positive.\textsuperscript{260} The possibility of the remote land later developing a higher value use is either small or remote in time. In fact, it may well be that the higher value use never would have developed were it not for “pioneering” offensive uses. Such pioneering uses can lead to the development of roads, providing access and general economic conditions that make surrounding parcels more desirable for other purposes. This is an illustration of the point that appropriating and using property is not a “zero-sum game.”\textsuperscript{261} David Schmidtz made a similar point in an essay discussing the original acquisition of property rights – one who originally appropriates unowned property can comply with Locke’s requirement that as much and as good be left for later comers by virtue of the fact that the appropriation and exploitation of property actually creates property.\textsuperscript{262} “[I]n taking control of resources and thereby reducing the stock of what can be originally appropriated, people typically generate massive increases in the stock of what can be owned. The lesson is that appropriation is not a zero-sum game. It is a positive-sum game.”\textsuperscript{263} It would be unfair and would create inefficient incentives to allow plaintiffs to recover when they have not been harmed.

Professor Rabin argues that to promote the free alienability of land, a plaintiff’s nuisance cause of action should transfer with the land and should not be extinguished upon transfer.\textsuperscript{264} This is a sensible suggestion, but the recoverable damages still should be measured by the effect of defendant’s chosen activity at the time the activity was initiated, no matter what the effect of that ongoing activity is at the time plaintiff’s land is transferred. Moreover, a sensible

\begin{footnotes}
\item 259. \textit{Id.} at 1325 (citing Restatement (Second) of Torts § 840D, cmt. b (Tent. Draft No. 16, 1970)).
\item 260. \textit{Id.} at 1319 (noting that at least some offensive uses may “generate business, employment, and facilities such as roads and stores that make neighboring land more valuable”).
\item 261. \textit{See infra} note 271 and accompanying text.
\item 262. David Schmidtz, \textit{The Institution of Property in Property Rights} 42, 46 (Ellen Frankel Paul, Fred D. Miller & Jeffrey Paul eds., 1994).
\item 263. \textit{Id.}
\item 264. Rabin, \textit{supra} note 258, at 1326-27.
\end{footnotes}
utilitarian constraint on the transferability of nuisance causes of action would be
the running of a reasonable statute of limitation. Otherwise, the offensiveness of
defendant’s activity initiated in a remote area might be subject to unfair 20/20
hindsight if the surrounding property later develops, predictably or unpredictably,
a higher valued use.

C. Significant Harm Requirement

Under prevailing nuisance doctrine, a defendant is responsible for nuisance
only when his conduct causes “significant harm.” This complicates the
nuisance inquiry by requiring an assessment of whether a particular harm is or is
not “significant.” Using impact on market value to determine whether
defendant’s conduct has created an actionable nuisance allows the “significant
harm” question to be answered by the market. Insignificant interferences with
use and enjoyment are unlikely to have any effect on the market value of
plaintiff’s property, or at least not a sufficiently significant impact to make
litigation worthwhile. Thus, a “market impact” requirement will serve to screen
out insignificant interferences in a meaningful way.

D. The Hypersensitive Plaintiff

Closely related to the problem of screening out of the tort recovery system
grievances for insignificant interferences with use and enjoyment of real property
is the problem of the hypersensitive plaintiff. The prevailing method of handling
the problem of the hypersensitive plaintiff is to judge the offensiveness of
defendant’s conduct by an objective standard – defendant is responsible for an
interference with plaintiff’s use and enjoyment of property only if “normal
persons living in the community would regard the invasion in question as
definitely offensive, seriously annoying or intolerable.” Otherwise, the
interference is treated as not significant and, therefore, not compensable. This
d doctrine seems appropriate – it probably would be unreasonable to expect a
defendant to anticipate the hypersensitive characteristics of his neighbors. But
judging the recoverability for a private nuisance by its negative impact on the
market value of property naturally incorporates an objective standard. Only
activities that would be seen as offensive by a significant segment of actors in the
market would have an appreciable impact on the market value of the property.

My proposal would depart from the prevailing doctrine on the hypersensitive
plaintiff in at least one important way. If a plaintiff makes a significant and
obvious investment in a sensitive productive enterprise, a defendant should be
required to take plaintiff’s investment into account when deciding how to use
defendant’s own land. If defendant’s new land use destroys the market value of

265. See Restatement (Second) of Torts § 821F (1979) (“There is liability for a nuisance
only to those to whom it causes significant harm . . . .”).
266. Id. at cmt. d.
plaintiff’s real property, which plaintiff has equipped to conduct a sensitive enterprise, then defendant should be responsible for that externality generated by his chosen use.

This issue is commonly illustrated by the scenario of a racetrack located next to a drive-in theater.\(^{267}\) The prevailing approach to this problem would be to deny any recovery to the drive-in for the negative impact on its market value caused by the racetrack lights, which dim the picture on plaintiff’s screen.\(^{268}\) Recovery is denied because the use of plaintiff’s property as a drive-in is “hypersensitive.”\(^{269}\) But it is hard to justify this result from either an efficiency or fairness perspective. Assuming that the drive-in was there first, efficiency would demand that the defendant contemplating a racetrack take into account the effect of the proposed racetrack on neighboring uses, and *sic utere* (the golden rule), properly understood and applied, would hold defendant responsible for the natural consequences of his choice. Therefore, the defendant who chooses to place a racetrack next door to a drive-in theater should be responsible for the negative market impact of that volitional choice on the value of the drive-in.

\[E. \text{ The Locality Rule}\]

Another doctrine related to the “substantial harm” test is the locality rule. Under the locality rule, “[t]he location, character and habits of the particular community are to be taken into account in determining what is offensive or annoying to a normal individual living in it.”\(^{270}\) Under prevailing doctrine, one of the factors taken into account in judging the gravity of the harm caused by defendant’s conduct is “the social value that the law attaches to the type of use or enjoyment invaded.”\(^{271}\) This depends on how much the use advances or protects the general public good:

How much social value a particular type of use has in comparison with other types of use depends upon the extent to which that type of use advances or protects the general public good . . . . The greater the general social value of the particular type of use or enjoyment of land which is invaded, the greater the gravity of the harm from the invasion.\(^{272}\)

The positive effect of this doctrine would be retained under my proposal. In a rural area, the odor of a henhouse is not likely to have an appreciable effect on the market value of surrounding tracts of land. However, in a dense residential

\(^{267}\) See *id.* § 821F cmt. d, illus. 2.
\(^{268}\) *Id.*
\(^{269}\) *Id.*
\(^{270}\) *Id.* § 821F cmt. e (1979).
\(^{271}\) *Restatement (Second) of Torts* § 827(c).
\(^{272}\) *Id.* § 827 cmt. f.
area, a henhouse next door probably would adversely affect the market value of a particular residence.

Likewise, one of the factors used in judging the utility of the actor's conduct is the “social value that the law attaches to the primary purpose of the conduct.”273 The comments to the Restatement state clearly that conduct “has social value if the general public good is in some way advanced or protected by the encouragement and achievement of the purpose.”274 The drafters of the Restatement were quite explicit in stating that mere private utility is insufficient to justify harmful conduct:

If the primary purpose of the conduct is malicious, illegal or contrary to common standards of decency, it quite clearly lacks social value since the achievement of malicious, illegal or indecent purposes and objectives is destructive of the general public good. Conduct carried on for these purposes thus lacks utility, and the invasion which it causes is unreasonable as a matter of law . . . .275

The Comments to the Restatement could be read to suggest that relative utility and harm are measured by how much good or ill flows to the community at large based upon the property use. But some tempering language in the Comments indicates that the question is whether the interest of the community at large would be served by encouraging members of the community to engage in such conduct.276 This point is illustrated by Comment d to Section 828, which notes that “freedom of conduct has some social value although in the particular case the conduct may not produce any immediate or direct public benefit.”277 In other words, the social value of allowing property owners to choose how to use their property is measured by whether freedom of choice generally has positive social value and not necessarily by the public benefit that happens to flow from the particular choice made. On the other hand, Comment f notes that activities that “produce a direct public benefit have more [social value] than those carried on primarily for the benefit of the individual.”278 Still, though, the tenor of the text of and Comments to the Restatement focuses on whether the activity is of a type that is likely to have social value, not precisely how much public benefit in fact flows from the activity.

V. NUISANCE CASE STUDIES

The problems with traditional ways of dealing with inconsistent uses of property are illustrated by comparing two late nineteenth century American
decisions – *Campbell v. Seaman*\(^{279}\) and *Booth v. The Rome, Watertown and Ogdensburg Terminal Railroad Co.*\(^{280}\) The lower court in *Campbell* had enjoined a brickyard that caused inconvenience and damage to the owner of trees and plants at a nearby mansion.\(^{281}\) Although the brickyard had been there first,\(^{282}\) once the mansion and formal gardens were built, the acid produced by the brickyard’s operation harmed trees and vines on plaintiff’s property.\(^{283}\) The referee estimated the damages to plaintiff at $500.\(^{284}\) In affirming the injunction against the brickyard, the *Campbell* court acknowledged both the defendant’s legitimate interest in operating a brick kiln on its property and plaintiff’s legitimate interest in using its property as a residence.\(^{285}\) The problem, of course, was that these uses tended to conflict – both could not be pursued simultaneously to the fullest extent possible.

The *Campbell* court upheld the injunction remedy,\(^{286}\) but whether the court had a principled basis upon which to uphold the injunction is not entirely clear. The court asserted that “the remedy at law was not adequate.”\(^{287}\) In support of this conclusion, the court asked the following rhetorical questions: “How can one be compensated in damages for the destruction of his ornamental trees, and the flowers and vines which surrounded his home? How can a jury estimate their value in dollars and cents?”\(^{288}\) These questions are a little puzzling in the light of the court’s earlier note that “[t]he referee had estimated plaintiff’s damages . . . at $500.”\(^{289}\) As the court put it, “[e]very one has the right to surround himself with articles of luxury” and “the trees and vines cannot be replaced.”\(^{290}\) But surely this is not literally true. Were there no other trees and vines in New York? Could not plaintiff have moved to another mansion that was not next door to a brickyard? The court had no difficulty concluding that the brickyard could move.\(^{291}\) For reasons that it does not explain, the court’s decision appears to have more to do with the court’s greater sympathy for the residential use of property over an industrial use than with the inadequacy of a damages remedy.

The court cited as another reason for the injunction remedy the concern that “[u]nless the nuisance be restrained the litigation would be interminable. The

\(^{279}\) 63 N.Y. (18 Sickels) 568 (1876).
\(^{280}\) 35 N.E. 592 (N.Y. 1893).
\(^{281}\) *Campbell*, 63 N.Y. (18 Sickels) at 568.
\(^{282}\) *Id.*
\(^{283}\) *Id.* at 570.
\(^{284}\) *Id.* at 576.
\(^{285}\) *See id.* at 576-77.
\(^{286}\) *Id.* at 587.
\(^{287}\) *Campbell*, 63 N.Y. (18 Sickels) at 583.
\(^{288}\) *Id.*
\(^{289}\) *Id.* at 576.
\(^{290}\) *Id.* at 583.
\(^{291}\) *Id.* at 586 (noting that “[i]n this country there can be no trouble to find places where brick can be made without damage to persons living in the vicinity. It certainly cannot be necessary to make them in the heart of a village or in the midst of a thickly settled community.”).
policy of the law favors, and the peace and good order of society are best promoted by the termination of such litigations by a single suit."292 Of course, as the Boomer court found out about 100 years later, a once-for-all-future-damage remedy can terminate all litigation without the need for an injunction remedy.293

Perhaps tellingly, the Campbell court rejected the brickyard’s asserted defense of “coming to nuisance.” The court stated bluntly, “[i]t matters not that the brick-yard was used before plaintiffs bought their lands or built their houses.”294 The court’s stated rationale for this conclusion is instructive:

One cannot erect a nuisance upon his land adjoining vacant lands owned by another and thus measurably control the uses to which his neighbor’s land may in the future be subjected. . . . [H]e cannot place upon his land any thing which the law would pronounce a nuisance, and thus compel his neighbor to leave his land vacant, or to use it in such way only as the neighboring nuisance will allow.295

This answer ignores the fact that all uses of property “measurably control” the future uses of neighboring lands. If plaintiff had built its mansion first, this would have measurably affected the practical future uses of neighboring lands. Use as brickyards likely would have been precluded. If a property owner today builds a multi-unit apartment complex on his property, that building will practically curtail any likelihood that a 20,000 square foot mansion will later be built next door. In fact, the building of defendant’s brick kiln did measurably affect likely future uses of neighboring tracts, but not necessarily in a limiting way. If the adjoining land was truly vacant, as the court assumed, the building of the brick kiln may have made some future uses, e.g., mansions, less likely or suitable, but other uses, businesses intended to service a brick-making enterprise and housing appropriate for brick-making employees, more likely or suitable.

To decide when an interference with another’s use of property would lead to legal liability, the court applied a reasonableness standard296 – neighbors need not endure, according to the court, “unreasonable” damage from their neighbor’s use.297 This analysis by the court mediated the conflict between uses by treating nuisance as one party’s property use (here the brickyard) interfering with the use of another (here the mansion), and by therefore limiting the interfering (brickyard) use.298 The court employed the sic utere maxim, but edited it to make it usable in a world where all property uses impact neighboring owners of

292. Id. at 583.
293. See supra notes 234-43.
294. Campbell, 63 N.Y. (18 Sickels) at 584.
295. Id.
296. See id. at 577.
297. Id.
298. The idea that when two uses are inconsistent, either could be seen as interfering with the other, was not widely understood until Ronald Coase’s groundbreaking work in 1960. See Coase, supra note 143, at 1-2, and accompanying text.
property – people must use their property so as not to work an *unreasonable*
interference with their neighbors’ use and enjoyment of their property.299

As the *Campbell* court recognized, it is literally impossible to use one’s
property without running some risk of interfering with a neighboring use.300
Indeed, why is it not plaintiff’s building of the mansion that interferes with
defendant’s operation of its brickyard? Some principle other than *sic utere* must
be used to determine when an interference is actionable and when it is not. The
*Campbell* court applied a vague “standard” to resolve this question: “[t]o
constitute a nuisance, the use must be such as to produce a tangible and
appreciable injury to neighboring property, or such as to render its enjoyment
specially uncomfortable or inconvenient.”301 Of course, the court already
acknowledged that some injury and inconvenience is a natural part of life in
civilized society,302 so precisely which interferences meet this “standard” is not
susceptible to principled analysis.

Yet the seeds of a more principled resolution of the conflicting uses at issue
were present in the *Campbell* court’s opinion. In acknowledging that a strict
application of *sic utere* would be impracticable, the court noted that “[p]ersons
living in organized communities must suffer some damage, annoyance and
inconvenience from each other. For these they are compensated by all the
advantages of civilized society.”303 Looking at the defendant’s and plaintiff’s
conflicting uses in the abstract, ripped from the context in which those uses were
undertaken, made it impossible for the court to answer whether one party had
suffered some damage that was uncompensated by offsetting advantages. If
plaintiff already had been compensated for whatever annoyance or inconvenience
was caused by the brickyard, then to compensate plaintiff again through a
nuisance action would overcompensate plaintiff.

When defendant started its brickyard operation, it had one of three effects on
the value of neighboring tracts of land. The brickyard operation may have
enhanced the value of surrounding parcels by bringing economic activity to an
area that otherwise was vacant and only valuable for speculative potential future
uses. Another possibility is that the brickyard depressed the value of surrounding
tracts by making them less suitable for some uses, such as mansions with formal
gardens. A final possibility is that the brickyard operation had offsetting positive
and negative effects on the value of the neighboring tracts. Assuming, as seems
to be the case, that the brickyard was there when plaintiff acquired plaintiff’s
property, then plaintiff took his property subject to whatever effect the
brickyard’s operation already had on the value of neighboring tracts. If the
brickyard had increased the value of the land acquired by plaintiff, it seems

300. Id. at 577.
301. Id.
302. Id. at 576-77.
303. Id. at 577.
strange to give plaintiff a cause of action against the brickyard. If plaintiff decided to pay a premium for its mansion property due a desire to live near the hustle and bustle of economic activity, it appears that, in the words of the Campbell court, the plaintiff has been “compensated by all the advantages” of living in such an economic center and should not be allowed to pick and choose which of the accompanying disadvantages plaintiff is willing to accept. It may be that the brickyard enhanced the value of the tract acquired by plaintiff because it is more valuable for commercial purposes than for residential purposes. Why, then, should defendant be saddled with the consequence of plaintiff’s poor choice of mansion location? If the brickyard depressed the value of the tract acquired by plaintiff because it was now less suitable for use as a mansion with formal gardens, then plaintiff acquired the property at the depressed price. This has compensated plaintiff for any annoyance generated by the brickyard’s operations. To compensate plaintiff again through a nuisance action would permit plaintiff to reap a windfall by choosing an inappropriate location for its mansion and gardens. In any event, the fact that plaintiff has come second and made its decision to acquire its tract and build its mansion and gardens, knowing that the brickyard was there, suggests that plaintiff already had been “compensated” for any annoyance from the brickyard.

Defendant should be responsible for the effect of his chosen use on the prospects of neighboring tracts of land at the time that he undertakes his brickmaking enterprise, but there is no reason to hold defendant responsible for any future limitations on the use of surrounding land without giving defendant the benefit of enhancements in potential use provided to surrounding landowners. Sic utere must be a two-way street. The law should compel the brickyard to take into account the effect of its use on surrounding landowners. Likewise, the law should compel the mansion builder to consider surrounding land uses before building her mansion. The Campbell court appears to fail to see that plaintiff’s use, too, essentially would “compel his neighbor[s] to use [their land] in such a way” only as plaintiff’s residential use will allow. Plaintiff’s building a mansion and formal gardens effectively condemned all surrounding property to uses consistent with having a mansion and formal gardens next door, and this, even though the mansion came second.

This passage from the court’s opinion reveals that the court viewed the basic property interest, to return to Hohfeldian terminology, as a right to the thing itself, not merely a privilege to seize and use some material as a plentiful common stock given by God to be held by all people in common. Under the Campbell court’s approach, one who improves his real property now is subject to another coming along and building an inconsistent use right next to him. The

304. Id.
305. Campbell, 63 N.Y. (18 Sickels) at 584.
306. See supra notes 159-64 and accompanying text.
first builder obtains no special right by way of his authorization by nature or nature’s God to seize and make use of that soil, even if there is plenty to go around. Land now is seen as a scarce resource, and the first builder may not unreasonably prejudice the right of later neighbors to do that which they like with their own property.

Somewhat inconsistently with its primary approach, the Campbell court did expressly distinguish the situation in which an injunction would cause more harm to the defendant than to the plaintiff.307 The court allowed that, under those circumstances, an injunction might not necessarily be warranted. Perhaps the court’s acceptance of the injunction was based in its inference that it would be cheaper to require defendant to move than to require plaintiff either to move or to endure brick making in his backyard.

A more helpful approach is to understand that both parties have a legitimate interest in doing what they like with their property and to recognize the need to mediate conflicts between inconsistent uses by holding every party responsible for the consequences of her own volitional acts. This approach applies the sic utere maxim, properly understood. Instead of requiring that property owners never affect other property owners, which is literally impossible and socially undesirable, sic utere should require property owners to treat their neighbors as they would treat themselves. This is accomplished by requiring every property owner to bear the consequences of her own volitional acts, thus forcing all property owners to “internalize” the costs of their own choices. This approach serves the interests of both fairness and efficiency.

A better way to arrive at the same result arrived at by the Campbell court would be to focus on the precise sequence of events and hold both parties responsible for the effects of each of their decisions. The brickyard was there first, but it did not always operate.308 In fact, the brickyard was not operating when plaintiff purchased the property in 1849.309 Bricks were burned between plaintiff’s purchase and the start of construction on the mansion.310 Therefore, defendant should have been held responsible for its decision to start burning bricks again in 1853, at least thirteen years after brick burning had ceased and four years after plaintiff purchased his property.311 If, at this point, the renewed brick burning adversely affected the market value of plaintiff’s property, then plaintiff should have a cause of action for the difference. This recovery would allow plaintiff to purchase a different tract that would be suitable to plaintiff’s chosen use. If, however, the renewed brick burning actually increased the market value of plaintiff’s property, then the answer for plaintiff was to sell at a profit and find another spot to build a mansion.

307. Campbell, 63 N.Y. (18 Sickels) at 586.
308. Id. at 584.
309. Id. at 576, 584.
310. Id.
311. Id. at 583-84.
Defendant stopped burning bricks again in 1857, and it was at that point that plaintiff decided to build.\textsuperscript{312} Defendant did not start burning bricks again until eight years after plaintiff had completed the construction of his mansion.\textsuperscript{313} Defendant should bear the responsibility for this 1867 decision to renew brick burning. Before this decision, plaintiff owned a mansion next door to a dormant brickyard. If the decision to start burning bricks again had a negative material impact on the market value of plaintiff’s mansion, then the law should force defendant to bear responsibility for that effect.

The \textit{Campbell} court’s failure to see that the case involved a battle between inconsistent uses of property is brought into relief by a hypothetical scenario proposed by the court in the case of \textit{Booth v. Rome}. \textit{Booth} involved damage caused to plaintiff’s house when defendant used dynamite to excavate a roadway on its property.\textsuperscript{314} The court acknowledged that due to “the rocky surface of the upper part of Manhattan,” a property owner who wanted to realize the full value of the property had to excavate by blasting.\textsuperscript{315} The court then asked the following rhetorical question:

\begin{quote}
May the man who has first built a store or warehouse or dwelling on his lot, and has blasted the rock for a basement or cellar, prevent his neighbor from doing the same thing, when he comes to build on his lot adjoining, on the ground that by so doing his own structure will be injured?\textsuperscript{316}
\end{quote}

This hypothetical question points out that the mere fact that one party’s use of property “damages” another’s use of adjoining property does not necessarily solve the question of responsibility for the resulting damage. The damage is a consequence of the inconsistency of the uses of the property. Therefore, the \textit{Booth} court rejected the systematic favoring of the first occupant.\textsuperscript{317} If one property user (in the \textit{Booth} scenario, the first builder) is systematically favored without regard to the value of competing and inconsistent uses, this would allow that property user to control subsequent uses of surrounding properties and could tend to prevent the valuable use of property. This is precisely the result allowed in \textit{Campbell}, except that the favored user was not the first-comer, but rather the residential user.\textsuperscript{318}

\begin{flushright}
\textsuperscript{312} \textit{Id.} at 576, 584.
\textsuperscript{313} \textit{Campbell}, 63 N.Y. (18 Sickels) at 576, 584.
\textsuperscript{314} 35 N.E. 592, 592 (N.Y. 1893).
\textsuperscript{315} \textit{Id.} at 595.
\textsuperscript{316} \textit{Id.}
\textsuperscript{317} See \textit{id.}
\textsuperscript{318} See \textit{Campbell}, 63 N.Y. (18 Sickels) at 584-87.
\end{flushright}
VI. Conclusion

Justice and efficiency are not mutually exclusive concepts. The only rule of nuisance liability that justly serves the interests of both efficiency and fairness is a rule that holds all actors responsible for the effects of their own volitional acts. Measuring those effects by their impact on the market value of surrounding property is a sensible utilitarian refinement of this proposed corrective justice rule.
A CALL FOR REFORMATION OF THE FEDERAL SENTENCING GUIDELINES APPLICABLE TO THE LARGE-SCALE DISTRIBUTION OF ANABOLIC STEROIDS

Michael A. Mahone, Jr.*

ABSTRACT

The mass media has created a perception in the minds of many Americans that anabolic steroids are problematic because they defile the purity of athletic competition. This misguided viewpoint obscures the very serious dangers that these substances pose to the user and the fact that young people frequently use steroids for cosmetic alteration as well as performance enhancement.

The federal government initially recognized that steroids posed a serious problem in 1990 when it criminalized their possession and distribution. Then, in 2008, Congress amended the Controlled Substances Act to provide for even greater punishments for the distribution of steroids and other similarly scheduled controlled substances. Yet, despite this alteration in the law, the federal sentencing guidelines have not yet been amended to incorporate the increased punishments applicable to steroids. This Article argues that the decision of the United States Sentencing Commission to forgo any amendment to the guidelines applicable to the distribution of anabolic steroids is erroneous because the presently set guideline range is too low to serve the goals of deterrence and retribution as set forth in the Sentencing Reform Act of 1984.

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* Attorney, Liskow & Lewis, New Orleans, LA; J.D., Vanderbilt University Law School, 2009; B.S., Accounting, Louisiana State University, 2005. The author would like to sincerely thank Professor Robert Mikos of the Vanderbilt Law School faculty for his invaluable assistance throughout the writing of this Article. The author would also like to thank the editors of the Northern Kentucky Law Review for their work during the preparation of this Article for publication. Any and all errors, however, remain the sole responsibility of the author.
“[Anabolic steroids are not] drug[s] that can be taken lightly . . . . It’s something that [the Drug Enforcement Administration] still consider[s] extremely dangerous to the public and we’re going to investigate it to its fullest, just as if it were heroin, cocaine or marijuana.”

-Special Agent Violet Szelezcy of the Drug Enforcement Administration

“Cheating” is almost always the first word that gets mentioned whenever discussing the abuse of anabolic steroids. This is primarily due to the media’s coverage of the subject, which in large part revolves around the use of these substances by professional athletes. Recently, the focus has been on factually-supported allegations that Alex Rodriguez, who is considered by many to be the greatest professional baseball player of the modern era, used performance-enhancing drugs during his tenure with the Texas Rangers. There also has been a media feeding-frenzy surrounding Barry Bonds’ upcoming perjury trial, prompted by allegations that he lied under oath to a congressional committee


when he flatly denied having ever used steroids. In all of this coverage, it has consistently been argued that these players have cheated the game, that there should be an asterisk accompanying the records that they hold, and that this is a “tainted era” in the history of professional baseball.

Largely falling by the wayside, however, are the egregious health consequences of abusing steroids as these and other performance-enhancing substances are drugs, plain and simple. If an athlete like Lawrence Taylor goes to rehab to break his dependence on cocaine, there is both concern for his health and an outcry over his illegal conduct. On the other hand, when a professional baseball player like Rodriguez admits to using steroids, baseball’s image is apparently more important.

This double standard is largely misplaced in the context of steroids because in both instances (i.e., the use of drugs such as cocaine on the one hand, and the use of performance-enhancing drugs on the other) there is an example being set for the youth of America. The actions of these athletes can instill in children the belief that cheating is acceptable, but more importantly, the decision by star athletes to use these substances can also lead young people to believe that there is little harm posed by the use of steroids. This is especially noteworthy in


6. Stain of Steroids Stamps Asterisk on Stars’ Careers, THE ARIZONA REPUBLIC, Jan. 13, 2010 at B4 (arguing that the accomplishments of professional baseball players who have tested positive for steroids during their careers will have those accomplishments “qualified with asterisks and quotation marks”); see also Posting of Jim McCormick to views.washingtonpost.com. http://views.washingtonpost.com/theleague panelists/2009/02/alex-rodriguez-mlb-steroids-worse-than-nfl-testing-positive-mccormick.html (Feb. 9, 2009, 2:36 EST) (“[T]he NFL never allowed performance enhancing drugs to define the game for any extended period of time, therefore we don’t find that steroids are a defining element of the sport. Baseball, sadly, sat back and tried to reap the rewards of what was an obviously tainted era and are now subject to our disdain and distrust of their product.”).


9. See, e.g., Michiko Kakutani, The Taint Baseball Couldn’t Wish Away, N.Y. TIMES, July 5, 2005, at E1, available at http://www.nytimes.com/2005/07/05/books/05kaku.html (emphasizing the effect of steroids upon the historical aspects of the game, with little consideration of the physical ramifications of the individual effects of steroid use by the players).


light of studies that have demonstrated that a large number of young people have been abusing anabolic steroids in addition to other recreational drugs.12

While many steroid users are athletes, the prevalence of steroid abuse is compounded even further by evidence that people are motivated to use anabolic steroids for cosmetic reasons in addition to seeking to improve their athletic performance.13 This is because many teenagers and young adults want to have the same perfect physique as their favorite movie stars or sports heroes but would rather not resort to Draconian measures such as working out and maintaining a healthy diet.14 This cosmetic use poses an additional obstacle to combating the problems of steroid abuse because unlike athletics, where there is a system of testing, there is no such oversight for the non-athlete who wants to increase his muscle mass.15

The federal government initially took notice of the need to curb the abuse of anabolic steroids in the late 1980’s, and Congress officially criminalized steroid use and distribution by passing the Anabolic Steroids Control Act of 1990.16 This Act “added anabolic steroids to the federal schedule of controlled substances, thereby criminalizing their non-medical use by those seeking muscle growth for athletic or cosmetic enhancement . . . [and] place[d] steroids in the
same legal class as barbiturates, ketamine and LSD precursors.” Congress took further action against steroids in 2008, when it once again amended the Controlled Substances Act to provide for greater maximum punishment of those caught selling anabolic steroids (and other Schedule III controlled substances).

The new law increased the maximum punishment for selling steroids from five years to ten years (and up to fifteen years if the substance causes death or serious bodily injury), in addition to making similar increases for offenders who had been previously found guilty of a felony drug offense.

While these increased maximum penalties do indicate that Congress acknowledges the need for increased punishment for these offenders, the federal sentencing guidelines (the “Sentencing Guidelines”) have not been amended to be in accordance with this new congressional prerogative. Under the current Sentencing Guidelines’ Drug Quantity Table, offenses involving 40,000 or more dosage units of anabolic steroids only receive a base offense level of twenty. This would mean that if one supplier had been apprehended with all of the steroids that were seized during “Operation Raw Deal” (the largest steroid enforcement action in United States history, where 11.4 million steroid dosage

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19. See Ryan Haight Online Pharmacy Consumer Protection Act of 2008, Pub. L. 110–425, 122 Stat. 4820 (codified as amended in scattered section of 21 U.S.C.) (“Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $500,000 if the defendant is an individual or $2,500,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.”) (emphasis added).

20. Gooden Put On Probation He’ll Stay In Drug Treatment, Sun Herald, Nov. 4, 2005, at C6 (noting that the guidelines offered for Federal sentencing provide “lighter penalties” for individuals convicted of dealing of steroids as compared to convictions for other drug offenses).

21. U.S. Sentencing Guidelines Manual § 2D1.1(c) (2008), available at http://www.ussc.gov/2008guid/tabcon08_1.htm. It should be noted that the Sentencing Guidelines provide forty-three different levels of offense seriousness (i.e., “the more serious the crime, the higher the offense level”); see Nora V. Demleitner, Douglas A. Berman, Marc. L. Miller & Ronald F. Wright, Sentencing Law & Policy: Cases, Statutes & Guidelines 169 (2d ed. 2007) [hereinafter Demleitner et al].
units and over 242 kilograms of raw steroid powder were seized nationwide),\textsuperscript{22} his or her sentencing calculation would nonetheless begin at a base offense level of twenty,\textsuperscript{23} which carries at most a seventy to eighty-seven month sentence (if the defendant fell into the highest criminal history category).\textsuperscript{24}

In its Proposed 2009 Guideline Amendments, the Sentencing Commission posed the following issue for comment:

Should the maximum base offense level be increased (or eliminated entirely) so that in a case in which the number of units [of a Schedule III controlled substance] involved is more than 40,000, a higher base offense level applies? If so, what higher base offense levels are appropriate, and what number of units should correspond to those higher base offense levels?\textsuperscript{25}

Despite this indication of willingness to revise the Guidelines, however, the Sentencing Commission chose to increase the base offense level only for hydrocodone while leaving the level set for anabolic steroids undisturbed.\textsuperscript{26}

This Article argues that the Sentencing Commission’s oversight regarding the base offense level classification for anabolic steroids should be remedied. Part I documents the formation of the United States Sentencing Commission, providing an overview of the Sentencing Guidelines and then explains the process for amending the Guidelines. Part II applies the factors found by Congress to be relevant to the proper classification of an offense so as to demonstrate that the manner in which the Sentencing Guidelines currently punish the distribution of anabolic steroids should be amended to provide for increased punishment. Finally, Part III proposes a workable solution that will adequately punish this offense while at the same time remaining true to the purposes for which the Sentencing Commission (and subsequently, the Sentencing Guidelines) was established.


\textsuperscript{23} This base offense level has not been increased since anabolic steroids were added to the list of Schedule III controlled substances in 1990. See supra note 17 (showing that the current level has remained unchanged since anabolic steroids were added in 1990).

\textsuperscript{24} See U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing tbl. (2008), available at http://www.ussc.gov/2008guid/5a_SenTab.htm. While the Guidelines do permit a judge to depart upward from the guideline range, an average of only 0.7% of the sentences imposed between 2001 and 2006 involved an upward departure. DEMLEITNER ET AL., supra note 21, at 213 (citing the national guideline applications trends as prepared by the United States Sentencing Commission).


I. SENTENCING IN THE FEDERAL COURT SYSTEM

A. The United States Sentencing Commission

Prior to the adoption of the Sentencing Guidelines, federal sentences were generally indeterminate with the actual release date being selected by the Parole Commission.27 Under this system “[s]tatutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide [an applicable sentence for each particular offender].”28 The Parole Commission was then afforded the authority to further reduce the offender’s sentence by determining whether the offender should be eligible for parole.29 This sentencing regime posed two distinct problems: (1) “great variation among sentences imposed by different judges upon similarly situated offenders;” and (2) “uncertainty as to the [amount of] time th[at an] offender would spend in prison.”30

Congress sought to rectify these problems with the passage of the Sentencing Reform Act of 1984.31 The Act “consolidate[d] the power that had been exercised by the sentencing judge and the Parole Commission to decide what punishment an offender should suffer.”32 It accomplished this goal “by creating the United States Sentencing Commission, directing the Commission to devise guidelines to be used for sentencing, and abolishing the Parole Commission.”33 While the Act was passed in 1984, “[t]he guidelines did not become fully operational until 1989 because [of the many] constitutional challenges to the [Act’s] approach to sentencing reform.”34

B. The Sentencing Guidelines

“The [Sentencing Reform] Act’s basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair

29. See id.
30. Id. at 366 (alteration in original).
31. See ABRAMS & BEALE, supra note 27, at 839.
32. Mistretta, 488 U.S. at 367.
33. Id.
34. DEMLEITNER ET AL., supra note 21, at 161 (alteration in original). In 1989, the Act was challenged and subsequently upheld by the United States Supreme Court. Mistretta, 488 U.S. at 412. The Court first held that the Act was not an unconstitutional delegation of legislative authority because Congress had “set forth sufficient standards for the exercise of the Commission's delegated authority.” Id. at 380. The Court then explained that Congress’ delegation of authority to the Sentencing Commission was not in violation of the constitutional separation of powers. Id. at 412 (stating “[n]or does our system of checked and balanced authority prohibit Congress from calling upon the accumulated wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within the ken of judges”).
sentencing system.”

To achieve this end, the Sentencing Commission endeavored to create guidelines that would “take into account both the seriousness of the offense, including relevant offense characteristics, and important information about the offender, such as the offender’s role in the offense and prior record.”

This was accomplished through the utilization of a sentencing matrix, which ascertains an appropriate range of potential punishments by plotting the point where the vertical axis (offense level) and the horizontal axis (criminal history) intersect. In order for this system to function properly, “[s]imilar offenses [must be] grouped together and assigned the same offense level . . . .”

In determining the appropriate classification for an offense, “Congress directed that guidelines specify a term of confinement at or near the statutory maximum for certain crimes and ensure a substantial term of imprisonment for various other offenses.”

Congress also stated that:

The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences . . . shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance: (1) the grade of the offense; (2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense; (3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust; (4) the community view of the gravity of the offense; (5) the public concern generated by the offense; (6) the deterrent effect a particular sentence may have on the commission of the offense by others; and (7) the current incidence of the offense in the community and in the Nation as a whole.

36. ABRAMS & BEALE, supra note 27, at 842.
37. See ABRAMS & BEALE, supra note 27, at 846.
38. See ABRAMS & BEALE, supra note 27 (alteration in original).
39. DEMLEITNER ET AL., supra note 21, at 162. The Sentencing Guidelines are not mandatory but are merely meant to advise the sentencing court in reaching its decision as to which sentence would be most appropriate for a given offender. See United States v. Booker, 543 U.S. 220, 245 (2005). This gives a sentencing judge wide discretion in deviating above or below the guideline range. ABRAMS & BEALE, supra note 27, at 870-71 (noting that there was no consensus as to whether the discretion provided by Booker led to sentences being higher or lower on the whole). Yet, this does not mean that a district court can disregard the Guidelines as the Supreme Court has held that the Guidelines must be considered in reaching a particular sentence. See Booker, 543 U.S. at 245. Thus, regardless of the fact that they are technically classified as “advisory,” the Sentencing Guidelines are still the primary determinate of sentences in the federal criminal justice system. See id.
Consideration of these factors allows the Commission to set the base offense level for a particular crime, which ultimately reflects the "gravity of the offense."\textsuperscript{41} Merely setting the base offense level, however, does not ensure that the present classification will not be changed in the future.\textsuperscript{42}

**C. Amendment of the Sentencing Guidelines**

"[T]he guidelines are the product of a deliberative and dynamic process that seeks to embody within federal sentencing policy the purposes of sentencing set forth in the Sentencing Reform Act."\textsuperscript{43} Consequently, simply establishing the Sentencing Guidelines does not end the duties of the Commission, as it is obligated to "periodically . . . review and revise" the Guidelines.\textsuperscript{44} Furthermore, Congress has expressly empowered the Commission to amend the Sentencing Guidelines.\textsuperscript{45}

In exercising that authority, there is a very detailed process that must be followed.\textsuperscript{46} First, the Commission must publish notice of its intention to amend the Guidelines in the *Federal Register* and allow for meaningful public comment on the matter.\textsuperscript{47} Once this is completed, the proposed amendment is submitted to Congress (no later than the first of May) with "an explanation or statement of..."
reasons for the amendments."\textsuperscript{48} Then, "[u]nless otherwise specified, or unless Congress legislates to the contrary, amendments submitted for review shall take effect on the first day of November of the year in which submitted."\textsuperscript{49}

The decision to propose an amendment in the Sentencing Guidelines can come about in two different ways: (1) the Commission can decide that the Guidelines require augmentation;\textsuperscript{50} or (2) Congress can order the Commission to amend the Guidelines.\textsuperscript{51} The Ryan Haight Online Pharmacy Consumer Protection Act of 2008, which mandated increased punishment for the distribution of steroids, expressly stated that:

\begin{quote}
The United States Sentencing Commission, in determining whether to amend, or establish new, guidelines or policy statements, to conform the Federal sentencing guidelines and policy statements to this Act and the amendments made by this Act, \textit{should not} construe any change in the maximum penalty for a violation involving a controlled substance in a particular schedule as being the \textit{sole} reason to amend, or establish a new, guideline or policy statement.\textsuperscript{52}
\end{quote}

As such, the Commission cannot rely exclusively on the change in the law to propose an amendment.\textsuperscript{53} Thus, the Commission must make its own determination as to whether a change in the Sentencing Guidelines as applied to

\textsuperscript{48} Rules of Prac. \& Procedure, \textit{supra} note 46, at 38,599.


\textsuperscript{50} See, e.g., Crystal Joy Carpenter, \textit{Federal Prosecution of Business Organizations: The Thompson Memorandum and Its Aftermath}, 59 ALA. L. REV. 207, 227 (2007) ("The Sentencing Commission's decision to [reverse the 2004 amendment to the Sentencing Guidelines, which contained language that encouraged corporate defendants to waive the attorney-client privilege and work product protections in order to gain leniency at sentencing,] was influenced in great part by the 'extensive written comments and testimony from the ABA, the coalition, numerous former senior Justice Department officials-including three former attorneys general-and other organizations.'").


\textsuperscript{53} Because of this, the Commission also is prevented from utilizing the "emergency" amendment procedure. See \textit{Emergency Guidelines, supra} note 46.
anabolic steroids is necessary to fully “embody within federal sentencing policy the purposes of sentencing set forth in the Sentencing Reform Act.”

II. AMENDING THE SENTENCING GUIDELINES FOR THE DISTRIBUTION OF ANABOLIC STEROIDS

The goal of the Sentencing Guidelines is to adequately balance the seriousness of the offense with the particular characteristics (e.g., prior record) of the offender. This Article is concerned solely with the proper base offense level to be assigned to the distribution of anabolic steroids (which is entirely independent of the offender’s criminal history). As a result, the following analysis will be limited to a consideration of whether the current Guidelines adequately reflect the seriousness of the distribution of steroids.

The non-exclusive list provided in § 994(c) will now be applied to the distribution of steroids. Yet, not all of the factors included in § 994(c) will be of primary importance to a determination of the proper classification for this offense. For example, the “circumstances under which the offense was committed” are not relevant to this analysis because such circumstances serve to mitigate or aggravate the overall level of a specific offense rather than merely setting the base offense level for the general category of offenses. Similarly, there is no need to evaluate in this Article the “nature and degree of harm caused by the offense,” as Congress has said that this factor requires consideration of elements that are particular to a given set of facts as opposed to being universally applicable to the offense in general.

The remaining factors, however, are clearly relevant to ascertaining the appropriate base offense level classification for the high-level distribution of anabolic steroids. As such, this Article will consider the following factors: the grade of the offense; the community view of the gravity of the offense; the public concern generated by the offense; the deterrent effect of a particular

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55. See ABRAMS & BEALE, supra note 27, at 842.
56. See Timothy J. Droske, Correcting Native-American Sentencing Disparity Post-Booker, 91 MARQ. L. REV. 723, 748 (2008) (stating that the non-exclusive list “include[s] a list of seven factors… related to the seriousness of the offense”).
57. See supra Part I.B.
58. 28 U.S.C.A. § 994(c)(2) (West 2008). According to the Senate Report, some of the non-exclusive factors to consider here include whether the offense was particularly heinous, whether the offense was committed on the spur of the moment or after substantial planning, whether the offense was committed with reckless disregard of the safety of others, and whether the offense involved a threat with a weapon or use of a weapon. See S. REP. NO. 98-225, at 170 (1983). 59. See 28 U.S.C.A. § 994(c)(3) (West 2008). According to the Senate Report, one factor that could be considered here is whether the victim was especially vulnerable and this vulnerability was known to the defendant. S. REP. NO. 98-225, at 170. Furthermore, the language of the statute itself says that the nature and degree of harm includes “[w]hether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust . . . .” 28 U.S.C.A. § 994(c)(3).
sentence on other potential offenders; and the current incidence of the offense in the community and the nation as a whole.  

A. The Grade of the Offense

Although according to Congress, “[a]ll offenses are graded according to their relative seriousness,” 61 it was not intended that “offenses with the same grade necessarily have the same sentence. . .[but rather] that the grading of the offense be some guide as to the Congress [sic] view of the relative seriousness of similar offenses.” 62 “[T]he rough approximations practical for statutory purposes are expected by the committee to be refined considerably by the Sentencing Guidelines.” 63 In any event, the Guidelines should adequately reflect the views of Congress (albeit an approximation) as to the seriousness of the given offense, as expressed in the statutory scheme enacted.

When looking to the language of criminal statutes, the relative seriousness of particular offenses is made evident by the punishments imposed upon culpable offenders. 64 In the case of anabolic steroids, it is apparent that the decision to raise the statutory minimum and maximum sentences applicable to the distribution of these and other Schedule III controlled substances reflects Congress’ view that these offenses are of the utmost seriousness and that combating them requires an increase in the applicable penalties. 65 The current Sentencing Guidelines fail to take into account this change in the views of our lawmakers. 66 Because Congress has changed its opinion as to the relative seriousness of these offenses and increased the grade of the offense, the corresponding base offense level assigned to the distribution of anabolic steroids should likewise be increased under the Sentencing Guidelines. 67

60. 28 U.S.C.A. § 994(c).
62. Id. at 169-70 (alteration in original).
63. Id. at 170.
65. See supra text accompanying note 21.
67. This alone does not mandate an increase, as allowing that would be contrary to the will of Congress as expressed in the Ryan Haight Online Pharmacy Consumer Protection Act. See supra text accompanying note 52.
B. Community View of the Gravity of the Offense

The community view of the gravity of the offense, is commonly said to reflect the standards of the various localities around the country. The statutory language supports this approach because § 994(c)(7) draws a clear-cut distinction between the “community,” on the one hand, and the “nation as a whole,” on the other. Congress further explained that the “community norms concerning particular criminal behavior might be justification for increasing or decreasing the recommended penalties for the offense.” With the understanding that “law is generally seen as accurately reflecting community norms,” this Section will consider the sentiments of the various communities (i.e., states) towards anabolic steroids by analyzing the various punishment regimes adopted by the states.

It bears noting that the focus of this article is not punishment for simple possession but rather punishing major distributors and suppliers, so state statutes dealing with mere possession will not be included in this Article’s analysis. Additionally, this Article is solely concerned with how the states treat the base offense of steroid distribution regardless of any aggravating or mitigating factors. Therefore, it is of no consequence that many states mandate an increased penalty if the offender is selling steroids within close proximity to a school, if the offender employs a minor in the commission of the offense, or if the offender has prior felony drug convictions.


71. See, e.g., Ala. Code § 13A-12-250 (2008) (“In addition to any penalties heretofore or hereafter provided by law for any person convicted of an unlawful sale of a controlled substance, there is hereby imposed a penalty of five years incarceration in a state corrections facility with no provision for probation if the situs of such unlawful sale was on the campus or within a three-mile radius of the campus boundaries of any public or private school, college, university or other educational institution in this state.”).

72. See, e.g., La. Rev. Stat. Ann. § 40:981.2 (2008) (“[A]ny person [over eighteen years of age] who [solicits, procures, or counsels any person under eighteen years of age to distribute or attempt to distribute any controlled dangerous substances] shall upon conviction be punished by a term of imprisonment of not more than one and one-half times the longest term of imprisonment authorized by the applicable provisions of R.S. 40:966 through 970, or by a fine of not more than twice that authorized by such applicable provisions, or both.”).

73. See, e.g., W. Va. Code Ann. § 60A-4-408(0) (West 2008) (“Any person convicted of a second or subsequent offense under [the West Virginia Uniform Controlled Substances Act] may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.”).
While almost all fifty states include anabolic steroids in their respective controlled substances acts, there is much disparity in how the distribution of these drugs is treated from state to state. Ultimately, the various punishment regimes can be broken down into three general categories: lenient, moderate, and strict.

1. Lenient or No Punishment

The states classified as “lenient” towards steroid distributors share one unifying factor: they all have criminal statutory schemes that reflect a legislative judgment that the distribution of anabolic steroids should not be a high priority for vigorous enforcement. Some states do not punish the distribution of steroids at all and simply exclude steroids from their controlled substances acts. Another lax approach to steroid distribution is to punish a first-time offender with a maximum term of incarceration of one year or less with no mandatory minimum sentence. Finally, there are states that, while actually punishing steroids to a greater degree than others with lenient approaches, have specifically chosen to punish steroid distribution less harshly than the distribution of other similarly scheduled controlled substances.

Vermont and Michigan are the only two states that have chosen to completely abstain from punishing offenses related to the distribution of anabolic steroids. In Vermont, the statutory definition of “regulated drug” makes absolutely no mention of anabolic steroids or any component thereof. However, while they are presently unregulated, the Board of Health is authorized to pass regulations that supplement this definition. If the Board determines that regulation of anabolic steroids is “necessary . . . to supplement the [controlled substances] provisions to effectuate the purposes and intent thereof . . .”

Michigan also has opted against punishing the distribution of anabolic steroids. However, the current state of the law in Michigan is different from that in Vermont, as Michigan formerly had a statute that dealt specifically with offenses involving anabolic steroids. Moreover, a bill that has been introduced in the state Senate that would include anabolic steroids in Schedule III of the

75. See infra text accompanying notes 75-84.
76. See infra text accompanying notes 85-88.
77. See infra text accompanying notes 89-95.
78. Until 2006, Alaska had opted to follow the same approach as Vermont by excluding anabolic steroids from its controlled substances act. However, that changed on June 3, 2006 when the Alaska legislature added steroids to its list. See ALASKA STAT. § 11.71.180(f) (2008). As such, anabolic steroids in Alaska are now regulated in a manner akin to that employed at the federal level.
79. See VT. STAT. ANN. tit. 18, § 4201(29) (2008). This section defines “regulated drug” as meaning “a narcotic drug; a depressant or stimulant drug, other than methamphetamine; a hallucinogenic drug; Ecstasy; marijuana; or methamphetamine.” Id. §4201(29)(A-F).
80. See VT. STAT. ANN. tit. 18, § 4202(a) (2008).
81. Id.
82. See MICH. COMP. LAWS. ANN. § 333.17766a (West 2008) (repealed 2002).
Michigan controlled substances act. If this law passes, anabolic steroids would then be punished by a maximum of seven years imprisonment.

States punishing the distributors of anabolic steroids by incarcerating first-time offenders for less than one year, at least from a deterrence perspective, have taken a policy only slightly stronger than the complete lack of punishment in Vermont and Michigan. For example, in Maine, trafficking in steroids (a Schedule Z drug) is punishable by no more than one year in prison. Likewise, in Massachusetts, a first-time distributor of anabolic steroids would only face a maximum sentence of nine months in jail.

Although Tennessee has been included with the states that impose strict punishments on distributors of anabolic steroids, the Tennessee legislature has evinced a belief that steroid-related offenses may be less blameworthy than offenses involving other controlled substances. For one thing, “a person charged for the first time with delivering an anabolic steroid or possessing an anabolic steroid with the intent to manufacture, deliver or sell the steroid shall be eligible for pretrial diversion.” Moreover, unlike other controlled substances, the legislature specifically chose to disallow an inference of intent to distribute based on the quantity of steroids possessed by the offender. Thus, while the


85. Threatening a major supplier of steroids (or any illegal drugs for that matter) with a maximum penalty of one year in prison would seemingly fail to deter such behavior, especially in light of the highly profitable nature of such an enterprise and the low probability of detection. See infra Part II.D. As such, it cannot be said that these states are doing much more than a state like Vermont in the way of combating the problems posed by the distribution of these drugs.


87. See id. tit. 17-A, § 1103(1-A)(H) (2008) (trafficking in Schedule Z drugs is a Class D crime); id. tit. 17-A, § 1252(2)(D) (“In the case of a Class D crime, the court shall set a definite period of less than one year.”).

88. Mass. Gen. Laws Ann. ch. 94C, § 32D(a) (West 2008); see also id. ch. 94C, § 31. Moreover, even a repeat offender is only subject to a maximum of one and a half years in prison. See id. ch. 94(c), § 32D(b).


90. Id. Pretrial diversion “involves an agreement to suspend prosecution up to 2 years while the defendant completes a probationary period.” Tennessee Pretrial Diversion, http://www.nashville-criminal-lawyer.org/tn-pretrial-diversion.html (last visited Jan. 21, 2010); see also Tenn. Code Ann. § 40-35-313(2) (West 2008) (establishing the possibility that the defendant’s record may be expunged upon the successful completion of a diversionary program as authorized by the state).

91. See Tenn. Code Ann. § 40-35-313(2) (West 2008) (“The inference permitted by the first sentence of § 39-17-419 does not apply to a person charged under subdivision (a)(4) with possession of an anabolic steroid with intent to sell or deliver the steroid.”) (emphasis added); see also id. § 39-17-419 (“It may be inferred from the amount of a controlled substance or substances possessed by an offender, along with other relevant facts surrounding the arrest, that the controlled substance or substances were possessed with the purpose of selling or otherwise dispensing.”). Furthermore, “[u]nless the state can prove that an actual sale or delivery occurred, the person may
applicable punishments would in fact be classified as strict in nature, these two safety valves demonstrate the intention of the state legislature to afford at least a modicum of leniency to steroid distributors.

Like Tennessee, Rhode Island also has opted to treat steroids differently from all other controlled substances. The maximum period of incarceration for the distribution of Schedule III controlled substances, which includes steroids, is set at twenty years. However, the statute then states that steroid distributors are subject to a maximum of only five years imprisonment. This carve-out shows that the legislature sought to differentiate anabolic steroids from other Schedule III substances such as pentobarbital, codeine, and ketamine.

The following table summarizes the punishment regimes in those states that take a lenient approach to punishing the distribution of anabolic steroids:

<table>
<thead>
<tr>
<th>PUNISHMENT:</th>
<th>NUMBER OF STATES:</th>
<th>SPECIFIC STATES:</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Punishment</td>
<td>2</td>
<td>VT &amp; MI</td>
</tr>
<tr>
<td>Maximum Sentence</td>
<td></td>
<td></td>
</tr>
<tr>
<td>of One Year or Less</td>
<td>2</td>
<td>MA &amp; ME</td>
</tr>
<tr>
<td>Total</td>
<td>4</td>
<td></td>
</tr>
</tbody>
</table>

2. Moderate Punishment

States with punishment systems that can be described as “moderate” are those whose criminal statutes set the maximum punishment applicable to steroid distribution at less than ten years imprisonment and choose not to prescribe a mandatory minimum sentence for offenders. Statutes of this nature give some indication as to the opinion of the respective state legislatures in that they express an understanding that steroid distribution can merit harsh punishment but not necessarily that it will merit it. These states essentially pass the buck to the judiciary and prosecutors and allow judges to exercise a wide range of

only be convicted of simple possession and punished [accordingly].” Id. § 39-17-417(d)(2) (emphasis added).

93. Id. § 21-28-4.01(a)(4)(ii).
94. Id.
95. See id. § 21-28-2.08. Virginia also differentiates anabolic steroids from other similarly scheduled controlled substances by stating that the distribution of steroids is considered a Class 1 Misdemeanor while the distribution of other Schedule III controlled substances is a Class 5 felony. See VA. CODE ANN. § 18.2-248(E1) (West 2008); id. § 18.2-248.5(B).
96. Tennessee, Rhode Island and Virginia have not been included in this number because while their respective statutory schemes do indicate some degree of leniency, the actual punishments mandated by their statutes come within the scope of other more stringent classifications.
discretion in determining how to punish the distribution of steroids. Moreover, they also generally lump steroids in with other controlled substances and punish them in a similar manner, thereby failing to differentiate between anabolic steroids and other similarly scheduled substances in terms of their harmful properties.

The most common punishment in states that follow this sort of regime is a maximum term of five years imprisonment. The following states adhere to such an approach: Alaska, Delaware, the District of Columbia, Florida, Idaho, Maryland, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, and Washington. Other states that take a
fairly moderate approach to punishing the distribution of steroids include Wisconsin,\textsuperscript{111} which imposes a six-year maximum sentence, and Connecticut\textsuperscript{112} and New Hampshire,\textsuperscript{113} which both impose a seven-year maximum sentence.\textsuperscript{114}

The following table summarizes the punishment regimes in those states that take a moderate approach to punishing the distribution of anabolic steroids:

<table>
<thead>
<tr>
<th>PUNISHMENT:</th>
<th>NUMBER OF STATES:</th>
<th>SPECIFIC STATES:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maximum Sentence of</td>
<td>13</td>
<td>AK, DE, DC, FL, ID, MD,</td>
</tr>
<tr>
<td>Five Years</td>
<td></td>
<td>OR, PA, RI, SC, SD, UT,</td>
</tr>
<tr>
<td></td>
<td></td>
<td>&amp; WA</td>
</tr>
<tr>
<td>Maximum Sentence</td>
<td>1</td>
<td>WI</td>
</tr>
<tr>
<td>of Six Years</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maximum Sentence of</td>
<td>2</td>
<td>CT &amp; NH</td>
</tr>
<tr>
<td>Seven Years</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>16</td>
<td></td>
</tr>
</tbody>
</table>

regulation, the existence of this specially tailored legislation may be indicative of a desire to regulate these substances more stringently than some other controlled substances.

108. See S.D. CODIFIED LAWS § 34-20B-22(3) (2008) (declaring anabolic steroids are classified as Schedule III controlled substances); id. § 22-42-3 (distribution of a Schedule III controlled substance is a Class 5 felony); id. § 22-6-1(8) (the maximum sentence for a Class 5 felony is five years imprisonment). Although South Dakota also has a five-year maximum sentence for distribution of anabolic steroids, the state also imposes an additional thirty-day mandatory sentence in the state penitentiary or the county jail for a first-time offender. Id. § 22-42-3. However, because of the extremely short length of time and the fact that the offender will be incarcerated in the county jail rather than a state prison, this can hardly be considered a severe punishment.

109. See UTAH CODE ANN. § 58-37-2(c)(vii) (West 2008) (establishing anabolic steroids are classified as Schedule III controlled substances); id. § 58-37-8(1)(b)(ii) (distribution of a Schedule III controlled substance is a third degree felony); id. § 76-3-203(3) (the maximum term of imprisonment for a felony of the third degree is five years).

110. See WASH. REV. CODE ANN. § 69.50.208(d) (West 2008) (stating anabolic steroids are classified as Schedule III controlled substances); id. § 69.50.401(2)(c) (distribution of a Schedule III controlled substance is a Class C felony); id. § 9A.20.021(1)(c) (the maximum sentence for a Class C felony is five years imprisonment).

111. See WIS. STAT. ANN. § 961.18(7) (West 2008) (indicating anabolic steroids are classified as Schedule III controlled substances); id. § 961.41(1)(b) (distribution of a Schedule III controlled substance is a Class H felony); id. § 939.50(3)(h) (the maximum sentence for a Class H felony is six years imprisonment).

112. See CONN. AGENCIES REGS. § 21a-243-9(f)(West 2009) (noting anabolic steroids are classified as Schedule III controlled substances); CONN. GEN. STAT. ANN. § 21a-277(b) (West 2008) (“Any person who . . . distributes . . . any controlled substance, except a narcotic substance, or a hallucinogenic substance other than marijuana, except as authorized in this chapter, may, for the first offense, be . . . imprisoned not more than seven years.”).


114. As previously noted, there is a bill currently before the Michigan legislature that would classify anabolic steroids as a Schedule III controlled substance; if that should pass, the distribution of steroids would be punishable by up to seven years imprisonment. See supra text accompanying note 83.
3. Strict Punishment

The states that employ a “strict” punishment regime generally utilize what could be termed a “zero-tolerance” policy towards the distribution of steroids by leaving an offender (even a first-time offender) with little hope of avoiding a fairly substantial amount of time in a state correctional facility. This type of punishment is unquestionably the most common and comes in many different forms. For example, some states use drug weight or quantity as a deciding factor in sentencing, an approach that can lead to severe penalties for steroid distributors.\footnote{See infra notes 119-30 and accompanying text.} Other state legislatures have been more explicit in their statutory draftsmanship by imposing presumptive sentences for the distribution of steroids, thus offering a very clear indication of the opinion of the legislature towards these crimes.\footnote{See infra notes 131-38 and accompanying text.} There are also states that utilize mandatory minimum sentences, which reflect a legislative judgment that there should be no probation or other diversion for even first-time offenders.\footnote{See infra text accompanying notes 141-56.} Finally, some state statutes have provided for such exorbitantly high maximum sentences that the legislature has essentially bestowed upon judges the power to make examples of steroid distributors by imposing dramatic punishments.\footnote{See infra text accompanying notes 157-63.}

Many states punish steroid distribution even-handedly with other controlled substances based on the amount of the drug sold, and this can often lead to harsher treatment because steroids tend to weigh more than other drugs.\footnote{See infra text accompanying notes 157-63.} Arkansas, for example, takes this sort of approach. If an offender distributes steroids with a gross weight of less than twenty-eight grams, he or she will be

\footnote{Steroids are less concentrated than other drugs and greater amounts must be taken to have the desired effect. Compare U.S. SENTENCING GUIDELINES MANUAL §2D1.1(c)(F) (2008), available at http://www.ussc.gov/2008guid/GL2008.pdf (noting that one dosage unit of an anabolic steroid is set at 25 milligrams), with id. § 2D1.1(c)(G) (noting that one dosage unit of LSD is set at 0.4 milligrams). Also, raw powder is oftentimes mixed with water so that it can be injected into the user’s body, and this carrier medium will undoubtedly increase the overall weight of the drugs. See Telephone Interview with Alex Davis, Special Agent, Food and Drug Administration, Office of Criminal Investigations, in New Orleans, LA (Apr. 25, 2009) (This interview was neither recorded nor transcribed) [hereinafter Interview]. See also Richard D. Collins, Of Ballparks and Jail Yards: Pumping up the War on Steroids, THE CHAMPION, November, 2006, at 23, available at http://www.nacdl.org/public.nsf/698e98dd101a846085256eb400500e01/89d2251f12e8448525723c0053ca347?OpenDocument. This is particularly important in light of the fact that courts often consider the total weight of the mixture (as opposed to the total weight of the raw materials used) in making sentencing decisions. See, e.g., United States v. Grant, 397 F.3d 1330 (11th Cir. 2005) (holding that in making a sentencing determination, the district court should consider the total weight of a liquid-based mixture of LSD); see also ABRAMS & BEALE, supra note 27, at 351 (“Courts following the rationale in Grant have subjected defendants in LSD cases to much longer sentences just because they used a heavier carrier, and it also distorted their sentences in comparison to dealers who sold other drugs.”). As such, lower-level distributors of liquid-based steroid mixtures can be subjected to the same punishments as major suppliers of other drugs that have a tendency to weigh less.}
sentenced to a minimum of five years in prison with a maximum sentence of twenty years. The penalties increase in proportion to the amount of the drug that is sold or manufactured. If between twenty-eight and four hundred grams are sold, the offender will be sentenced to a minimum of ten years with a maximum sentence of forty years in prison. Then, if greater than four hundred grams are sold, the offender will be subject to a minimum sentence of fifteen years in prison with a maximum of forty years in prison. Like Arkansas, Texas also punishes steroid distribution by imposing minimum and maximum term of incarceration based on the amount of drugs that are sold.

Hawaii utilizes a statutory scheme similar to that used in Arkansas and Texas but punishes the distribution of steroids to an even greater degree because its distribution statute does not merely set minimum sentences, but rather sets a mandatory sentence for distribution offenses. Steroids are classified as a Schedule III drug and as such, are considered "harmful drugs." Distribution of twenty-five or more capsules or more than one-eighth of an ounce of steroids is treated as a Class A felony in Hawaii, and the offender "shall be sentenced to an indeterminate term of imprisonment of twenty years without the possibility of suspension of sentence or probation." If an offender distributes a harmful drug in any amount, he or she will be guilty of a Class B felony, and in such a case, "the court shall impose [a sentence of ten years,] the maximum length of imprisonment."

Arizona adheres to a strict sentencing regime that is similar, though slightly less harsh, to that utilized by Hawaii. In Arizona, the distribution of anabolic

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121. See id. § 5-64-401(a)(2)(A)-(C).
122. Id. § 5-64-401(a)(2)(B)(i).
123. Id. § 5-64-401(a)(2)(C)(i).
124. Under Texas law, steroids fall into Penalty Group 3. Tex. Health & Safety Code Ann. § 481.104(a)(9) (Vernon 2008). If the quantity sold is less than twenty-eight grams of steroids, the offender is guilty of a state jail felony and is subject to a mandatory minimum sentence of one hundred and eighty days in jail up to a maximum of two years imprisonment. Tex. Health & Safety Code Ann. § 481.114(b) (Vernon 2008); Tex. Penal Code Ann. § 12.35(a) (Vernon 2008). If the quantity sold is greater than twenty-eight grams but less than two hundred grams, the offender is guilty of a felony of the second degree and is subject to a mandatory minimum sentence of one hundred and eighty days in jail up to a maximum of two years imprisonment. Tex. Health & Safety Code Ann. § 481.114(c); Tex. Penal Code Ann. § 12.33(a). If the quantity sold is greater than two hundred grams but less than four hundred grams, the offender is guilty of a felony of the first degree and is subject to a mandatory minimum sentence of five years in prison up to a maximum of ninety-nine years in prison. Tex. Health & Safety Code Ann. § 481.114(d); Tex. Penal Code Ann. § 12.32(a). Lastly, if the quantity sold is greater than four hundred grams, the offender is subject to a mandatory minimum sentence of ten years in prison up to a maximum of ninety-nine years or life in prison. Tex. Health & Safety Code Ann. § 481.114(e).
126. Id. § 712-1240.
127. Id. § 712-1244.
128. Id. § 706-659 (emphasis added).
129. Id. § 712-1245.
130. Id. § 706-660 (emphasis added).
steroids, which are classified as Schedule III controlled substances, is considered a Class Two felony. A Class Two felony carries a presumptive sentence of five years with a maximum sentence of ten years and a minimum sentence of four years. California, Indiana, Kansas, New Mexico, and North Carolina also impose presumptive sentences for the distribution of anabolic steroids.

Unlike the states previously considered, Ohio’s statutory scheme punishes steroid distribution based on quantity sold, and the statute defines quantities that are particular to anabolic steroids rather than generally applicable to controlled substances. Ohio uses the “bulk amount” of drugs sold as a benchmark and, for anabolic steroids, defines that as “[a]n amount equal to or exceeding two hundred solid dosage units, sixteen grams, or sixteen milliliters of a compound, mixture, preparation, or substance that is or contains any amount of a schedule III anabolic steroid.” The state then metes out the applicable punishment based on the relation of the quantity sold to the designated bulk

132. Id. § 13-3407(A)(5), (B)(5).
133. Id. § 13-702(D). It should be noted that the sentence imposed can be either mitigated (with a corresponding duration of three years) or aggravated (with a corresponding duration of twelve and a half years). Id.
134. California imposes a presumptive sentence of two, three, or four years for the distribution of steroids. See Cal. Health & Safety Code § 11056(f) (West 2008) (steroids are classified as Schedule III controlled substances); § 11379(a) (distribution of a Schedule III controlled substance is punishable “by imprisonment in the state prison for a period of two, three, or four years”). However, the statute draws a distinction between simple distribution and in-state trafficking by noting that “any person who transports for sale any controlled substances specified in subdivision (a) such as anabolic steroids] within this state from one county to another noncontiguous county shall be punished by imprisonment in the state prison for three, six, or nine years.” Id. § 11379(b).
136. New Mexico imposes a presumptive sentence of eighteen months for the distribution of steroids. See N.M. Stat. Ann. § 30-31-41(B) (West 2008) (“It is unlawful for any person to intentionally distribute or possess with intent to distribute anabolic steroids. Any person who violates this subsection is guilty of a fourth degree felony . . . .”); id. § 31-18-15(A)(10) (“For a fourth degree felony, [the basic sentence of imprisonment is] eighteen months imprisonment.”).
137. See N.C. Gen. Stat. Ann. § 90-91(k) (West 2008) (establishing anabolic steroids are classified as Schedule III controlled substances); id. § 90-95(b)(2) (the distribution of a Schedule III controlled substance is a Class H felony); id. § 15A-1340.17 (the presumptive sentence for a Class H felony is a sentence of five to twenty months, depending on the defendant’s prior record).
This willingness to specifically tailor legislation for steroid distributors demonstrates that the state legislature is of the opinion that these specific provisions are necessary to combat the harm caused by these offenses.

In contrast, some states will simply impose mandatory minimum sentences for distribution offenses by treating anabolic steroids in the exact same manner as other controlled substances that are similarly scheduled. The following states follow such a system of punishment: Alabama, Colorado, Georgia, Illinois, Indiana, Kentucky, Missouri, Montana, Nebraska, and others.
Nevada,\textsuperscript{150} New Jersey,\textsuperscript{151} New York,\textsuperscript{152} Oklahoma,\textsuperscript{153} Tennessee,\textsuperscript{154} West Virginia,\textsuperscript{155} and Virginia.\textsuperscript{156}

\textsuperscript{148.} See \textit{Mont. Code Ann.} § 50-32-226(5) (2008) (noting anabolic steroids are classified as dangerous drugs and included in Schedule III of the controlled substances act); \textit{id.} § 45-9-101(4) ("A person convicted of criminal distribution of dangerous drugs [included in Schedule III who does not have a prior conviction for criminal distribution of such a drug] shall be imprisoned in the state prison for a term of not less than 1 year or more than life . . . ").

\textsuperscript{149.} See \textit{Neb. Rev. Stat. Ann.} § 28-405 (LexisNexis 2008) (stating anabolic steroids are classified as Schedule III controlled substances); \textit{id.} § 28-416(2) (distribution of a Schedule III substance is a Class III felony); \textit{id.} § 28-105(1) (sentence for a Class III felony is a minimum of one year in prison with a maximum of twenty years in prison).

\textsuperscript{150.} See \textit{Nev. Admin. Code} § 453.530(9) (2008) (declaring anabolic steroids are classified as schedule III controlled substances); \textit{Nev. Rev. Stat. Ann.} § 453.321(4)(a) (West 2008) (distribution of a schedule III substance is a category C felony); \textit{id.} § 193.130(2)(c) ("A category C felony is a felony for which a court shall sentence a convicted person to imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 5 years.").

\textsuperscript{151.} See \textit{N.J. Admin. Code} § 8:65-10.1(b) (2008) ("Any reference in this chapter to controlled dangerous substance Schedules I, II, III, IV and V shall mean the Federal schedules . . . ."); 21 C.F.R. § 1308.13(f) (2009) (anabolic steroids are classified as Schedule III controlled substances); \textit{N.J. Stat. Ann.} § 2C:35-5(a)(13) (West 2008) (distribution of a Schedule III controlled substance is a crime of the third degree); \textit{id.} § 2C:43-6(a)(3) ("In the case of a crime of the third degree, [a person who has been convicted of a crime may be sentenced to imprisonment] for a specific term of years which shall be fixed by the court and shall be between three years and five years.").

\textsuperscript{152.} See \textit{N.Y. Pub. Health Law} § 3306 (McKinney 2008) (indicating anabolic steroids are classified as a Schedule II controlled substance); \textit{N.Y. Penal Law} § 220.31 (McKinney 2008) ("A person is guilty of criminal sale of a controlled substance in the fifth degree when he knowingly and unlawfully sells a controlled substance. Criminal sale of a controlled substance in the fifth degree is a class D felony."); \textit{id.} § 70.00(2)(d), 3(b) ("For a class D felony, the term shall be fixed by the court, and shall not exceed seven years . . . [and] the minimum period shall be fixed by the court and specified in the sentence and shall be not less than one year nor more than one-third of the maximum term imposed."). The classification of anabolic steroids as a Schedule II controlled substance (as opposed to Schedule III in the vast majority of jurisdictions) shows that the New York legislature believed that steroids required the same heightened degree of control as opiates, methamphetamine, and morphine, which are all also included in Schedule II. \textit{id.} § 3306.

\textsuperscript{153.} See \textit{Okla. Stat. Ann.} tit. 63, § 2-208(A)(19) (West 2008) (noting anabolic steroids are classified as Schedule III controlled substances); \textit{id.} tit. 63, § 2-401(B)(2) ("[Any person who distributes a controlled dangerous substance classified in Schedule III], upon conviction, shall be guilty of a felony and shall be sentenced to a term of imprisonment for not less than two (2) years nor more than life . . . .").

\textsuperscript{154.} See \textit{Tenn. Code Ann.} § 39-17-410(f) (West 2008) (stating anabolic steroids are classified as Schedule III controlled substances); \textit{id.} § 39-17-417(d)(1) (distribution of a Schedule III controlled substance is a Class D felony); § 40-35-111(b)(4) (an offender found guilty of a Class D felony is subject to a minimum of two years up to a maximum of twelve years in prison). It should be remembered that despite the applicable punishments for the distribution of steroids, Tennessee has statutory mechanisms in place to alleviate some of the harshness of these sentences. \textit{See supra} text accompanying notes 89-91 (noting that Tennessee has implemented a diversion program for first-time offenders and that the state does not allow an inference of intent to distribute based on the quantity of anabolic steroids possessed).

\textsuperscript{155.} See \textit{W. Va. Code Ann.} § 60A-2-208(f) (West 2008) (establishing anabolic steroids are classified as Schedule III controlled substances); \textit{id.} § 60A-4-401(a)(ii) ("[Any person who distributes a controlled substance classified in Schedule III] is guilty of a felony and, upon conviction, may be imprisoned in the state correctional facility for not less than one year nor more than five years . . . .").
Despite not setting a mandatory minimum, other states will set very high maximum sentences for steroid distribution, thereby essentially giving the sentencing judge *carte blanche* to impose almost any sentence that he or she believes necessary to serve the dual goals of deterrence and retribution.\textsuperscript{157} Iowa,\textsuperscript{158} Louisiana,\textsuperscript{159} North Dakota,\textsuperscript{160} and Wyoming\textsuperscript{161} all allow a maximum sentence of ten years imprisonment for distribution offenses. While these states are obviously strict on drug offenses, Minnesota permits a maximum sentence of fifteen years\textsuperscript{162} and Mississippi permits a maximum sentence of twenty years.\textsuperscript{163}

The following table summarizes the punishment regimes in the states that take a strict approach to punishing the distribution of anabolic steroids:

\begin{table}[]
\begin{tabular}{|c|c|}
\hline
State & Maximum Sentence \\
\hline
Iowa & 10 years imprisonment \\
North Dakota & 15 years imprisonment \\
Wyoming & 10 years imprisonment \\
Mississippi & 20 years imprisonment \\
\hline
\end{tabular}
\end{table}

\textsuperscript{156} See VA. CODE ANN. § 18.2-248.5(A) (West 2008). Although, it should be noted that the statutory language specifically gives the court or jury the discretion to deviate below the mandatory sentence imposed. See id.

\textsuperscript{157} See Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 924 (2007) (emphasizing the primary goal of the public criminal justice system in modern society is to be retributive in nature, as well as provide an element of deterrence to potential criminals).

\textsuperscript{158} See IOWA CODE ANN. § 124.208(6) (West 2008) (indicating anabolic steroids are classified as Schedule III controlled substances); id. § 124.401(c) (distribution of a controlled substance is a class “C” felony); id. § 902.9(4) (“A class ‘C’ felon, not an habitual offender, shall be confined for no more than ten years . . . .”).

\textsuperscript{159} See LA. REV. STAT. ANN. § 40:964 (2008) (noting anabolic steroids are classified as Schedule III controlled substances); id. § 40:968(B) (“Any person who [distributes] any controlled dangerous substance classified in Schedule III shall be sentenced to a term of imprisonment at hard labor for not more than ten years . . . .”).

\textsuperscript{160} See N.D. CENT. CODE § 19-03.1-09(7) (2008) (stating anabolic steroids are classified as schedule III controlled substances); id. § 19-03.1-23(1)(b) (distribution of a schedule III controlled substance is a Class B felony); id. § 12.1-32-01(3) (an offender found guilty of a Class B felony is subject to a maximum sentence of ten years in prison).

\textsuperscript{161} See WYO. STAT. ANN. § 35-7-1018(g) (2008) (establishing anabolic steroids are classified as Schedule III controlled substances); id. § 35-7-1031(a)(ii) (“An offender found guilty of distributing a controlled substance classified in Schedule III is guilty of a crime and upon conviction may be imprisoned for not more than ten (10) years . . . .”).

\textsuperscript{162} See MINN. STAT. ANN. § 152.02, subdiv. 4(6) (West 2008) (noting anabolic steroids are classified as Schedule III controlled substances); id. § 152.024, subdiv. 1(1), subdiv. 3(a) (distribution of a Schedule III controlled substance is a crime of the fourth degree and is punishable by up to fifteen years imprisonment).

\textsuperscript{163} See MISS. CODE ANN. § 41-29-117(A)(f) (West 2008) (stating anabolic steroids are classified as Schedule III controlled substances); id. § 41-29-139(b)(4) (distribution of a Schedule III controlled substance is punishable by up to twenty years imprisonment).
PUNISHMENT | NUMBER OF STATES | SPECIFIC STATES
--- | --- | ---
Mandatory Minimum Sentence or Presumptive Sentence of Six Months or Longer. | 25 | AL, AZ, AR, CA, CO, GA, HI, IL, IN, KS, KY, MO, MT, NE, NV, NJ, NM, NY, NC, OH, OK, TN, TX, WV, & VA
Maximum Sentence of Ten Years or Longer. | 19 | AL, AZ, AR, GA, HI, IN, IA, LA, MN, MS, MO, MT, NE, ND, OK, TN, TX, VA, & WY
Total | 31 |  

4. Summary

The community view of the gravity of steroid distribution is readily discernable when one notes that all but four states have at the very least opted to employ a moderate punishment regime to combat the distribution of steroids with the majority of them favoring strict punishments. The following table summarizes all of the approaches taken by the different states:

<table>
<thead>
<tr>
<th>PUNISHMENT:</th>
<th>NUMBER OF STATES:</th>
<th>SPECIFIC STATES:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lenient</td>
<td>4</td>
<td>MA, ME, MI &amp; VT</td>
</tr>
<tr>
<td>Moderate</td>
<td>16</td>
<td>AK, CT, DE, DC, FL, ID, MD, NH, OR, PA, RI, SC, SD, UT, WA, &amp; WI</td>
</tr>
<tr>
<td>Strict</td>
<td>31</td>
<td>AL, AR, AZ, CA, CO, GA, HI, IA, IL, IN, KS, KY, LA, MN, MS, MO, MT, NE, NV, NJ, NM, NY, NC, ND, OH, OK, TN, TX, WV, WY, &amp; VA</td>
</tr>
</tbody>
</table>

164. This depends on the defendant’s prior record, but the presumptive range is between five and twenty months. See supra note 138.

165. This number reflects some double counting as Alabama, Arizona, Arkansas, Georgia, Hawaii, Indiana, Missouri, Montana, Nebraska, Oklahoma, Tennessee, Texas, and Virginia were all previously counted with the states imposing mandatory minimum or presumptive sentences of six months or longer. As such, there are actually only six states that had not been previously counted included in this number: Iowa, Louisiana, Minnesota, Mississippi, North Dakota, and Wyoming.

166. As long as the defendant sold greater than twenty-eight grams of steroids, he or she will be subject to a maximum sentence of between twenty years and ninety-nine years or life imprisonment, depending on the total quantity sold. See supra note 124. If, however, the defendant sold less than twenty-eight grams of steroids, he or she will be subject to a maximum sentence of two years imprisonment. See supra note 124.
It is helpful to draw a comparison between these statutory regimes and the current punishments under the Sentencing Guidelines. In making this comparison as accurate as possible, it is necessary to assume that the punishment will apply to a hypothetical offender with no criminal record because the statutory punishments previously documented were based on the perpetrator being a first-time offender. With that in mind, a first-time offender (i.e., one with a criminal history category of 0) with a base offense level of twenty would be subject to a guideline range of between thirty-three and forty-one months. Using this range as a baseline, it is immediately apparent that the majority of states provide for greater punishment than those suggested by the Guidelines. For example, even the sixteen states that have been classified as “moderate” allow for maximum punishments of five to seven years, much higher than the federal guideline range for the same conduct. Additionally, the nineteen states that impose maximum sentences of ten years or longer clearly support punishments that are well above that proposed by the Guidelines. Moreover, assuming that a quantity greater than 40,000 dosage units was distributed, then Arkansas, Hawaii, and Texas would all impose sentences well above the guideline range. Regardless of quantity, New Jersey provides for minimum sentences that are above the low end of the “advisory” guideline range, and Arizona, Indiana, and Missouri all mandate minimum or presumptive sentences that are above the high end of the guideline range.

In sum, the overwhelming majority of the states take a strict approach to punishing steroid distributors, which demonstrates the opinion of the “community” as to these offenses. Moreover, an analysis of these various

168. See supra notes 97-114.
169. See supra note 165.
170. See supra text accompanying note 123 (punishing steroid distributors who sell more than four hundred grams of steroids with a mandatory minimum sentence of fifteen years imprisonment).
171. See supra text accompanying notes 127-28 (punishing steroid distributors who sell more than twenty-five capsules or one eighth of an ounce of steroids with a mandatory minimum sentence of twenty years).
172. See supra note 124 (punishing steroid distributors who sell more than four hundred grams of steroids with a mandatory minimum sentence of ten years imprisonment).
173. See supra note 151 (punishing steroid distributors with a mandatory minimum sentence of three years).
175. See supra text accompanying notes 131-33 (punishing steroid distributors with a mandatory minimum sentence of four years imprisonment and a presumptive sentence of five years imprisonment).
176. See supra note 145 (punishing steroid distributors with a mandatory minimum sentence of six years imprisonment).
177. See supra note 147 (punishing steroid distributors with a mandatory minimum sentence of five years imprisonment).
178. See supra text accompanying notes 68-71.
punishment regimes also shows that the majority of the state statutes actually provide punishments for steroid distribution that are much more severe than those imposed in the federal courts adhering to the Sentencing Guidelines. Ultimately, the prevailing community view, as evidenced by the various state statutes, favors harsher punishments and should counsel the Sentencing Commission towards increasing the base offense classification for large-scale steroid distribution.

C. Public Concern Generated by the Offense

Another factor that the Sentencing Commission was directed to consider was the “public concern generated by the offense.” As Congress explained, “[I]f there were a substantial increase in the rate of commission of a very serious crime, the public concern generated by that increase might cause the Commission to conclude that the guideline sentences for the offense should be increased.” This can be broken down into two different analyses: (1) the rate of commission of the offense; and (2) the seriousness of the offense. Thus, the first issue to consider is whether there has been an increase in the incidence of steroid distribution.

1. Current Incidence of Steroid Abuse and Distribution Among Young Adults

There have been a multitude of studies over the years that have tended to show that an alarmingly high percentage of high school students have used steroids. For example, one study conducted by the Center for Disease Control (CDC) concluded that the percentage of students who admitted to lifetime steroid use increased from 2.1% in 1991 to 6.1% in 2003. However, that same study further determined that the percentage decreased to 4.0% between 2003 and 2005. Yet, a more telling aspect of the CDC study is the breakdown of steroid usage by grade. The study found that while only 3.3% of the twelfth-
graders surveyed in 2005 admitted to having used steroids once in their lifetimes, 4.8% of the ninth-grade students made the same admission.185

Regardless of how this trend is interpreted, it is rather disturbing that the youngest students are reporting the greatest percentage of usage. One could convincingly argue that this is an indicator of current sentiments towards steroids (i.e., an increased willingness to use these substances) and that those sentiments can serve as a predictor of the future behavior of our current crop of children. Also, the fact that younger people are reporting a higher percentage of steroid use is troubling because the younger (and therefore less physically developed) the user, the more dangerous the drugs are to the user’s long-term well-being.186

As such, based on these numbers at least, it would appear that steroid usage is a problem that is not going away any time soon.

Yet, contrary to the findings of the CDC, there are other studies that support the argument that steroid abuse among young adults poses a far less serious problem. A study undertaken by the National Institute on Drug Abuse (NIDA), for example, seemingly undercuts the findings of the CDC as it found that only 2.6% of high school seniors admitted to having used steroids in their lifetimes (compared to the 3.3% found by the CDC).187 Additionally, the University of Michigan’s “Monitoring the Future” drug survey uncovered statistics similar to those of the NIDA by finding that the annual prevalence rate of steroid abuse in twelfth-graders was roughly 2.3% as of 2007.188

Despite the reputability of the entities conducting all of these studies, there are often flaws in the methodologies employed. One criticism of steroid usage studies is that children and young adults were often uncertain of whether they had actually taken a substance that was properly classified as a “steroid,” which has a tendency to inflate the incidence rate.189 On the other hand, people may not be entirely forthright when asked about their prior drug usage, and this may tend to skew the numbers downward.

Nonetheless, regardless of any disparity in the results of the various studies or flaws in their respective methodologies, the numbers still indicate that steroids pose a quantifiable threat to the health and well-being of many teenagers. Even using the low-ball estimate of steroid use as determined by the University of

185. See id. This number fluctuated from 5.8% in 2001, to 7.1% in 2003, and then to 4.8% in 2005. Id.
186. See infra note 207 and accompanying text.
187. Anabolic Steroid Statistics, supra note 184. Another helpful comparison is that the NIDA study found that only 2.0% of tenth-graders admitted to steroid use in 2005, while the CDC found that the number was substantially higher (3.9%). See Anabolic Steroid Statistics, supra note 184.
189. See, e.g., Shaun Assael, High School Testing Loses Momentum, EPSN The Mag., Mar. 5, 2009, available at http://sports.espn.go.com/espn/otl/news/story?id=3951039 (“If you ask a kid if he smoked marijuana, he’d know whether the answer was ‘yes’ or ‘no.’ But to kids, the word ‘steroid’ is ambiguous. A teenager might say, ‘My doctor gave me steroids for my poison ivy. I’ll answer yes.’” (quoting Dr. Harrison Pope of McLean Hospital in Boston)).
Michigan (2.3%), the estimate of the scope of steroid usage among young adults in the United States is still staggering. As of July 1, 2006, the United States Census Bureau estimated that there are 21,274,583 high-school aged students (i.e., individuals between the ages of fifteen and nineteen) in the United States. Assuming that 2.3% of those students will use steroids at some point in their high school careers, we can then estimate that almost half of a million teenagers will be exposed to these substances before they graduate from high school. A corollary of this finding is that someone must provide these students with steroids in the first place, which necessarily means that the incidence of distribution must coincide with the incidence of usage. Therefore, it is apparent that there is significant incidence of steroid distribution to warrant action by the Sentencing Commission.

2. Seriousness of Steroid Distribution

Given that there is substantial incidence of steroid distribution, one must then consider whether this is a “very serious crime” capable of generating public concern. With the understanding that the seriousness of an offense is a function of the degree of harm caused, the scope of that harm must be calculated. As with all drugs, the harm caused by anabolic steroids can be readily seen when one looks to the adverse effects that they have on the body and mind of the user. Thus, to truly appreciate the scope of the harm caused by the distribution of steroids, it is necessary to document the damage incurred by the user.

Some of the short-term damage inflicted by steroids is obvious to the trained eye. For example, steroid users will often experience bad acne, jaundice, and fluid retention (i.e., swelling) in the muscles. Then, there are short-term effects that are not readily observable, such as increases in bad cholesterol and decreases in good cholesterol. Moreover, users will often suffer from psychological effects that may be noticeable by their friends and family, such as

192. Moreover, if the demand for these drugs (as reflected by the incidence rates) remains high, their sale will continue to be highly profitable and will therefore necessitate increased punishments to provide adequate deterrence. See infra Part II.D.
194. There are temporary effects that occur while the user is actually using the substances (similar to what a drug user experiences while “high”), which I will hereinafter refer to as short-term effects. Then, there are the permanent long-term physical effects that are suffered after the user has finished taking the substance.
mood swings and increases in hostility and aggressive behavior.\textsuperscript{197} In men, the drugs can also cause temporary shrinkage in the testes, a reduced sperm count, and lower reproductive capacity.\textsuperscript{198}

As for the long-term cosmetic side effects, steroid abuse can lead to a number of irreversible physical abnormalities.\textsuperscript{199} For one thing, steroids can cause the user to suffer permanent loss of scalp hair\textsuperscript{200} and can also cause male users to grow breasts and female users to grow facial hair.\textsuperscript{201} There is also the possibility of permanent voice deepening for female users.\textsuperscript{202}

While the user may find these cosmetic side effects to be extremely unpleasant, the true severity of the long-term consequences of steroid abuse are most evident when one looks to the damage that these substances inflict upon the user’s critical body systems. For example, there has been a documented correlation between the use of anabolic steroids and problems with the user’s cardiovascular system and other internal organs.\textsuperscript{203} Steroid usage has also been linked to incidences of heart attacks and strokes, even in users under the age of thirty.\textsuperscript{204} Other cardiovascular disorders that have been attributed to steroid abuse include increases in the risk of hypertension and arteriosclerosis.\textsuperscript{205} There is even the possibility that steroid users will develop liver tumors and cysts capable of rupturing and causing internal bleeding.\textsuperscript{206}

Abusing steroids takes a tremendous toll on the body of the user. While this damage is very serious in adults, it is compounded exponentially when teenagers abuse these substances, as their bodies have not yet fully developed.\textsuperscript{207} These health consequences can be life threatening or at the very least lead to a substantially decreased quality of life. Moreover, steroid use has been linked to

\begin{enumerate}
\item See Office of Diversion Control, \textit{supra} note 195. Cases of suicide have even been found to have been caused by the mood swings attributable to anabolic steroids. See \textit{infra} text accompanying notes 210-11.
\item NIDA Mind Over Matter, \textit{supra} note 198.
\item NIDA Research Report Series, \textit{supra} note 199.
\item See NIDA Research Report Series, \textit{supra} note 199.
\item NIDA Research Report Series, \textit{supra} note 199: see also Steroid Statistics, \textit{supra} note 182.
\item See Steroid Statistics, \textit{supra} note 182.
\item See NIDA Research Report Series, \textit{supra} note 199.
\item See, e.g., Focus Adolescent Services: Teens and Steroids, http://www.focusas.com/Steroids.html (last visited Jan 21, 2010) (noting that steroid abuse can lead to “premature termination of the adolescent growth spurt, so that for the rest of their lives, abusers remain shorter than they would have been without the drugs”).
\end{enumerate}
homicide and suicide.\textsuperscript{208} For all of these reasons, it is apparent that there is a
great deal of harm caused by the distribution of these substances, especially to
young adults. Consequently, the distribution of steroids should be regarded as a
very serious offense by the Sentencing Commission and punished accordingly.

3. Manifestations of Public Concern

After having established that the distribution of anabolic steroids is a serious
crime with a substantial rate of incidence within the United States, it is evident
that this offense is capable of generating public concern. However, not only is it
capable of doing so, but there has already been public concern \textit{actually}
raised because of the use of steroids among high school students and young adults.
This concern has been voiced through the news media, popular fictional
programming, and the political arena.

While there has not necessarily been public outcry in the news media
regarding the distribution of anabolic steroids, the abuse of these substances by
high school students and young people \textit{in general} is an issue that has generated
significant concern.\textsuperscript{209} One of the most disturbing stories involved a college
student who committed suicide after he stopped taking steroids.\textsuperscript{210} Doctors
attributed his suicidal impulses to the hormonal mood swings that users will
often suffer when they complete a cycle of steroid ingestion or simply cease
using the drugs all together.\textsuperscript{211} There also has been repeated news coverage of
high school athletes who were caught taking steroids to enhance their on-the-
field performance.\textsuperscript{212} This media attention paid to steroid abuse by young adults
has generated concern from parents and also has led to much finger-pointing

\textsuperscript{208}. See, e.g., Toure, \textit{Damn Yankees}, N.Y. \textit{TIMES}, July 26, 2009, at BR8, available at
the main reason steroids cannot be allowed to proliferate, is that they are killers. Steroids can lead
to several forms of cancer, heart attacks, liver disease, even homicide and suicide.”).

08-sports-weekly-steroids-report_x.htm (“Congress went on to hear from commissioners of the
major sports, pro athletes, medical specialists and labor representatives, and the No. 1 concern
expressed was steroid use by young athletes.”).

\textsuperscript{210}. See Duff Wilson, \textit{After a Young Athlete’s Suicide, Steroids Are Called the Culprit}, N.Y.

\textsuperscript{211}. See id. (“[T]he family, their doctor and their friends think that [the victim] fell into an
abyss [of depression] from having suddenly stopped using steroids.”). Cf. Thayer Evans &
(notting that “[d]epression and suicide are symptoms of steroid withdrawal”).

\textsuperscript{212}. See, e.g., Jere Longman, \textit{High Schools Take on Doping With No Consensus on Strategy},
N.Y. \textit{TIMES}, Nov. 28, 2008, at B8, (“In an investigation that has identified about 100 suspected
steroid users and 15 dealers in the county, 10 people have been arrested, including two former high
school football players . . . .”); Avi Salzman, \textit{Daniel Hand Students Caught With Steroids}, N.Y.
\textit{TIMES}, Mar. 13, 2005, at 14CN7 (“Five students from Daniel Hand [High School] in Madison,
three of whom were members of the football team[,] were arrested on Tuesday and charged with
possessing steroids . . . .”).
directed at the steroid-abusing athletes considered by many to be role models for our country’s youth.213

In addition to news coverage that has focused on steroid abuse amongst young adults, popular fictional television programs have been used as pulpits to tackle the issue. For example, “Friday Night Lights,” one of NBC’s marquee programs, vividly depicted the consequences of steroid abuse by high school athletes.214 In the show, one of the main characters, a star football player, turns to steroids in the hopes of improving his performance and thus increasing his chances of earning a college scholarship.215 Predictably, to teach the viewers a lesson, the player’s plan backfires when his mother and coach learn about it.216 In the end, he acknowledges his mistake and understands the danger and stupidity of his plan.217

Academics have argued that the “mass media are more likely to reflect and reinforce attitudes and opinions rather than to change them.”218 Thus, despite the fact that shows like “Friday Night Lights” are merely fictional programming, the prevalence of steroid-related issues in these sorts of television programs demonstrates that steroid abuse is a subject that is on the minds of many Americans. For those who are unaware of the ubiquitous nature of steroid abuse, the exposure that these programs receive allows for a wide-ranging audience to see the dangers of these substances and to recognize the need to be cognizant of what is taking place in our communities.219

Perhaps prompted by the negative portrayal of steroids in the mass media, political leaders have also addressed the epidemic of steroid abuse in our society. Notably, in his 2004 State of the Union address, former president George W. Bush “exhort[ed] Americans ‘to get tough and to get rid of steroids now’ as part of his call for additional funding for testing for illegal drugs in the nation’s schools.”220 This concern led states around the country to propose and implement policies mandating random steroid testing in high schools.221

213. See, e.g., George Vecsey, Parents Feel Betrayed by Role Models, N.Y. TIMES, Feb. 10, 2008, at SP10 (quoting Frank Marrero, father of Efrain Marrero, whose suicide was attributed to steroids: “My son watched [Mark McGwire] and Barry Bonds as role models. I felt so violated. He’s here denying everything, and my son is dead and buried.”).


215. See id.


217. See id.


220. Assael, supra note 189.

221. States Consider High School Steroid Testing, supra note 11.
Jersey, Florida, Illinois, and Texas have all implemented steroid testing policies, although their effectiveness is questionable. The existence of these policies shows that state legislators were well aware of the problem and acted in a manner that they believed (albeit incorrectly) would solve it.

4. Summary

The incidence of steroid abuse, while not necessarily increasing at a dramatic rate, is of such magnitude that it cannot be ignored. The seriousness of the offense is easily discernable when one looks to the harm caused by the abuse of steroids. Furthermore, there has been significant public outcry about steroid use. Consequently, the Sentencing Commission should strongly consider the concern generated by the incidence of this very serious crime when deciding whether to amend the Sentencing Guidelines.

D. The Deterrent Effect of Current Sentences

The Sentencing Commission must consider “the deterrent effect [that] a particular sentence may have on the commission of the offense by others.” The Senate Report noted that there are some offenses that might be more easily deterred than others, which should be reflected in the Guidelines.

As such, assuming that the current base offense level for distribution of steroids is low, the first question is whether it is low because this sort of conduct is more easily deterred than other drug-related offenses. If this were so, the current sentencing regime would be sufficient to “prevent similar criminal acts from being committed by others by instilling in them a fear of unpleasant consequences.” As such, testing the sufficiency of this regime requires consideration of the concept of “marginal deterrence, which postulates that an additional quantum of punishment can lead to a measurable decrease in a particular crime.”

223. See id. (“New Jersey State Senate President Richard Codey said he knew something should be done in 2005 when his basketball-playing sons — then in high school and college — told him they were aware of peers who used steroids.”).
227. DEMLEITNER ET AL., supra note 21, at 12; see also Michael Tonry, Purposes and Functions of Sentencing, 34 CRIME & JUST. 1, 29-30 (2006) (“Having punishments scaled to the severity of offenses should provide rational incentives . . . to commit fewer rather than more serious crimes and . . . to reinforce basic social norms.”).
Ideally, a punishment regime should strive to achieve “optimal deterrence,” according to Gary Becker (winner of the Nobel Memorial Prize in Economic Sciences and Presidential Medal of Freedom), whereby “a wrongdoer’s expected costs equal . . . the wrongdoer’s expected benefits.” Becker further asserts that: “[E]xpected costs [are] a function of both the severity of the punishment potentially imposed on the wrongdoer and the probability of punishment.” So, before one can address the severity of the punishments imposed on distributors of steroids, the probability of actually facing such punishment must first be considered.

The possibility of actually being punished for distributing anabolic steroids is rather insubstantial. First, one of the only ways to effectively target distributors of a particular drug is to identify users and establish a link. Second, it is extremely difficult to determine which young people are actually using these substances. Specifically, even though steroid testing for high school athletes is in place, it is highly ineffective. Furthermore, there is no steroid testing for non-athletes. With the absence of a method of uncovering steroid abuse, this use will remain hidden, and as a byproduct of that, distributors will continue to operate with relative anonymity.

Further contributing to the low probability of being caught distributing steroids is the nature of the business in general. The majority of steroid-related transactions take place on the Internet, as opposed to the distribution of other drugs, which involve face-to-face interaction. This allows for distributors to further protect their anonymity by utilizing encryption software and other anonymizers to avoid detection by law enforcement. Lastly, the

230. Id.
233. See Fox, supra note 232; Mulvihill, supra note 222 (“New Jersey, Florida, Texas and Illinois have tried steroid testing since 2006, and an examination of the results by The Associated Press shows that only 20 tests out of 30,799 have come back positive.”).
234. See supra note 15 and accompanying text.
235. See Interview, supra note 119; see also Collins, supra note 119, at 23.
236. See Interview, supra note 119; see also Collins, supra note 119, at 23 (“American consumers [may] order online, usually from foreign sources, and have the drugs delivered by international mail or express carrier.”).
237. See Interview, supra note 119; see also Prescription Drug Abuse: What is being done to address this new drug epidemic?: Hearing Before the Subcomm. on Criminal Justice, Drug Policy,
drugs are shipped through the mail with an inaccurate return address or no return address at all, so even if law-enforcement personnel were able to actually confiscate the shipment (either in transit or once it was received), tracking the shipment back to its origin is virtually impossible.\(^{238}\)

This lack of visibility dramatically decreases the probability that distributors will be punished for their crimes and thus reduces the individual calculations of the “cost” of their illegal activity. As a result, unless the punishment imposed upon distributors is disproportionately higher than the benefit of selling steroids, this low probability of enforcement will prevent current sentences from adequately deterring future conduct.\(^{239}\)

On the other hand, steroid-related offenses such as simple possession and minor distribution are theoretically easy to deter if one assumes that users perceive minimal benefit from physical growth, improved athletic ability or small pecuniary gain. If so, the risk of prison time would apparently dwarf the negligible benefit that would accrue to the violator. In contrast, however, it is all but impossible to assert that assigning a base offense level of twenty (i.e., at most a sentence of between seventy and eighty-seven months)\(^ {240}\) to a major distributor is going to serve as much of a deterrent because mass distribution is such a highly lucrative enterprise, which is one of the primary reasons why the “War on Drugs” has posed such a seemingly insurmountable obstacle for law-enforcement personnel.\(^ {241}\)

Steroids are no different from other drugs in this regard, as their distribution can reap tremendous financial benefits for the dealer. The financial incentive to sell steroids may be even greater than with other illegal drugs because of the high “street” (i.e., market) value of these substances in relation to the relatively low cost of the raw materials, which can be procured with relative ease over the Internet.\(^ {242}\) Also, because steroids are often times mixed with liquid prior to sale (so that they may be injected by the user), more finished product can be made with fewer raw materials.\(^ {243}\) This allows dealers to charge a higher premium for a smaller amount of raw product, leading to higher profit margins for the sale of steroids as compared to other drugs with a lower market value and a higher

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238. See Interview, supra note 119; see also Liang and Mackey, supra note 237, at 150-51.
239. See supra text accompanying notes 231-33.
240. See supra notes 23-24 and accompanying text.
241. Cf. Neal Kumar Katyal, Deterrence’s Difficulty, 95 MICH. L. REV. 2385, 2428 (1996) (“Criminalization of some activities, such as drug dealing, results in an increased benefit to drug dealers—a higher price—that creates an opportunity for true profit.”).
242. See Interview, supra note 119; see also Hearing, supra note 237.
243. See Interview, supra note 119; see also Collins, supra note 119, at 23.
wholesale cost of the product itself. Consequently, because of this high level of profitability, mass distribution of steroids is not so easily deterred that it merits severe punishment.

Additionally the Senate Report explained that an increase in the incidence of a particular offense might be grounds for an increase in the Guidelines in order to deter others from committing that offense. As previously noted, although various studies have reached different results, they indicate that there is a serious problem with steroid abuse among young people.

Because the sale of steroids, like all drugs, is a highly profitable business venture, it requires increased punishment in order to alter the balance of the risk-versus-reward calculus. The current base offense level is far too low to adequately deter a significant distributor, especially in light of the low probability of being apprehended. Moreover, because of the fact that large numbers of young people are using these dangerous substances, developing a means of deterring this behavior is all the more imperative. Therefore, the Sentencing Commission should factor the need for increased deterrence of these offenses into its decision to amend the Sentencing Guidelines for the distribution of steroids.

III. CONCLUSION

The use of anabolic steroids by young people is something that has taken place behind closed doors for years; but now, with the increased exposure that steroids have received as a result of abuse by star athletes, the issue has made its way to the forefront of media coverage. While Congress has recently altered the Controlled Substances Act to provide for higher penalties for the distribution of steroids, the United States Sentencing Commission should change the correlating Sentencing Guidelines for the following reasons. First, Congress has evinced its belief that the distribution of steroids is a serious offense and should be punished accordingly. Second, the majority of the states in the union impose stricter punishments upon individuals who distribute these substances than those suggested by the Sentencing Guidelines. Third, the rate of incidence of steroid abuse by young people and the magnitude of the harm inflicted upon steroid users has spurred public concern about steroid abuse (and as a by-product of that, steroid distribution). Fourth, the current base offense level classification for large-scale distribution is insufficient to deter this illegal activity due to the highly profitable nature of the business, the limited risk of

244. See Interview, supra note 119; see also Collins, supra note 119, at 23.
246. See supra Part II.C.1.
247. See supra notes 20-21 and accompanying text.
248. See supra Part II.A.
249. See supra Part II.B.
250. See supra Part II.C.
getting caught, the relatively minimal punishments imposed upon steroid distributors, and the high demand for steroids that is apparent from the high incidence of abuse within the United States.\textsuperscript{251}

Merely stating that a change is needed, however, still leaves unresolved the question of what specific variety of change should be implemented. The simplest answer would be to assign higher base offense levels to offenses involving distribution of more than 40,000 dosage units of steroids.\textsuperscript{252} Almost every other illegal drug included in the Sentencing Guidelines (e.g., heroin, cocaine, marihuana, methamphetamines, LSD, ketamine, etc.) has a maximum base offense level of thirty-eight (assuming that the offense would qualify as the highest level of distribution),\textsuperscript{253} which carries with it a sentence of between 235 months and life imprisonment, depending upon the offender’s criminal history.\textsuperscript{254} All of these offenses have different base offense levels (depending upon the quantity distributed) that culminate with the maximum offense level.\textsuperscript{255}

The easiest way of implementing a similar system for anabolic steroids would be to put them into the same graduations as ketamine (also a Schedule III controlled substance under the Controlled Substances Act), which, until 2007, was punished in the exact same manner as steroids. However, because Congress increased the maximum penalties applicable to the distribution of ketamine by classifying it as a “date-rape” drug, the Guidelines were amended, and ketamine now has a maximum base offense level of thirty-eight, rather than its previous maximum of twenty.\textsuperscript{256} The Guidelines applicable to anabolic steroids could be amended in a similar manner by doing nothing more than altering the language of the Drug Quantity Table so that instead of having the base offense level of twenty apply to “40,000 or more units of Schedule III substances (except ketamine)”\textsuperscript{257} it could apply to “40,000 dosage units or more of Schedule III substances (except anabolic steroids and ketamine).” Then all that would be needed to accomplish the amendment would be to add steroids to the currently established levels for ketamine. This simple alteration to the current Guidelines

\begin{itemize}
  \item \textsuperscript{251} See supra Part II.D.
  \item \textsuperscript{252} See supra text accompanying note 23.
  \item \textsuperscript{253} See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(1) (2008), available at http://www.ussc.gov/2008guid/2d1_1.htm.
  \item \textsuperscript{254} Id. at ch. 5, pt. A, sentencing tbl., available at http://www.ussc.gov/2008guid/5a_SenTab.htm.
  \item \textsuperscript{255} For example, marijuana distribution could have a base offense level of twenty if between forty and sixty kilograms are distributed, a base offense level of twenty-two if between sixty and eighty kilograms are distributed, and a base offense level of twenty-four if between eighty and one hundred kilograms are distributed all the way up to a maximum base offense level of thirty-eight if greater than 30,000 kilograms are distributed. See id. § 2D1.1(c)(1)-(10). A base offense level of thirty-eight carries with it a suggested sentence of between 235 months and life imprisonment. See id. at ch. 5, pt. A, sentencing tbl.
  \item \textsuperscript{257} U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(10) (2008), available at http://www.ussc.gov/2008guid/2d1_1.htm.
\end{itemize}
would allow for the adequate punishment of serious distributors of anabolic steroids.

On the other hand, some may conclude that even the most egregious distributor of anabolic steroids does not deserve a life sentence in a federal penitentiary.258 With that in mind, another solution would be to include anabolic steroids in the same levels as those now imposed for the distribution of hydrocodone (after the 2009 amendments to the Sentencing Guidelines).259 Instead of increasing to the absolute apex of the Drug Quantity Table, the maximum sentence allowed for hydrocodone distribution is a base offense level of thirty,260 which suggests a sentence of between 97 and 210 months (depending on the offender’s criminal history).261 While this is not nearly as severe as the treatment of ketamine and other controlled substances, it would, at the very least, necessitate increased punishment for these offenders.

Furthermore, more particularized analysis could show that anabolic steroids are less - or more - harmful than ketamine, which would justify devising Guidelines particularly calculated for anabolic steroids. While this would undoubtedly require more effort than simply lumping anabolic steroids and ketamine or hydrocodone together, it would provide for a more finely tuned punishment regime that could better serve the ambition of the Sentencing Guidelines by treating like offenses alike.262

Any of these proposed alterations would alleviate the disparity that exists in the current version of the Guidelines. In the end, however, it will be up to the Sentencing Commission to first recognize that there is a need for an amendment to the Sentencing Guidelines and to then select the most appropriate amendment. Regardless of which method it should choose, the time to act is now, and the onus will ultimately be on the Commission to augment the Sentencing Guidelines in such a way as to “further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.”263

258. See id. at ch. 5, pt. A, sentencing tbl. (A base level offense of 38 or higher carries with it a suggested sentence of between 235 months and life imprisonment.).
260. See id.
262. See supra text accompanying note 38.
# We Don’t Live Here Anymore: A Critical Analysis of Government Responses to the Foreclosure Crisis

Benjamin A. Bauer

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* Benjamin A. Bauer is a J.D. candidate for 2011 at Salmon P. Chase College of Law, Northern Kentucky University. He earned his B.S. in Business Administration from the University of Phoenix in 2007 and has worked in the real estate title industry since 2001, most recently as a small business owner providing closing and settlement services to attorneys and title companies in the Greater Cincinnati area.
I. INTRODUCTION

While there are no tales of breadlines and the unemployment rate is substantially less that it was during the Great Depression, times are tough for many Americans. Within the last two-and-a-half years, the stock market has fallen by over fifty percent, the housing market has nearly imploded as a result of large increases in mortgage foreclosures and the tightening of credit in what has been called “a perfect storm,” and the unemployment rate has broken the double digit mark and is likely to continue to rise. In 2008 alone, foreclosure activity increased by 81%, which equates to over 2.3 million mortgage loans being in “some state of foreclosure.” This reflects what many consider to be a nationwide foreclosure crisis. The high foreclosure rate, previously driven by the subprime mortgages of media infamy, has begun to spread to prime loans and “threatens to undermine the housing recovery.”

Examples of government efforts to provide relief for mortgagors during times of economic crisis in the United States extend back well past the Civil War.

2. Adam Shell, Was That the Bottom?, USA TODAY, Feb. 23, 2009, at 6A.
9. E.g., MALLACH, supra note 5, at 4.
10. Stephanie Armour, Foreclosure Crisis Bleeds into Prime Territory, Defaults Hit High-End Loans, USA TODAY, June 9, 2009, at 6A; MALLACH, supra note 5, at 5-7; see also Lind, supra note 3, at 254 (“In fact, there will be more foreclosures and more abandonment in 2009 than in 2008.”); Brad Heath, Lost Jobs Forcing More Out of Homes, Reach of Foreclosures Shows Scope of Crisis, USA TODAY, June 23, 2009, at 1A.
Historically, when mortgagors have defaulted on a large scale, state legislatures have responded, if at all, by implementing moratoria on foreclosures in an attempt to “grant[] time to mortgagors in which to catch their breath and adjust their financial situation,” and thereby forward the policy goals of protecting home ownership and avoiding the ripple effects that a large number of foreclosures has on the economy as a whole. Foreclosure moratoria were last enacted on a national scale during the 1930s in response to the Great Depression, commonly either by providing for a judicial stay of foreclosure proceedings or adding additional steps to the foreclosure process.

The crux of government mortgagor-relief efforts before and through the Great Depression generally did not rise above the state level. However, in 1938, the Federal National Mortgage Association (Fannie Mae) was established as a federal agency; just thirty years later it was privatized and Congress chartered the Federal Home Loan Mortgage Corporation (Freddie Mac). The purpose of these government-sponsored companies is to promote and stabilize U.S. mortgage lending: “Freddie Mac and Fannie Mae buy mortgages from lending institutions and then either hold them in investment portfolios or resell them as mortgage-backed securities to investors. The two companies play a vital role in providing financing for the housing markets.”

To that end, their size is incredible; by 1998, they had grown to the point of having “purchased and retained or guaranteed almost 74 percent of all the conventional/
conforming mortgages outstanding,” which equates to almost forty percent of the entire United States residential market. They have since continued to grow to the point where they now either own or guaranty roughly half of all residential mortgages in the United States.  

Although Fannie Mae and Freddie Mac have been privatized for most of the last four decades, in 2008 they were placed under direct control of the Federal Housing Finance Agency, a federal executive agency, after major accounting scandals at the companies necessitated a governmental bailout. The bailout and resulting federal conservatorship of the companies have allowed the federal government to respond to the current mortgage crisis in an unprecedented fashion. Rather than limiting the response to the crisis to passing legislation, which historically has been moratoria at the state level, the federal government has instead responded through Fannie Mae and Freddie Mac, which implemented self-imposed moratoria late in 2008. Several of the major lenders followed, also implementing self-imposed moratoria, and the effect was close to that of a federal moratorium—without actually having to enact any legislation.

The purpose of this article is to critically examine the effect of delaying the foreclosure process by the U.S. federal, state, and even local governments in an attempt to provide relief to mortgagors during times of economic crisis. In the current financial crisis, as during the Great Depression, proposals and calls for moratoria abound. But, now, just as then, “[t]he grave danger lies in the hasty adoption of proposals which are not bottomed on the experience of the past.” Therefore, a general understanding of past moratory legislation within the United

22. Id. at 15.
27. See Feller, supra note 11.
30. See examples provided infra Part II.B.
31. Feller, supra note 11, at 1065.
States is essential to the discussion of current mortgagor-relief efforts. Past examples can be used to develop a framework for proposing current solutions and, because a significant portion of past moratory legislation has been tested in the courts, as a basis for constructing current solutions in a manner likely to pass constitutional muster. This article will begin by establishing the historical context of mortgagor-relief legislation from the 1800s through the Great Depression and the Midwest farming crises of the 1980s, analyze current moratoria and mortgagor-relief efforts and conclude by attempting to examine the effects of these efforts, culminating with a proposal for relief based on these considerations.

II. HISTORICAL BACKGROUND

A moratorium is “a postponement of fulfillment of obligations decreed by the state through the medium of the courts or legislature.” Moratoria date back to antiquity, with one of the earliest examples being a provision in the Code of Hammurabi providing for the deferment of one’s debt obligations in the event of the failure of his harvest. Other examples occurred in Greek and Roman history, the Middle Ages, and during the Industrial Revolution. The last wide-scale imposition of moratory legislation occurred in the 1930s in response to the Great Depression, and state legislatures largely remained silent on the matter until the recession of the late 1980s and early 1990s.

The constitutional basis for U.S. moratory legislation rests in the power of the state to act to protect the public interest in response to a major emergency, usually a war or natural or economic disaster. A comparison of the factors that justified both the passage and renewal of moratory legislation in the past to current events is useful for determining whether an equivalent emergency exists today and, therefore, whether there is currently sufficient justification for moratory legislation notwithstanding the prohibitions set forth in the Contracts Clause of the U.S. Constitution, which prohibits states from passing laws that...
impair contractual obligations and has historically been the primary constitutional obstacle to U.S. moratory legislation.

A. Moratory Efforts of the 19th Century

A majority of early U.S. legislative moratoria, which were particularly common among southern states during the Civil War and the reconstruction period, were declared invalid by state courts, usually on the basis that they conflicted with the Contracts Clause. Most of these moratoria, whether upheld or not, were “blanket” efforts, meaning that they applied to all mortgages, regardless of type. Most took the form of one or a combination of the following: 1) an extension of the “redemption period,” which is the period in which a defaulting mortgagor can redeem the subject property; 2) a temporary stay of foreclosure actions; or 3) a temporary stay of the execution of foreclosure judgments. Although the decisions during this time were not uniform, moratoria of less than a year were more likely to survive constitutional scrutiny than lengthier efforts, foreshadowing the tempering constitutional limitations set forth by the Supreme Court in the 1930s.

B. Moratory Efforts During the Great Depression

The next major wave of moratory legislation occurred in the 1930s in response to the Great Depression. In addition to the moratoria and extended redemption periods of the previous century, legislative responses in the 1930s

41. See, e.g., Poteat, supra note 32; see also Feller, supra note 11, at 1067-74, (for a thorough, if dated, treatment of the origins of the constitutional basis for moratory legislation).
42. U.S. Const. art. I, § 10, cl. 1; Poteat, supra note 32, at 519; e.g. Taylor v. Stearns, 59 Va. (18 Gratt.) 244 (1868) (overturning 1865 act of Virginia General Assembly postponing foreclosure sales until January 1, 1868); see also cases cited infra note 47.
43. See Feller, supra note 11, at 1081-85.
44. See Holloway v. Sherman, 12 Iowa 282 (Iowa 1861) (upholding 1860 act providing for a nine month stay of all foreclosure actions); see also Von Baumbach v. Bade, 9 Wis. 559 (Wis. 1859) (upholding 1858 act providing for six-month stay of foreclosure sales).
45. See Blair v. Williams, 14 Ky. (4 Litt.) 34 (Ky. 1823) (overturning act creating two-year stay on all judgments if plaintiff refuses to accept a bank note from the Commonwealth or the Bank of Kentucky); Coffman v. Bank of Ky., 40 Miss. 29 (Miss. 1866) (overturning 1861 and 1865 acts that effectually closed the courts for two years); Garlington v. Priest, 13 Fla. 559 (Fla. 1869) (overturning 1861 act prohibiting all “sales under execution and judgments at common law or decrees in Chancery in this State” until a year after conclusion of the Civil War); State v. Carew, 47 S.C.L. (13 Rich.) 498 (S.C.Err. 1866) (overturning 1861 and 1865 acts proving for a temporary stay of all executions).
46. See infra, Part II.B.1.
47. See Powell on Real Property, supra note 12.
included other mechanisms for providing relief to struggling debtors such as the reduction of the size of deficiency judgments through the use of the fair market value of the collateral property rather than the foreclosure sale price as the basis for determining deficiency and limitations on the amount of time in which lenders could pursue deficiency judgments against mortgagors. Likewise, mortgagor relief efforts during the Great Depression differed from those of the 19th century in that they tended to shift away from blanket moratoria and instead either limited their application to certain situations, such as when a mortgagor continued to pay the interest and taxes due, or gave the courts discretion to extend relief depending on the particular circumstances of the mortgagor. Although some of these acts were overturned, the 1934 Supreme Court Blaisdell decision marked a shift toward the acceptance of legislative efforts to protect debtors in state courts.

1. The Blaisdell Decision

The issue in Blaisdell was the constitutionality of a 1933 Minnesota moratory statute that delayed foreclosure sales and extended redemption periods for foreclosed mortgagors, during which time no actions for deficiency judgments could be maintained. The case had been heard by the Minnesota Supreme Court, which had held that the police power of the state “was called into exercise by the public economic emergency” and, therefore, justified what would otherwise be prohibited as interference with contractual obligations under the Contracts Clause. The U.S. Supreme Court found that the statute did not significantly interfere with contractual mortgage obligations:

The statute does not impair the integrity of the mortgage indebtedness. The obligation for interest remains. The statute does not affect the validity of the sale or the right of a mortgagee-purchaser to title in fee, or his right to obtain a deficiency judgment, if the mortgagor fails to

51. Wheelock, supra note 50, at 574.
52. Id. Prior to the Great Depression, the term of mortgage loans tended to be less than half of the thirty-year mortgage loan commonly seen today, which means that statutory provisions requiring the payment of interest only would have provided a greater degree of relief than they would today. See CARYL A. YZENBAARD, RESIDENTIAL REAL ESTATE TRANSACTIONS § 4:8 (1991 & Supp. 2005).
53. Wheelock, supra note 50, at 574.
54. See cases cited supra note 47.
56. AMERICAN LAW OF PROPERTY, supra note 15.
58. Id. at 419-20.
redeem within the prescribed period. Aside from the extension of time, the other conditions of redemption are unaltered. While the mortgagor remains in possession, he must pay the rental value as that value has been determined, upon notice and hearing, by the court. The rental value so paid is devoted to the carrying of the property by the application of the required payments to taxes, insurance, and interest on the mortgage indebtedness. While the mortgagee-purchaser is debarred from actual possession, he has, so far as rental value is concerned, the equivalent of possession during the extended period.\textsuperscript{59}

To the extent the statute interfered with contractual obligations, the Court found that there was justification based on the state’s interest in responding to the economic emergency: “The economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts.”\textsuperscript{60} The Court held that the statute was a legitimate constitutional exercise of the state’s power on the basis that 1) an emergency existed that “furnished a proper occasion for the exercise of [its] power [] to protect the vital interests of the community,” 2) “the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society,” 3) the statutory relief was “of a character appropriate to [the] emergency,” 4) the conditions on which the relief was granted were reasonable, and 5) the legislation was temporary, being “limited to the exigency which called it forth.”\textsuperscript{61} It should be noted, however, that the decision has been criticized as ignoring the Constitution’s Takings Clause\textsuperscript{62} on the basis that a mortgagee’s interest is in fact a property right, and delaying the process by which that right is exercised serves to take a portion of it, for which compensation is due.\textsuperscript{63}

2. Moratory Legislation in Other States and in the Wake of Blaisdell

The Blaisdell decision came down in the midst of a flurry of state legislative action designed to provide relief to troubled mortgagors.\textsuperscript{64} A year earlier, in February, 1933, the Iowa legislature had passed the first major moratorium act of the Great Depression.\textsuperscript{65} Within a year and a half of the Iowa legislation, twenty-six states enacted moratoria, most of which were implemented immediately after the Iowa act.\textsuperscript{66} These statutes represent a wide variety of legislative relief options.\textsuperscript{67} Many states followed the lead of the Minnesota statute, extending the

\begin{itemize}
\item \textsuperscript{59} Id. at 425.
\item \textsuperscript{60} Id. at 437.
\item \textsuperscript{61} Id. at 444-47.
\item \textsuperscript{62} U.S. Const. amend. V.
\item \textsuperscript{64} American Law of Property, supra note 15.
\item \textsuperscript{65} American Law of Property, supra note 15.
\item \textsuperscript{66} American Law of Property, supra note 15.
\item \textsuperscript{67} American Law of Property, supra note 15.
\end{itemize}
length of the redemption periods that follow foreclosure sales and delaying when
deficiency judgments could be executed.\textsuperscript{68} Even more common was the
statutory postponement of the sale, either by granting power to the courts to stay
foreclosure proceedings or extending the time required for the various steps in
the foreclosure process.\textsuperscript{69} Efforts to provide relief to mortgagors in Wisconsin
were unique among those of the states at that time.\textsuperscript{70} They included a mandatory
mediation program,\textsuperscript{71} foreshadowing the modern emphasis on modification that
is at the heart of the response to the current foreclosure crisis.\textsuperscript{72}

The various legislative efforts during the Great Depression era were not
without judicial challenge.\textsuperscript{73} However, in the wake of Blaisdell, most of the
statutes were upheld.\textsuperscript{74} Based on the criteria set forth in Blaisdell, the statutes
were usually limited in duration, but as the economic crisis protracted they were
renewed to continue to provide relief to struggling mortgagors.\textsuperscript{75} As the country
began to escape from the grips of the Great Depression, the emergency basis for
the statutes dwindled.\textsuperscript{76} Some of the statutes expired on their own accord, others
expired when state legislatures declared the emergency had passed, and even
others ended when the courts determined that the emergency was over.\textsuperscript{77}

\textbf{C. Moratory Efforts of the 1980s}

Following the Great Depression, no moratory statutes were enacted until the
1980s,\textsuperscript{78} when Iowa enacted legislation in 1985 allowing its governor to declare
a moratorium during times of economic emergency, particularly for property
used for farming.\textsuperscript{79} In 1986, several other states followed Iowa’s lead: the
Kansas legislature enacted the Family Farm Rehabilitation Act,\textsuperscript{80} Oklahoma
enacted the Mortgage Foreclosure Moratorium Act,\textsuperscript{81} and the Minnesota
legislature enacted the Farmer-Lender Mediation Act.\textsuperscript{82} The acts were similar in
that they were all designed primarily to provide relief for owners of farm

\begin{itemize}
  \item\textsuperscript{68} American Law of Property, supra note 15; Poteat, supra note 32, at 526-27.
  \item\textsuperscript{69} American Law of Property, supra note 15; Wheelock, supra note 50, at 574.
  \item\textsuperscript{70} American Law of Property, supra note 15.
  \item\textsuperscript{71} American Law of Property, supra note 15.
  \item\textsuperscript{72} See examples of current efforts cited infra, Part III.
  \item\textsuperscript{73} American Law of Property, supra note 15.
  \item\textsuperscript{74} American Law of Property, supra note 15.
  \item\textsuperscript{75} American Law of Property, supra note 15; Powell on Real Property, supra note 12.
  \item\textsuperscript{76} American Law of Property, supra note 15.
  \item\textsuperscript{77} American Law of Property, supra note 15; Powell on Real Property, supra note 12.
  \item\textsuperscript{78} Powell on Real Property, supra note 12.
  \item\textsuperscript{79} Iowa Code § 654.15 (2008). See Frank J. Camp & Gregory S. Crespi, The Iowa
         Foreclosure Moratorium Law of 1983: A Preliminary Analysis and Proposed Changes, 35 Drake
         L. Rev. 545 (1986).
  \item\textsuperscript{80} Family Farm Rehabilitation Act, Kan. Stat. Ann. § 2-3401 (Supp. 1986) (declared
  \item\textsuperscript{81} 62 Okl. St. § 492 (1986) (declared unconstitutional by Fed. Land Bank of Wichita v.
         Story, 756 P.2d 588, 589 (Okla. 1988)).
  \item\textsuperscript{82} Minn. Stat. § 583.20 (2009).
\end{itemize}
property. The Kansas and Oklahoma acts were declared unconstitutional by their respective state supreme courts.

The Kansas act “authorize[d] the stay of enforcement of certain judgments relating to land and property used in farming operations and provide[d] for redemption of that land and property in certain cases . . . [that were] limited in scope to agricultural foreclosure or repossession actions wherein the defendant is a ‘farmer’ engaged in a ‘farming operation’ and is ‘insolvent.'”

The act was overturned by the Kansas Supreme Court the following year on the basis that it violated the Contracts Clause. After examining the relevant judicial precedent, the court determined that various provisions of the Act did not “provide sufficient protection for the mortgagee, and lack[ed] the ‘reasonable conditions’ contained in the debtor relief legislation upheld in Blaisdell.” The provisions - such as allowing the farmer to redeem the property for less than what was owed, allowing the farmer to redeem only a portion of the property, and modifying the interest rate during the stay period, - were significant departures from the constitutionally successful and more conservative legislative efforts of the Great Depression era.

The Oklahoma act was similarly held unconstitutional by its supreme court in 1988. After reviewing Blaisdell and its own response to the state’s 1933 moratorium act, the Oklahoma Supreme Court found that the 1986 act violated the Contracts Clause because it failed to “provide for judicial determination of whether the circumstances justify application of the moratorium” and did not “grant discretion to the trial court in determining the length of the continuance.” The court continued:

The Act fails to provide for the protection of the mortgagee by requiring the payment of taxes, interest, or fair market rental by the mortgagor during the continuance. The Act further fails to grant the trial court the power to prevent waste or otherwise protect the mortgagee during the period of delay. Stare decisis dictates that [the 1986 act is] unconstitutional on [its] face as a violation of the Contracts Clause under Federal and State Constitutions. The Act is a further violation of

83. See sources cited supra notes 79-82.
84. Bott, 732 P.2d at 718; Story, 756 P.2d at 589.
86. Id. at 718-19.
87. Id. at 717-18.
88. Id.
89. Story, 756 P.2d at 593.
90. Id. at 592.
Article II, § 6, of the Oklahoma Constitution for failure to provide a speedy and certain remedy for every wrong and injury without delay.91

The first of the 1980s farming moratoria was enacted by Iowa in May 1985.92 The statute provides that mortgagors in foreclosure “may apply for a continuance of the foreclosure action if the default or inability of the owner to pay or perform is mainly due or brought about by reason of drought, flood, heat, hail, storm, or other climatic conditions or by reason of the infestation of pests which affect the land in controversy,”93 and the governor had “declare[d] a state of economic emergency.”94 In October 1985, shortly after the moratorium statute was enacted, Iowa’s governor declared a state of emergency allowing qualifying owners of farm property to apply for continuances as per the provisions of the statute.95 Unlike the Kansas and Oklahoma moratoria, the Iowa legislation does not provide for judicial revision of the interest rate.96 Instead, it requires the mortgagor to continue to pay interest during the continuance,97 which is accomplished through the judicial appointment of a receiver, who manages the property, collects rents, and distributes the proceeds according to the provisions of the statute.98 In addition, the statute itself limited the continuance to a maximum of one year.99 These more restrictive provisions likely account for the constitutional survival of the Iowa statute, in contrast to the overturned Kansas and Oklahoma statutes.

The Minnesota Act required creditors to go through mediation proceedings with debtors prior to foreclosing on certain agricultural property.100 The Act also provided for a ninety-day stay of foreclosure proceedings once applicable mediation notices have been served upon the parties.101 Although the Act was initially set to expire in 1989, it has been extended regularly by the Minnesota legislature since then, generally in one- or two-year increments.102

In summary, the main thrust of legislative efforts to provide relief to mortgagors during times of economic crisis has generally been limited to delaying the foreclosure process in some way. Early moratoria often faced heavy opposition from the courts, which questioned their constitutionality in light of the Contracts Clause.103 Constitutional factors include the existence of

91. Story, 756 P.2d at 592.
92. IOWA CODE § 654.15 (2008); Camp & Crespi, supra note 79, at 545.
95. Camp & Crespi, supra note 79, at 545.
99. Id.
100. MINN. STAT. § 583.26 (2009).
101. Id.
102. MINN. STAT. § 583.20 (2009).
103. See Feller, supra note 11, at 1067-74; see also Poteat supra note 32, at 517-20.
an emergency to justify the implementation of the power of the state;\textsuperscript{104} the moratoria being limited to, at most, the duration of the emergency;\textsuperscript{105} and the degree to which the terms of the moratoria impair the interests of lenders.\textsuperscript{106} Moratoria of a shorter duration that included provisions such as requiring the mortgagor to continue to pay interest and property taxes have been more likely to survive constitutional scrutiny.\textsuperscript{107} The Supreme Court’s 1934 \textit{Blaisdell} decision provided an implicit nod of approval to the states, resulting in a large number of them moving forward with moratoria in response to the Great Depression.\textsuperscript{108} Even though the courts may now be more open to moratoria after \textit{Blaisdell}, the constitutional restraints nevertheless remain, as the overturning of the Kansas and Oklahoma moratoria in the 1980s illustrate.\textsuperscript{109}

\section*{III. \textsc{Current Moratory Efforts}}

The response to the current financial crisis differs from those of the past because relief efforts now focus heavily on the modification of loan terms,\textsuperscript{110} and the means of providing relief has changed to direct assistance rather than simply restricting actions of the lenders.\textsuperscript{111} The change comes from the industry dominance of the government-sponsored companies Fannie Mae and Freddie Mac,\textsuperscript{112} which did not exist during the Great Depression.\textsuperscript{113} Put simply, the 2008 federal bailout and conservatorship of Fannie Mae and Freddie Mac,\textsuperscript{114} which own or insure roughly half of all residential mortgage loans in the United States,\textsuperscript{115} has led to a shift toward direct assistance and loan modification.

\begin{thebibliography}{99}
\bibitem{104} Home Bldg. & Loan Ass’n v. Blaisdell, 290 U.S. 398, 437-439 (1934); \textit{American Law of Property}, supra note 15; Feller, supra note 11, at 1073-74.
\bibitem{105} \textit{Blaisdell}, 290 U.S. at 437-439; \textit{American Law of Property}, supra note 15; Feller, supra note 11, at 1071, 1074.
\bibitem{106} \textit{Blaisdell}, 290 U.S. at 424-425; 55 \textit{A.M.Jur. 2d Mortgages} § 827 (2009). Moratoria are usually limited by constitutional constraints to, at most, altering the remedy (foreclosure) for default; they cannot change the material terms of the mortgage contract, for example, by changing the interest rate or reducing the principal balance owed. \textit{See} Feller, supra note 11, at 1074; Poteat, supra note 32, at 519-20.
\bibitem{107} \textit{E.g.}, \textit{Blaisdell}, 290 U.S. at 424, 437-39; \textit{see} Feller, supra note 11; Poteat, supra note 32.
\bibitem{108} \textit{American Law of Property}, supra note 15; \textit{see} Poteat, supra note 32, at 522.
\bibitem{111} \textit{See infra} Part III.A.
\bibitem{112} \textit{See} \textit{Wallison & Ely}, supra note 21, at 1-2, 5-10.
\bibitem{113} “Fannie Mae was established as a federal agency in 1938, and was chartered by Congress in 1968 as a private shareholder-owned company.” \textit{About Fannie Mae}, \textit{http://www.fanniemae.com/kb/index/?page=home&kcid=aboutus} (last visited Jan. 21, 2010). “Freddie Mac . . . is a stockholder-owned corporation chartered by Congress in 1970 . . . .” \textit{About Freddie Mac}, \textit{http://www.freddiemac.com/corporate/about_freddie.html} (last visited Jan. 21, 2010).
\bibitem{114} Goldfarb, supra note 26.
\end{thebibliography}
States,\textsuperscript{115} has effectively put the federal government in the position of being the largest residential mortgage lender in the United States. Thus, by changing the foreclosure policies within Fannie Mae and Freddie Mac to temporarily halt their foreclosures and more actively pursue modifications,\textsuperscript{116} the federal government has been able to implement what largely equates to a federal moratorium without enacting any moratory legislation.

The Fannie Mae and Freddie Mac self-imposed moratoria only lasted for about five months, through early 2009,\textsuperscript{117} and modification efforts continue today.\textsuperscript{118} State responses, however, have been more along traditional lines—lengthening the foreclosure process in some way or implementing actual moratoria\textsuperscript{119}—and, as a result, have added additional time to the foreclosure process beyond that of the Fannie Mae and Freddie Mac moratoria. However, a major difference between current efforts and those of the past is the great emphasis placed on modification.\textsuperscript{120} At the forefront of the modification push is the City of Philadelphia, which has had a high success rate with a mediation program that it implemented early in the crisis and which has served as a model nationwide.\textsuperscript{121}

\textbf{A. Federal Efforts}

Although then-Senators Hillary Clinton and Barak Obama both called for a federal ninety-day moratorium during their 2008 presidential campaigns,\textsuperscript{122} no actual federal moratorium has been enacted in response to the current financial crisis, and key congressional leaders do not appear to support any such proposal.\textsuperscript{123} Some politicians have called for more severe responses, from New Jersey Governor Jon Corzine’s push for a six-month federal moratorium\textsuperscript{124} to a Maine Senatorial candidate’s campaign support for a five-year federal moratorium\textsuperscript{125}.

\begin{itemize}
  \item 116. See infra Part III.A.
  \item 117. See sources cited infra notes 133-34.
  \item 119. See infra Part III.B.
  \item 120. ADELINO ET AL., supra note 110, at 2. \textit{Compare} the moratory efforts during the Great Depression cited supra Part II.B, \textit{with} current efforts cited infra Parts III.A., III.B.
  \item 123. \textit{E.g.}, Stacey Kaper, \textit{Frank Seeks Conditions on Tarp Funds}, AM. BANKER, Jan. 8, 2009, at 20 (“[House Financial Services Committee Chairman] Rep. [Barney] Frank shook his head ‘no’ when asked if he was considering such a proposal himself.”).
\end{itemize}
moratorium. The Senate recently rejected a measure backed by Senator Dick Durbin that would have allowed judges to reduce, or “cram down,” the amount debtors in bankruptcy owed on their mortgages. The Senate recently rejected a measure backed by Senator Dick Durbin that would have allowed judges to reduce, or “cram down,” the amount debtors in bankruptcy owed on their mortgages.

The bulk of the federal government’s response to the current crisis turns on its control of Fannie Mae and Freddie Mac, which it placed into government conservatorship in September 2008, in the wake of major accounting scandals that necessitated a federal bailout of the companies. The daily operations of Fannie and Freddie are now under the supervision of the Federal Housing Finance Agency (FHFA), an independent federal agency created by the Housing and Economic Recovery Act of 2008. The companies own $5.4 trillion in mortgage assets and account for roughly eighty percent of U.S. mortgage originations. In fact, the potential negative impact from the failure of these mortgage giants was the major impetus behind the decision to bail them out rather than simply let them fail. The importance of the size of Fannie Mae and Freddie Mac cannot be understated: their actions have major impact across the entire U.S. mortgage industry, and, through the FHFA, the federal government now controls them.

The Obama administration has responded to the current financial crisis by attempting to encourage mortgage modifications through efforts such as the Making Home Affordable program, which “pay[s] servicers a few thousand dollars per loan they modify, depending on when they make the offer and how

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126. The measure was a controversial amendment that was part of the larger Helping Families Save Their Homes Act of 2009, which President Obama signed into law in May, 2009. Of note, the act encourages loan modifications by creating a safe harbor provision designed to limit the liability of mortgage servicers to underlying investors for losses stemming from modifications. STEPHEN S. KUDENHOLDT, Impact of the Homeowner Affordability and Stability Plan on Securitization Transactions, in NEW DEVELOPMENTS IN SECURITIZATION 2009 277, 280-82 (2009); Legislative Highlights, AM. BANKR. INST. J., June 2009, at 8; Helping Families Save Their Homes Act Of 2009, Publ. L. No. 111-22, 123 Stat. 1632 (2009); Janet Hook, Senate Rejects Homeowner Relief Measure, L.A. TIMES, May 1, 2009; Stacy Kaper, Battle Lines Form over Rate-Cap Legislation, AM. BANKER, June 2009, at 1.
127. Montgomery, supra note 115; Goldfarb, supra note 26.
132. Goldfarb, supra note 26; Pickert, supra note 19.
133. See WALLISON & ELY, supra note 21.
successful it is," and generally encourages lenders to pursue modifications. As part of the effort, Fannie Mae and Freddie Mac “have been called on to carry out large parts of the government’s plan to spur a housing recovery by modifying mortgages and taking anti-foreclosure steps.” In November 2008, two months after the companies were placed into government conservatorship, Fannie and Freddie implemented their own moratorium, which were ultimately extended through March 31, 2009. The extensions were primarily intended to provide time for homeowners to find alternatives to foreclosure, whether through the Making Home Affordable program modifications or otherwise. Several of the larger lenders followed their lead, including J. P. Morgan Chase & Co., Citigroup, Inc., and Bank of America Corp. “[T]he plan has led to offers of more than 190,000 mortgage modifications with lower monthly payments.”

Because of Fannie Mae and Freddie Mac’s size and the fact that the major mortgage lenders also participated, the effect was similar to a nation-wide moratorium, but without the need for any direct congressional action. Although some lenders have been slow to follow, the majority of U.S. lenders have participated in the program. The historically unique nature of this response should not go unnoticed—for the first time, the driving force behind U.S. mortgage-relief efforts came from executive actions of the federal government, not from state legislative restrictions on the foreclosure process.

138. Baldacci, supra note 8, at 29; Lee, supra note 28.
140. Baldacci, supra note 8, at 29; Renae Merle, Not Paying the Mortgage, Yet Stuck with the Keys, WASH. POST, June 24, 2009, at A01.
141. Baldacci, supra note 8, at 29; Heisel, supra note 29.
144. Compare the current federal response through Fannie Mae and Freddie Mac, with the state efforts during previous financial crises discussed supra, Part II.
Loan modifications have had drawbacks as well, paramount among which is the high default rate among participants. In a Fannie Mae program known as HomeSaver, which was launched in February 2008, and was a precursor to the Obama Administration’s Making Home Affordable program, the majority of participants who obtained modifications redefaulted on their loans within the first nine months of the program. A major obstacle is that homeowners often do not understand the modification process, and it can be difficult for them to comply with the various document requests required as part of the program. In addition, lenders have had trouble keeping up with the increase in modification requests, with lenders and servicers taking from forty-five to sixty days to respond and some reports of delays in excess of five months. Many of the modifications fail to actually reduce the monthly payments in any substantial manner. Modifications that do not reduce a borrower’s monthly payment are much more likely to fail.

When modifications fail, the Making Home Affordable program calls for lenders to accept short sales in lieu of foreclosures, a process in which a lender accepts less than what is owed on the loan provided that the mortgagor can sell the property. These programs present processing requirements similar to those of modifications and are, therefore, likewise prone to backlog. Another drawback is the negative financial impact that the moratoria and modifications will have on Fannie Mae, Freddie Mac, and the mortgage lenders,
at least in the short term, which will only serve to increase the federal—and, therefore, taxpayer—investment in their bailout.155

B. State and Local Efforts

State and local responses to the mortgage crisis began well before the self-imposed Fannie Mae and Freddie Mac moratoria of late 2008156 and have continued since their expiration at the end of March.157 State mortgagor-relief efforts have generally taken the form of a combination of one or more of the following: 1) lengthening the foreclosure process itself, whether directly or through the imposition of additional requirements; 2) requiring mediation before the foreclosure process can be completed; or 3) enacting foreclosure moratoria. These responses all delay the foreclosure process in some way and, notably, also tend to promote modifications in lieu of foreclosing.

1. Lengthening the Foreclosure Process

State responses that have lengthened the foreclosure process have done so either by implementing additional notice requirements or by extending the length of time that lenders must wait after default before moving forward with foreclosure. For example, California’s first major legislative response to the foreclosure crisis came in 2008 when it extended its foreclosure process by requiring lenders to make diligent efforts to contact defaulting homeowners to discuss their financial situation and alternatives to foreclosure, after which lenders must wait thirty days before moving forward with foreclosure.158 In the short term, the bill reduced the number of notices of default and notices of trustee sale filings while the lenders caught up with the new requirements.159 Thus, it was effectively a short moratorium.

Illinois amended its foreclosure process in 2009, for properties occupied as principal residences160 after a proposed moratorium failed to pass in the 95th General Assembly in 2008.161 Under the new law, before initiating foreclosure proceedings, lenders are now required to mail a notice to defaulting borrowers

155. Goldfarb, supra note 26 (“Fannie Mae said these programs are likely to have ‘a material adverse effect on our business, results of operations and financial condition, including our net worth.’ But, it said, the program could yield long-term benefits. ‘If, however, the program is successful in reducing foreclosures and keeping borrowers in their homes, it may benefit the overall housing market and help in reducing our long-term credit losses.’ But in a filing, Fannie Mae said, ‘We expect that we will not operate profitably for the foreseeable future.’”) 156. See supra authorities cited in Part III.A. 157. See Merle, supra note 143. 158. CAL. CIV. CODE § 2923.5 (West 2009) (effective Sept. 6, 2008); Peter Viles, New Law Stalls Foreclosure Filings, L.A. TIMES, Oct. 19, 2008, at 15 (reporting on the effect of SB1137 and what it required of lenders). 159. Viles, supra note 158. 160. S.B. 2513, 95th Gen. Assem. (Ill. 2009). 161. S.B. 2131, 95th Gen. Assem. (Ill. 2008).
advising them of credit counseling options and giving them a thirty-day grace period to seek credit counseling.162

Similar changes to the foreclosure process have been made in Iowa, North Carolina, and Maryland. Recently enacted legislation in Iowa requires lenders to give notice of counseling and mediation options before foreclosing and allows courts to postpone a foreclosure sale for up to sixty days if the notice is not given.163 The legislation is set to expire on July 1, 2011.164 North Carolina implemented a program that requires lenders to give homeowners and the state banking commissioner a forty-five day notice prior to filing a foreclosure action, which the commissioner can extend an additional thirty days.165 In early 2008, Maryland amended its foreclosure process, which now requires lenders to wait to file foreclosure actions until the later of ninety days after default or forty-five days after a notice of intent to foreclose is sent.166 The bill has been criticized as “cosmetic” because prior to the new legislation lenders commonly waited ninety days after default to begin foreclosure.167

2. Requiring Mediation

The recent success of an early mediation program implemented in Pennsylvania has led to the push for similar programs elsewhere in the United States,168 including, for example, in Texas.169 The program was instituted in 2008 by the City of Philadelphia.170 Initially, after passing a one-month moratorium,171 the City Council, in conjunction with Sheriff John Green, sought a six-month or longer moratorium,172 but “legal officials from the city advised

164. Id.
168. Hurdle, supra note 121.
the Sheriff and the council that neither has the authority to impose the longer-
term moratorium they seek." 173 Instead, the Philadelphia County Court of
Common Pleas created a mediation program 174 in which owners of residential,
owner-occupied properties can request a conciliation conference 175 that, once
requested, becomes mandatory before lenders can foreclose. 176 Although the
program has encountered some difficulties, particularly with mortgagors failing
to appear, 177 it has been considered quite successful overall, 178 helping as many as “seventy-eight percent of its participants avoid foreclosure simply by having
borrowers and lenders sit down and talk.” 179 The program has served as a model
for similar programs both within the state 180 and across the country, 181 and
Pennsylvania is considering implementing similar programs state-wide. 182

wpvi/story?section=news/consumer&id=6055270 (The council actually passed a non-binding
resolution for an indefinite moratorium on March 27, 2008).

173. Paul Jackson, In Philly, a New Epicenter for the Battle Over Foreclosures (Apr. 3, 2008),
http://www.housingwire.com/2008/04/03/in-philly-a-new-epicenter-for-the-battle-over-
foreclosures/.

174. FIRST JUDICIAL DISTRICT OF PHILADELPHIA COURT OF COMMON PLEASE OF PHILADELPHIA
COUNTY, RESIDENTIAL MORTGAGE FORECLOSURE DIVERSION PILOT PROGRAM (2008),
Kostelini, City Foreclosure Program Brings Problems to Fore, PHILA. BUS. J., July 18, 2008,
available at http://www.bizjournals.com/philadelphia/stories/2008/07/21/story2.html; Priya David,
Philadelphia Fighting Foreclosures Head-On (July 31, 2008), http://www.cbsnews.com/
stories/2008/07/31/earlyshow/main4310133.shtml.

(providing conciliation form and instructions for entering the conciliation program); Hurdle, supra
note 121.

Reforms Mortgage Foreclosure Process; Takes Moderate Path (May 12, 2008),

177. Jeff Blumenthal, ‘Model’ Foreclosure Program Seeks Ideas for Improvement, HOUSTON
Pleas Judge Annette M. Rizzo, who supervises the program, said roughly 30 percent of
homeowners do not show for conferences . . . . She said of those who do show up, some are not
fully prepared, which causes problems for both lawyers and judges.”); id. (An administrator from
the city’s Office of Housing and Community Development indicated that the volume of
homeowners seeking help is sometimes so high that it is difficult to reach counselors.).

178. See generally Blumenthal, supra note 171; Jon Hurdle, Success Seen in Program to Save
Homes, N.Y. TIMES, Sept. 28, 2008, at A22; Hurdle, supra note 121.

179. Bertha Lewis, Op-Ed., Mayors Helping to Solve Housing Crisis, PHILA. INQUIRER, June 15,
crisis.html; see also Mark Belko & Bill Schackner, Rescue Mission, PITTSBURGH POST-GAZETTE,

180. Belko & Schackner, supra note 179.

181. Blumenthal, supra note 171; Hurdle, supra note 121; Kostelini, supra note 174; Lewis,
 supra note 179.

182. Sam Spatter, Public Hearing Held on Pennsylvania Foreclosure Bill, PITTSBURGH TRIB.
REV., May 21, 2009; Tim Grant, Effort Aimed at Reducing Foreclosures, PITTSBURGH POST-
Connecticut has also implemented a mandatory mediation program. Despite a proposal from Governor M. Jodi Rell that would have provided for a sixth-month moratorium on all foreclosures as long as the homeowners continued to pay their property taxes and mortgage interest, the Connecticut General Assembly instead made a previously established, voluntary mediation program mandatory through at least June 30, 2010. The voluntary program has had a high success rate, with a large majority of the program’s participants working out alternatives to foreclosure. Like the Philadelphia program, it has served as a model for other states.

3. Actual Moratoria

A few states have enacted actual moratoria, beginning with Massachusetts in 2007, which implemented a sixty-day case-by-case hold on foreclosures for homeowners who had filed complaints with the Massachusetts Division of Banks. Much media attention has been given to California’s enactment of a ninety-day moratorium that went into effect on June 15, 2009. The moratorium is limited to first mortgages originated between 2003 and 2008 that are secured by principal residences and occupied by the borrower at the time of default, but it has been criticized because lenders can obtain an exemption if they have a modification program in place that meets the state requirements.

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188. Cover, supra note 186.
After efforts by state senators to pass a two-year moratorium in 2008 failed, Michigan implemented a similar ninety-day moratorium that went into effect in May for loans in which mortgagors have requested to participate in a workout program.

4. Failed and Pending Attempts at Moratoria

Failed attempts at passing mortgagor-relief legislation abound. The most striking examples have occurred in Minnesota, where in 2008 Governor Pawlenty vetoed a one-year moratorium and another stalled while in committee. Then, in 2009, moratory efforts again stalled in committee and Governor Pawlenty vetoed a bill that would have allowed the state Attorney General’s office to appoint a mediator in cases where homeowners are unable to resolve their defaults with their lenders. Other failed efforts include those of Massachusetts, in which a 180-day moratorium stalled while in committee in 2008; New York, in which a one-year moratorium on all foreclosures passed in the State Assembly but stalled in the state’s Senate; and Utah, in which a ninety-day moratorium on all foreclosures was defeated in the state legislature in 2009.

In March 2009, the Rhode Island Senate introduced a bill that would impose a 180-day moratorium on foreclosures of mortgages with various subprime provisions, such as certain adjustable-rate, stated income, and interest-only loans, but the bill has been put on hold while the General Assembly drafts alternate legislation. The bill would have required that no interest or fees can

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accrue during the moratorium for loans that fall within its scope and would have only applied to residential properties with four or fewer units.\textsuperscript{203}

The Ohio House of Representatives has passed a bill that would establish a six-month moratorium on foreclosures against occupied properties and impose an additional $750 foreclosure-filing fee for lenders, but it remains to be approved by the Ohio Senate.\textsuperscript{204} One Ohio Representative criticized the bill as injecting “big brother government into private contracts.”\textsuperscript{205} The bill may not receive immediate attention by the Senate, which is working through state budgeting problems.\textsuperscript{206}

5. Moratoria Following Natural Disasters

Louisiana and Mississippi are unique because it is difficult to determine the degree to which the subprime crisis contributed to the financial damage caused by the hurricanes.\textsuperscript{207} Following Hurricane Katrina in 2005, Mississippi Governor Haley Barbour declared a moratorium on foreclosures that expired in 2007.\textsuperscript{208} In response to the damage caused by Hurricane Gustav, the Department of Housing and Urban Development implemented a ninety-day moratorium on FHA foreclosures in thirty-four Louisiana parishes in September 2008.\textsuperscript{209}

IV. THE EFFECTS OF MORATORIA

Mortgagor-relief efforts that comprehensively delay the foreclosure process without limiting it to borrowers who actually want modifications and are likely to recover from the default-causing event only serve to deepen the negative impact of the foreclosure crisis.\textsuperscript{210} The circumstances surrounding default vary among mortgagors,\textsuperscript{211} and blanket solutions fail to account for these differences. In many cases, delaying the foreclosure process or making modification efforts

\textsuperscript{203} R.I. S. Res. 250; Press Release, State of Rhode Island General Assembly, supra note 201.


\textsuperscript{205} State Representative Jarrod B. Martin on Foreclosure Moratorium (May 21, 2009), http://xeniacitizenjournal.wordpress.com/2009/05/21/state-representative-jarrod-b-martin-on-foreclosure-moratorium/.

\textsuperscript{206} Id.


\textsuperscript{208} Tom Wilemon, Paycheck-Loan Rates Called Exorbitant – Annual Rate is 468 Percent, SUN HERALD, Sept. 9, 2006, at B10.

\textsuperscript{209} FHA to Cut Some Slack on Loans; Foreclosures on Hold in Storm Areas, NEW ORLEANS TIMES-PICAYUNE, Sept. 4, 2008, at 8.


\textsuperscript{211} See infra Part IV.A.
mandatory only delays the inevitable, which leads to an increase in vacant property problems, further strains on municipal resources, additional decreases in property values, severe damage to the financial conditions of lenders, and further damage to the economy as a whole. Defaulting borrowers often have already given up and are attempting to move on. Delaying the foreclosure process only prolongs their financial wounds and impedes their ability to put the foreclosure behind them.

A. The Roots of Default

Of first order in attempting to understand the effects of foreclosure moratoria is to identify the circumstances that most commonly cause default. Generally, there are three types of defaulting mortgagors in the current market. The first are owner-occupants who have experienced a catastrophic life changing event, such as a severe health problem, the death of a spouse, or the loss of employment. These types of defaults will tend to increase when...

212. Morgenson, supra note 153.
213. M Allach, supra note 5, at 17; Paul Wenske, Their Foreclosures Delayed, Vacant Homes Fall into Disrepair, KANSAS CITY STAR, June 9, 2008, at A1.
219. See infra Part IV.B.
220. Baldacci, supra note 8, at 28.
unemployment rises.\textsuperscript{222} With unemployment currently at 9.7\%—which does not account for cuts in hours or wages—and likely to rise,\textsuperscript{223} defaults of this type are likely to continue on a large scale\textsuperscript{224} and increasingly account for a greater percentage of total defaults.\textsuperscript{225}

The second type of defaulting mortgagors are owner-occupants who overleveraged themselves, whether through a lack of understanding of the risk of their loan terms\textsuperscript{226} or simply by making what turned out to be bad financial decisions, such as using non-traditional loan products to purchase more expensive houses than they could afford, often with little or no down payment.\textsuperscript{227} These mortgagors usually default because of the “payment shock” from a scheduled change in their loan terms that increases the amount of their monthly payment due to an adjustable rate resetting or an introductory interest-only period ending.\textsuperscript{228} Many of them counted on property values continuing to rise when they entered into their loan agreements,\textsuperscript{229} whereas the real estate market has stagnated and property values have decreased in most markets.\textsuperscript{230} With the decrease in housing prices, these mortgagors are likely to owe more on their loans than their properties are worth,\textsuperscript{231} which severely limits their ability to refinance or sell.\textsuperscript{232} Even if they have some equity left, the tightening of

\textsuperscript{222} See generally S. JOINT ECON. COMM., supra note 4, at 7 (tying foreclosure rates to unemployment in various geographical regions of the United States).
\textsuperscript{224} Armour, supra note 10 (“Economists fear that further increases in unemployment could lead to more defaults on prime, fixed-rate loans.”); Stan J. Liebowitz, New Evidence on the Foreclosure Crisis, WALL ST. J., July 3, 2009, at A13.
\textsuperscript{225} Heath, supra note 10.
\textsuperscript{226} Lind, supra note 3, at 239.
\textsuperscript{227} Armour, supra note 221; Henry & Roberts, supra note 221 (“[T]here are those who were sold mortgages by brokers without fully understanding that the payments would escalate beyond their ability to pay.”).
\textsuperscript{228} S. JOINT ECON. COMM., supra note 4, at 2; Zywicki & Adamson, supra note 221, at 26, 44-45; Richard H. Thaler & Cass R. Sunstein, The Psychology of the Housing Mess, USA TODAY, Apr. 24, 2008, at 11A.
\textsuperscript{229} Patty Shillington, Adjustable Mortgages Out of Favor, MIAMI HERALD, May 31, 2009, at E1.
\textsuperscript{231} S. JOINT ECON. COMM., supra note 4, at 2; Henry & Roberts, supra note 221; Dina ElBoghdady & Sarah Cohen, The Crash: Delinquencies Moving from Subprime to Prime, WASH. POST, Jan. 19, 2009.
\textsuperscript{232} GETTER, supra note 230, at 5; Richard A. Epstein, The Subprime Crisis: Why One Bad Turn Leads to Another’ at Pepperdine University School of Law, 2 J. BUS. ENTREPRENEURSHIP & L. 198, 207 (2008); ElBoghdady & Cohen, supra note 231. Mortgagors with negative equity also tend to have more difficulty in obtaining modifications because they are more likely to redefault.
lending standards in the wake of the subprime crisis is nevertheless likely to preclude all but the most creditworthy borrowers from being able to refinance.²³³ With few options, little or no money of their own invested in their properties, and no equity to protect, these borrowers have “an unusually powerful incentive to default if property values fall,”²³⁴ and many “strategically default”—meaning that they simply walk away—because of the negative equity, even if they can afford the monthly payments.²³⁵

The last type of defaulting mortgagor is the speculator.²³⁶ Speculators are usually either landlords, who buy multiple properties and rent them out for short-term cash flow and long-term equity benefits,²³⁷ property “flippers” who purchase properties at low prices and the resell them for a profit, perhaps after making renovations,²³⁸ or both. Speculators are different from owner-occupant mortgagors in that they often own multiple properties.²³⁹ Therefore, the insolvency of a single speculator will usually have a much greater impact on a community than that of a single owner-occupant.²⁴⁰ In addition, the insolvency of a speculator can affect lives in other ways. In many cases tenants are not aware that the property that they are renting is in foreclosure. When the foreclosure does go through, many “face disrupted lives and even homelessness,”²⁴¹ further compounding the problem.²⁴²

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²³³ S. JOINT ECON. COMM., supra note 4, at 14, 16.
²³⁴ Zywicki & Adamson, supra note 221, at 42-43; ElBoghdady & Cohen, supra note 231.
²³⁵ GETTER, supra note 230, at 6; ElBoghdady & Cohen, supra note 231; Kenneth R. Harney, Study Shows One Quarter of Mortgage Defaults are Calculated Decisions, ALAMEDA TIMES-STAR, July 12, 2009; Thaler & Sunstein, supra note 228; Sandra Hughes, Anatomy of an Intentional Foreclosure (Feb. 12, 2008), http://www.cbsnews.com/stories/2008/02/12/eveningnews/main3823531.shtml; Posting of Todd Zywicki to The Volokh Conspiracy, http://www.volokh.com (Mar. 2, 2009, 07:00) (“[T]here are a lot of other people—perhaps a majority in some places at this point—who are walking away as a rational response to the incentives they have, some of which are pernicious incentives established by state law, such as state antideficiency laws that let them walk.”). However, some economists believe the problem to be overstated, arguing that monthly cash flow constraints are a more significant factor than negative equity in leading to mortgagor defaults. GETTER, supra note 230, at 7; FOOTE ET AL., NEGATIVE EQUITY & FORECLOSURE: THEORY & EVIDENCE (Federal Reserve Bank of Boston) (2008), available at http://www.bos.frb.org/economic/ppdp/2008/ppdp0803.pdf.
²³⁶ See Kate Berry, Fannie Gets Tougher on Walk-Aways, Speculators, AM. BANKER, Apr. 22, 2008, at 11.
²³⁷ Zywicki & Adamson, supra note 221, at 45.
²³⁸ Edward Gately, Study: More Are Leery of Homeownership: Housing Crisis Sours Many Americans, SURVEY SHOWS, MESA, ARIZ. TRIB., June 24, 2009; see Shillington, supra note 229.
²³⁹ E.g., Joel Achenbach, Las Vegas, Flush with Empty Houses, WASH. POST, Oct. 30, 2008, at D01; Thaler & Sunstein, supra note 228.
²⁴⁰ Lind, supra note 3, at 239-40.
²⁴² The problem has had some extreme ad hoc responses, such as a recently enacted Los Angeles Municipal Code provision that prevents foreclosing lenders from evicting tenants until a new buyer is ready to move in to the property, which can make foreclosed property difficult to sell.
Speculators frequently used subprime loans to finance their investments. The lower monthly payments of adjustable-rate mortgages (“ARMs”), interest-only loans, and negatively amortizing “option ARMs” were attractive for maximizing cash flows, particularly during times when properties were not producing income, such as between tenants or during renovation. The relaxed approval requirements of subprime loans were ideal since many speculators are self-employed and cannot prove income via traditional means. In addition, speculators “flipping” properties only intended their investment in a given property to be short term, which meant that they were likely to view the long-term features of their loans as largely unimportant. Even for properties that they intended to keep for a longer term, many speculators thought that they would be able to refinance before the rates adjusted or the interest-only periods expired.

However, as property values began to plummet in most markets, the equity in the houses—the speculators’ profits and primary means of paying the costs of refinancing or selling—correspondingly decreased as well, resulting in additional mortgage defaults that further fueled the crisis. The tightening of lending standards following the beginning of the subprime crisis—as early as 2007—further restricted the ability to refinance; the subprime loans were no longer available. As ARMs reset and interest-only periods ended, which they still continue to do absent modification, landlords with these types of loans

However, the problem may be curbed to some degree now that new federal legislation allows existing tenants to remain in their properties for the remaining duration of their lease. Charlotte Laws, Clueless at City Hall: Foreclosures & Tenants (July 10, 2009), http://www.citywatchla.com/content/view/2457/.


245. See, e.g., Schmudde, supra note 243, at 727; Zywicki & Adamson, supra note 221, at 40-41.

246. Zywicki & Adamson, supra note 221, at 40, 45-46.

247. Zywicki & Adamson, supra note 221, at 40, 45-46; Schmudde, supra note 243, at 727; Shillington, supra note 229.

248. Shillington, supra note 229.


250. MALLACH, supra note 5, at 11; Zywicki & Adamson, supra note 221, at 40.

251. S. JOINT ECON. COMM., supra note 4, at 16.

252. MURPHY, supra note 216 (“Although the peak period of payment resets for subprime mortgages reportedly is passing, other mortages with a reset feature . . . will be triggered in . . . 2009 and 2010.”); MALLACH, supra note 5, at 7.
have faced cash flow difficulties, which lead to default.\footnote{253} Like overextended owner-occupants, speculators that do not default are still likely to “walk away” because their equity has disappeared or even become negative, and they have even less of an incentive to hold on to their properties because they do not live in them.\footnote{254}

**B. Foreclosure Externalities, Vacant Properties, and Mortgagors Who Just Want to Move On**

While some defaulting mortgagors remain in their homes, many see no hope and move on, abandoning their properties.\footnote{255} The result has been an increase not only in the number of defaults and foreclosures, but also in the number of vacant properties.\footnote{256} For example, in Cleveland, where the foreclosure rate has been among the highest in the country, “[t]he city estimates that 10,000 houses, or 1 in 13, are vacant,” and the county treasurer thinks the number is actually much greater.\footnote{257} These mortgagors want the foreclosure to move forward so they can get on with their lives—the properties are no longer their residences.\footnote{258} Yet in many cases lenders have been reluctant to foreclose.\footnote{259} In the meantime, the mortgagors are still responsible for the maintenance of their properties, which they often cannot afford\footnote{260} or simply have no incentive to pay for.\footnote{261} Moreover, many mortgagors think that the filing of a foreclosure action or having gone through bankruptcy means that they are no longer responsible for maintaining their properties, and they are “shocked” when they receive citations for housing problems.

\begin{itemize}
\item \footnote{253}{E.g., Liz Chandler, *Inner-City Landlord Shifts to the Suburbs & Loses – Former Judge, Sister Brought Up Starter Homes, Saw Sales Prices Go Flat*, *Charlotte Observer*, Dec. 9, 2007; Jeff Ostrowski, *Landlords’ Failure to Pay Mortgage Puts Renters at Risk of Being Shown Door*, *Palm Beach Post*, June 6, 2008, at 1A.}
\item \footnote{254}{Zewicki & Adamson, supra note 221, at 45-46 (“The bottom line is: the presence of a larger number of speculators in a given market will exacerbate a downward cycle of falling home values as they are more likely to exercise their default option.”); Berry, supra note 236.}
\item \footnote{255}{E.g., Cary Spivak, *Lenders Abandon Foreclosures*, *Milwaukee J. Sentinel*, July 12, 2009, at 1.}
\item \footnote{256}{Mallach, supra note 5, at 12, 17; Schilling, supra note 215, at 110.}
\item \footnote{257}{Alex Kotlowitz, *All Boarded Up*, N.Y. Times, Mar. 8, 2009, at MM28.}
\item \footnote{258}{E.g., Lind, supra note 3, at 240; Sullivan, supra note 218. Mortgagors such as these may even attempt to give their properties away.}
\item \footnote{259}{Lind, supra note 3, at 240; Sullivan, supra note 218; Livingston, supra note 210; Merle, supra note 140 (“[E]ven though a delayed foreclosure can be a blessing for some troubled homeowners, for others, it simply prolongs the financial distress, leaving them on the hook for the condition of the property. Even if they move out, they cannot move on.”); Michael Orey, *Dirty Deeds: The Mortgage Crisis Has Blighted the Landscape with Boarded-Up Houses*, *Bus. Week*, Jan. 14, 2008, at 46; Wenske, supra note 213; Rachel Lynn Foley, *More Mortgage Companies Are Refusing to Foreclose When the Borrower Stops Paying* (Apr. 3, 2009), available at http://www.wwwww.mortgagelawnetwork.com/?p=469; see also Epstein, supra note 232, at 204.}
\item \footnote{260}{E.g., Joyce Miles, *Debtors Tagged for Problems at Vacant Houses*, *Lockport Union-Sun & J.*, May 7, 2008.}
\item \footnote{261}{Spivak, supra note 255.}
\end{itemize}
code violations. Vacant properties in foreclosure exemplify how efforts to delay the foreclosure process without accounting for individual circumstances can actually create significant negative externalities. Normally, a lender would foreclose and liquidate the subject property to recoup its investment. Delaying the foreclosure process without limiting it at least to occupied properties only delays this process without benefit and serves to increase the blight on communities and the trauma to the mortgagors.

The increases in the number of vacant properties have had a drastic negative impact on local communities. Not only does real property require maintenance, but it also impacts surrounding properties. As the number of foreclosures and vacant properties in a community increases, its property values, safety and desirability decrease. The longer a property remains vacant, the greater “the likelihood the property will deteriorate, become a victim of vandalism, or be abandoned.” The problem has become so significant during the current mortgage crisis that many states have enacted legislation regulating lenders’ responsibilities with respect to maintaining vacant property, and some

262. Spivak, supra note 255; Lind, supra note 3, at 240; Livingston, supra note 210.
263. Epstein, supra note 232, at 208 (“Th[e] approach [of implementing moratoria] would be correct if foreclosures were always the wrong solution, which they’re not. It is important to remember what a moratorium does. It leads to a precarious situation where property can deteriorate still further while in the hands of someone who is still underwater. Worse still, even after the delays, the foreclosure may still be necessary, at which time the property is likely to have deteriorated still further, so that the foreclosure is less effective than it otherwise would have been. There’s absolutely no reason to believe that the systematic waste of property works in the social interest, no matter how great its political appeal. If, in fact, the dominant solution is to liquidate the losses and to start over again, any moratorium is far likely to do more systematic harm than good.”); see also Lind, supra note 3 (discussing the impact of the foreclosure crisis in increasing the number of vacant properties and the amount of neighborhood blight with an emphasis on the city of Cleveland, Ohio).
264. See generally 55 AM. JUR. 2D Mortgages §§ 449-715 (2009) (providing an overview of foreclosure methods); Wenske, supra note 213 (“Usually when a stressed homeowner falls behind in payments or surrenders the home to the bank, the lender forecloses to take back ownership and resell the house, often on the courthouse steps.”).
265. Epstein, supra note 232, at 208; see also Lind, supra note 3, at 242; Schilling, supra note 215, at 130.
267. See generally Vacant Properties: The True Costs to Communities, supra note 214.
268. Vacant Properties: The True Costs to Communities, supra note 214; Lind, supra note 3, at 254; MALLACH, supra note 5, at 17-18.
269. Schilling, supra note 215, at 126.
cities have taken steps to avoid the problems that an excessive number of vacant properties presents.270

This is not to say that mortgagor abandonment is the primary cause of vacant property problems. Many of the properties at issue have been through foreclosure and are lender-owned or have been bought by speculators attempting to sell them for a profit.271 The “general lack of responsiveness [of lenders] in maintaining properties in foreclosure”272 has led some municipalities to bring public nuisance actions against lenders for failing to maintain properties of which they have taken ownership.273 Enforcement problems are compounded when the identities of the lenders responsible for a property is “hidden” behind the cloak of servicers and trustees.274 Nevertheless, the “point of greatest neglect” is usually just before the foreclosure sale, after which the new owner, usually the lender, assumes responsibility for maintenance of the property.275 Adding extra time to the foreclosure process for these properties, whether through an actual moratorium or otherwise, only delays the new owner from taking over and prolongs the neglect when it is at its worst.276

1. Maintenance

Real property requires maintenance, and “[o]rphaned properties quickly fall into disrepair.”277 During the summer, lawns grow and must be cut. Bushes and trees must be cut back from time to time to avoid overgrowth. Severe storms can blow off siding and shingles, knock down tree branches, and damage gutters. The maintenance of abandoned properties generally falls to already overburdened local building code departments.278 During this economically


271. Kotlowitz, supra note 257; Lind supra note 3, at 239-41, 251-52.


273. E.g., City of Cincinnati v. Deutsche Bank Nat’l Trust Co., No. A0811824 (Hamilton County, Ohio Ct. Com. Pl. filed Dec. 22, 2008); Joan Mazzolini, Wells Fargo Must Put Up $1 Million to Sell Homes in City, CLEV. PLAIN DEALER, July 2, 2009, at B6; Dan Monk, City Sues Deutsche Bank, Wells Fargo, CINCINNATI BUS. COURIER, Dec. 24, 2008; Mary Kane, Lawsuit Targets Banks with Novel Tactic (Dec. 29, 2008), http://washingtonindependent.com/23055/lawsuit-targets-banks-with-novel-tactic; see also Orey, supra note 259. In addition, out-of-state lenders are often ill-equipped to check regularly on the status of properties in foreclosure. Spivak, supra note 255 (“Local housing officials and real estate agents who deal with foreclosed and abandoned properties say out-of-state lenders don’t know the condition of a property when the foreclosure process starts. By the time their representative checks out the property, it already may have sat vacant for months, making it a target to vandals, squatters and . . . harsh winters.”).

274. Schilling, supra note 215, at 120-22, 124; Wenske, supra note 213.


276. Epstein, supra note 232, at 208; Wenske, supra note 213.

277. Orey, supra note 259.

278. Vacant Properties: The True Costs to Communities, supra note 214, at 3, 5; Schilling, supra note 215, at 120-21; e.g., Alan Choate, Pair Taking Steps to Clean Up Gateway District,
troubling time they are facing budget cuts as local governments struggle to make ends meet\(^{279}\) and often are "no match for the effects of the mortgage crisis."\(^{280}\) The problem is compounded because local governments are losing significant amounts of revenue from unpaid property tax bills, at least in the short term.\(^{281}\) The reduction in property values stemming from the increased number of foreclosures and vacant properties reduces tax revenues even further.\(^{282}\) In addition, code enforcement systems are generally designed to respond only after a property has deteriorated enough to be in violation of the housing code.\(^{283}\) The impact starts well before the properties get to such a point, and "the longer a property remains abandoned, the higher the cost of renovation."\(^{284}\)

2. Crime

Vacant properties also encourage crime.\(^{285}\) The tall grass, overflowing mailboxes, and general disrepair of vacant properties are inviting to criminals, particularly when multiple vacant properties are "clustered" together.\(^{286}\) Common problems include vandalism\(^{287}\) and the theft of plumbing copper and other items,\(^{288}\) in some cases even by the homeowners themselves upon vacating.\(^{289}\) The longer that a property remains vacant, the more apt these problems are to occur.\(^{290}\) It is not uncommon for squatters\(^{291}\) or drug dealers or

\(^{279}\) Schilling, supra note 215, at 110; Brad Heath, Unpaid Property Taxes Hit Localities, Delinquencies Leave Areas with Shortfalls, USA TODAY, July 30, 2009, at 1A.

\(^{280}\) Lind, supra note 3, at 248; see generally Weinstein, supra note 214.

\(^{281}\) Heath, supra note 279; Schilling, supra note 215, at 110-11; Schreiner, supra note 215.

\(^{282}\) Schilling, supra note 215, at 7-8; Schilling, supra note 215, at 110-11.

\(^{283}\) See Lind, supra note 3, at 248.

\(^{284}\) Schilling, supra note 215, at 2; Immergluck & Smith, supra note 266, at 59.


\(^{286}\) Schilling, supra note 215, at 3-4.

\(^{287}\) Schilling, supra note 215, at 126.

\(^{288}\) Immergluck & Smith, supra note 266, at 59.

\(^{289}\) Kotlowitz, supra note 257; Livingston, supra note 210; Thomas J. Sheeran, Glut of Empty Homes Creates More Opportunities for Squatters, VA. PILOT & LEDGER STAR, Feb. 19, 2008, at 4.


\(^{291}\) Schilling, supra note 215, at 126.
users move in,\footnote{293} using the vacant property to further illicit activities,\footnote{294} and “vacant buildings are a primary target of arsonists.”\footnote{295} The problem has become so bad that in some areas of the country, advocacy groups have been formed to help homeless people illegally move into vacant properties.\footnote{296} Meanwhile, municipalities are additionally burdened as their police, fire, building, and health departments attempt to respond to the problems that would otherwise be minimal if the properties were appropriately occupied.\footnote{297}

3. Impact on Surrounding Home Values

Residential property values are generally calculated by what is known as the “market comparison approach,” in which the value of the subject property is determined by the sales of comparable properties nearby.\footnote{298} On a large scale, therefore, the downward economic pressure of a large number of vacant properties in a community has a tremendous negative impact on the values of surrounding properties.\footnote{299} The problem has a “snowball” effect - the more properties that become vacant and blighted, the more property values decrease, resulting in more defaults, more foreclosures more vacant properties, and further depressed property values throughout the community.\footnote{300} In the hardest hit areas, some streets see so many foreclosures that “residents left behind are not...
necessarily inclined to stay.”

“In the most extreme cases, in cities like Cleveland or Detroit, widespread market collapse has resulted in parts of each city turning into virtual wastelands.”

C. Modification Failures

The short-term effect of moratoria should be, of course, a decrease in foreclosures. Yet despite the recent moratoria implemented by Fannie Mae, Freddie Mac, and several of the larger lenders, foreclosure rates were surprisingly up at the end of 2008 and in early 2009. This suggests that the self-imposed moratoria and attempts at modification did not “have any real success at slowing down [the] foreclosure tsunami,” only serving “to have done little more than to delay the inevitable.” Some of the increase is due to a lack of sufficient resources on the part of lenders to efficiently respond to borrower modification requests and a lack of authority among loan servicers to change loss mitigation strategies. However, as many as one-third of the mortgagors who do obtain modifications “end up back in default within three months.” The cause is likely a failure to make modifications that adequately address the events that caused the default. These problems suggest that although encouraging modifications may be a viable solution to the foreclosure crisis, to be successful it must include: 1) a means of ensuring that lenders can adequately respond to mortgagor modification requests, and 2) a means of structuring the

301. Kotlowitz, supra note 257; Schreiner, supra note 215.
302. Mallach, supra note 5, at 18.
304. See sources cited supra notes 138-39.
308. Stier, supra note 110, at 6; Merle, supra note 118; Kopecki, supra note 148.
309. E.g., Adelino et al., supra note 110, at 10.
terms of modifications so that they sufficiently account for the default-causing event and thereby reduce the likelihood that the mortgagor will redefault.

Mortgagors’ responses to default vary. Ideally, a homeowner in default will contact her lender and attempt to work out a modification or develop a plan to sell her property, possibly with the lender accepting less than what is owed through a short sale. However, mortgagors must first be able to “acquire information about their alternatives”; if they are not aware that relief options exist, they will not be able to pursue them. In addition, some mortgagors become overwhelmed with lender collection efforts or simply do not want to face the problem, and, therefore, they avoid attempts by the lender to contact them. “Mere notice that [a foreclosure] action might be filed often sends residents packing.” Owner-occupants who default because of a catastrophic life event are the most likely to attempt or succeed with a modification, primarily because many have time and money invested in their homestead and would otherwise not have defaulted but for the external event. Owner-occupants who overleveraged themselves with their mortgages are more likely to walk away because they tend to have less invested in their properties and have fewer options available, particularly when they have negative equity and modifications that are not likely to lower their payments significantly. They have no equity from which to pay the costs of selling, and lenders are less likely to approve modifications among these types of borrowers because of their high propensity for redefault. The same is true for speculators, who are often considered undeserving of relief. Moreover, speculators have less of an incentive to work out modifications since failure to do so does not result in a loss of their residences, and the more properties that an insolvent speculator owns, the more time-consuming and exhausting attempting to work out modifications will be. After the emotional and financial stresses of trying to keep their business afloat prior to defaulting, for many speculators, the final response is to just walk away.

311. See, e.g., Vivki Lee Parker, Walking Out on Mortgage is Wrong Answer, NEWS & OBSERVER, Mar. 16, 2008, at G1; see also sources cited supra note 152.
312. GETTER, supra note 230, at 10.
313. GETTER, supra note 230, at 15; ElBoghdady & Cohen, supra note 231 (“[L]enders . . . say many struggling borrowers do not respond to outreach efforts, and when they do they come with inflated notions about what can be done.”); Parker, supra note 311.
314. Orey, supra note 259.
315. Merle, supra note 118 (“Modification makes economic sense for a bank or other lender only if the borrower can’t sustain payments without it, yet will be able to keep up with new, more modest terms.”).
316. FOOTE ET AL., supra note 235, at 26; see supra Part IV.A.
317. See FOOTE ET AL., supra note 235, at 3.
319. E.g., Berry, supra note 236.
Mortgagors who have contacted their lenders to attempt to obtain modifications have often faced uphill battles.\textsuperscript{320} Lenders simply were not prepared for the increase in foreclosures spawned by the current crisis.\textsuperscript{321} Loss mitigation and workout departments have been understaffed and, therefore, incapable of effectively handling the increase in volume,\textsuperscript{322} which has resulted in many mortgagors being unable to get through to the appropriate department to discuss modification or other options.\textsuperscript{323} Faced with loss mitigation officers who were difficult to contact\textsuperscript{324} and a myriad of documentation requests with which unsophisticated mortgagors have trouble complying,\textsuperscript{325} many mortgagors simply give up trying to negotiate a workout.\textsuperscript{326} The stories of these borrowers illustrate the need to ensure that lenders have adequately staffed workout departments with sufficient resources to assist borrowers in a timely manner in order for modifications to be effective.

Modifications must address the cause of default. Responses that treat long-term problems as short-term are doomed to fail. For example, when mortgagors default because of decreases in income, modifications that provide for lower monthly payments through a decrease in their interest rates or an extension of the length of their loans are more likely to be successful.\textsuperscript{327} However, in many cases even lowering the payment will not be enough, and the modification still will be doomed to fail.\textsuperscript{328} The ability of modification options to adequately meet the needs of the mortgagor must be critically assessed. If they fail to provide a workable solution for the mortgagor, a short sale\textsuperscript{329} or deed in lieu of foreclosure\textsuperscript{330} should be pursued instead of moving forward with modifications that will only prolong the problem.\textsuperscript{331}

\textsuperscript{322.} Adelino et al., \textit{supra} note 110, at 6; Merle, \textit{supra} note 118; Morgenson, \textit{supra} note 320; Kopecki, \textit{supra} note 148.
\textsuperscript{323.} Armour, \textit{supra} note 142; Bajaj & Leland, \textit{supra} note 151 (“Two years into the foreclosure crisis, many borrowers say they still have trouble reaching anyone at their bank or mortgage company to discuss loan modifications.”); Jenni Mintz, \textit{Loan Modifications a Tricky Thicket for Those Seeking}, VENTURA COUNTY STAR, Jan. 11, 2009; Morgenson, \textit{supra} note 320.
\textsuperscript{324.} \textit{E.g.,} Bajaj & Leland, \textit{supra} note 151; Morgenson, \textit{supra} note 320.
\textsuperscript{326.} Mintz, \textit{supra} note 323.
\textsuperscript{327.} See Adelino et al., \textit{supra} note 110, at 11-12; Emily Flitter, \textit{Rising Redefaults Raise Loan Mod Mandate Odds}, AM. BANKER, May 5, 2009, at 1.
\textsuperscript{328.} See Adelino et al., \textit{supra} note 110, at 11-12.
\textsuperscript{329.} See sources cited \textit{supra} note 152.
\textsuperscript{330.} See Epstein, \textit{supra} note 232, at 206; Andrews, \textit{supra} note 152.
\textsuperscript{331.} Morgenson, \textit{supra} note 153.
D. Other Effects to Consider

The purpose of foreclosure moratoria is generally “to prevent widespread 
ruin of mortgagors with the consequences of financial chaos and social 
anarchy”\(^{332}\) by delaying the foreclosure process to create additional time for 
homeowners to work out modifications, sell their properties, or find other ways 
to avoid foreclosure.\(^{333}\) Once moratoria are lifted, however, an excess of 
foreclosures hits suddenly,\(^{334}\) which creates a wave of surplus lender-owned 
real estate that drives down housing prices, prolongs the crisis, and worsens its 
impact.\(^{335}\) Moratoria also can damage the financial health of lenders, who 
depend on the foreclosure—the legal remedy for default on mortgage debt—as a 
means of recapitalization.\(^{336}\) National lenders can better maintain their health 
during moratoria through diversification, provided that their investments in non-
moratorium states offset the additional losses in states with moratoria, which is 
the danger that a long-term federal moratorium would present. If the

\(^{332}\) 55 AM. JUR. 2D Mortgages § 828 (2009).

\(^{333}\) POWELL ON REAL PROPERTY, supra note 12, at § 37.49.

\(^{334}\) Press Release, RealtyTrac, Foreclosure Activity Increases Six Percent in February (Mar. 
channelid=9&ItemID=5982 (reporting that foreclosures increased from January to February 2009, 
due in part to the lifting of moratoria in NY and FL, although the increase was a surprise given 
other efforts); Press Release, RealtyTrac, Foreclosure Activity Increases Nine Percent in First 
Quarter (Apr. 16, 2009), available at http://www.realtytrac.com/ContentManagement/
presselease.aspx?ChannelID=9&ItemID=6180&acct=64847 (reporting that March, 2009 had a 
record number of foreclosures and indicating that the data suggests that many lenders had been 
holding off on foreclosures “due to industry moratoria and legislative delays”); Bryant Ruiz 
Switzky, Rush of Foreclosures Ready to Flood the Market, WASH. BUS. J., Mar. 27, 2009, 
http://www.bizjournals.com/washington/stories/2009/03/30/story12.html (expecting foreclosures to 
increase in the wake of the lifting of the Fannie and Freddie moratoria); Press Release, RealtyTrac, 
U.S. Foreclosure Activity Decreases Six Percent in May (June 11, 2009), available at 
(reporting that May, 2009 was the third highest foreclosure month on record, and predicting that 
the number of foreclosures would continue to increase as various moratoria come to an end); Siter, 
supra note 309 (reporting a 465% increase in the Massachusetts foreclosure rate after its 
moratorium ended); Posting of Richard Warren to Real Estate Dispatch, 
(Apr. 20, 2009) (discussing the record number of March, 2009 foreclosures as a result of Fannie Mae and 
Freddie Mac moratoria being lifted).

\(^{335}\) Lee, supra note 142; NorCalSavant, http://www.norcalsavant.com/2009/05/29/more-
federal-foreclosure-mitigation-programs-for-delinquent-homeowners-but-how-effective/ 
(May 29, 2009) (discussing the end of the moratoria and the expectation that the effect will be a continued 
decline in housing prices); The Real Estate Bloggers, http://www.therealestatebloggers.com/
2009/05/07/south-carolina-blocks-foreclosures-unti-housing-plan-enacted/ (May 7, 2009).

\(^{336}\) MURPHY, supra note 216, at 2; see also S. JOINT ECON. COMM., supra note 4, at 14; 
Epstein, supra note 232, at 204-05; Becky Yerak, State Bankers Fear Effects of Foreclosure 
Moratorium; Office of Thrift Supervision Seeking Voluntary Suspension, CHI. TRIB., Feb. 12, 2009, 
at 27; available at 2009 WLNR 2735436 (reporting the concern of Chicago thrifts regarding the 
potential effect of a moratorium on their ability to “preserve capital and stay healthy”). Some 
commentators have also suggested that moratoria and other state intervention efforts could drive 
some lenders from the state. The Real Estate Bloggers, http://www.therealestatebloggers.com/ 
(May 1, 2009).
moratorium’s impact becomes deep enough, it could erode consumer confidence in the lenders’ ability to back their deposit accounts and create a “run” on the banks. \(^{337}\) Likewise, in response to moratoria, lenders are likely to “restrict the supply of loans and raise interest rates to compensate for the possibility that their right to foreclose on delinquent loans or to collect deficiency judgments will be constrained,”\(^{338}\) making loans “costlier or more difficult to obtain.”\(^{339}\) The best means of reducing the impact of these effects is to limit moratoria, as previously discussed, to borrowers who occupy their properties and are likely to reach sustainable modifications during the additional time that they provide.\(^{340}\)

V. A MODEL FOR MORTGAGOR RELIEF

The justification for government action to provide relief to defaulting mortgagors during times of economic crisis is twofold: 1) to protect the homestead, a fundamental institution of the “American dream” and an integral foundation upon which the family unit can be built,\(^{341}\) and 2) to reduce the negative economic and societal impact that results from a sudden glut of foreclosures, which can multiply in a “feedback loop” absent intervention.\(^{342}\) However, it is important to remember that the deeply rooted legal remedy for a mortgagor against a mortgage in default is foreclosure.\(^{343}\) Through the foreclosure process, the market will naturally correct itself on its own. In response to the subprime crisis, for example, lenders have responded to the large number of defaults by tightening their credit standards.\(^{344}\) Lenders have been forced to write off significant losses on properties that have negative equity, and in the short term, the real estate market has continued to be flooded with properties.\(^{345}\) The excess supply has lead to reduced prices\(^{346}\) and fewer housing

\(^{337}\) Diversification rose to prominence out of the Savings and Loan crisis of the 1980s and has been used as a hedge against local risk in conjunction with the securitization of the mortgage market in recent years. In short, a local event, such as the closing a major local employer, can devastatingly impact a bank that only invests locally, but a bank that invests regionally or nationally will still have its other markets to support it, reducing the risk to the bank as a whole. Richard Epstein, The Economic Crisis: Wall Street, Main Street, or K Street? Address Before the Fordham Student Chapter of The Federalist Society for Law and Public Policy Studies (Oct. 23, 2008) http://www.fed-soc.org/publications/pubID.1340/pub_detail.asp (This is available online in either video or audio format. Epstein talks about banks diversifying across geographical areas to reduce risk from approximately 20:10 to 23:45.); see also Epstein, supra note 232, at 201.

\(^{338}\) Wheelock, supra note 50, at 580.

\(^{339}\) Wheelock, supra note 50, at 580.

\(^{340}\) See, e.g., Wheelock, supra note 50, at 580.

\(^{341}\) See S. JOINT ECON. COMM., supra note 4, at 14.

\(^{342}\) GETTER, supra note 230, at 6, 11.

\(^{343}\) See sources cited supra note 264.

\(^{344}\) Zywicki & Adamson, supra note 221, at 68-69.

\(^{345}\) E.g., Lind, supra note 3, at 254 (“In fact, there will be more foreclosures and more abandonment in 2009 than in 2008.”); Merle, supra note 118 (“[F]oreclosed homes continue to flood the market, forcing down home prices.”).

\(^{346}\) Merle, supra note 118.
starts, “bring[ing] affordable home ownership within the reach of a greater percentage of [the] population.” In time, foreclosures will return to predownturn levels, overall real estate values will again start to appreciate, and the housing market will stabilize, without legislative intervention.

Thus, because of the natural corrective process that already exists within the market and the constitutional prohibitions against state interference with contractual rights and the taking of property, the first question that must be asked when considering any mortgagor-relief effort is whether the government should intervene at all. The answer depends on the degree to which the justifications for intervening outweigh the free market principles that are at the root of our economic system. Tough economic times, such as the Great Depression or even the current crisis, are more likely to merit intervention. However, care must be taken to avoid ad hoc responses that result in severe unwanted side effects such as increased vacant housing problems and the like, which are easier to mitigate if the bulk of mortgagor-relief efforts remain at the state or local level, for the states and municipalities are in the best position to analyze the needs of their citizens and tailor relief efforts accordingly. In short, federal solutions should be avoided because they paint with too large of a brush, but that is not to say that the federal government is without a role. Congress or perhaps the U.S. Department of Housing and Urban Development could lead by drafting a model mortgagor-relief act, which the states would be free to amend and adopt as they consider appropriate to their needs. The remainder of this Section outlines what such an act should entail.

Both lenders and defaulting mortgagors would benefit greatly from a program that enlists the help of financial professionals to analyze each participating mortgagor’s financial position and to serve as mediators. The use of mediation would solve a number of major problems in the modification process. It would level the playing field between the many unsophisticated mortgagors and experienced lenders, facilitate communication between mortgagors and lenders, and help to avoid modifications that do not adequately address the needs of mortgagors. It also would reduce the workload for lenders. Mediators would be able to assist borrowers in gathering necessary documents and assessing their financial situation, after which they could present

347. MURPHY, supra note 216, at 4.
348. See MURPHY, supra note 216, at 4.
349. For a compelling argument in favor of the market being allowed to correct itself without government intervention, see Epstein, supra note 232.
350. See supra Part IV.B.
351. Mintz, supra note 323 (“‘If you call your servicer, they’re representing themselves,’ he said. ‘You need someone who will represent you.’”), Vivian S. Toy, Penetrating the Maze of Mortgage Relief, N.Y. TIMES, June 14, 2009, at 1.
352. Toy, supra note 351.
353. Toy, supra note 351.
a single streamlined recommendation to the lender without the lender having to expend significant upfront resources to get to the same point.354

Thus, the crux of the model act should be a mediation program. The successful results of the Philadelphia and Connecticut programs and the federal Making Home Affordable program support this recommendation.355 The program should be limited to mortgagors who occupy their defaulted properties as their primary residences and who specifically request to participate, which would avoid exacerbating vacant housing problems. Likewise, to prevent abuse of the program, mortgagors who have previously been terminated from the program or who have already successfully completed a workout through the program and redefaulted should be ineligible to re-enroll.

Lenders should be required to inform mortgagors about the availability of the program by including a uniform information statement about it with all notices of default sent on loans secured by principal residences. The statement should include a toll free phone number for a state-run information call center for general information and help regarding enrollment in the program. A mortgagor should initially contact the call center, which would then coordinate the scheduling of an orientation meeting for the mortgagor with a county office responsible for overseeing the mediation process in the mortgagor’s locale.

During the orientation process, a mediator should meet with the mortgagor, explain how foreclosure works and what the mediation program entails, obtain the mortgagor’s written consent to communicate with her lender regarding her loan, and begin to assist the mortgagor in gathering the financial information and supporting documentation required for evaluation. Upon completion of orientation, the mortgagor should be enrolled in the mediation program. The mediator then should notify the lender that the mortgagor is participating in the program, after which mediation should become mandatory. Then the lender should not be permitted to proceed with a foreclosure auction of the property or obtain a deficiency judgment against the mortgagor until whichever of the following occurs first: 1) the mediator notifies the mortgagor and lender that mediation efforts have failed or are no longer viable; 2) the mortgagor fails to appear for a scheduled mediation meeting, ceases to reside at the property as his principal residence, or otherwise fails to meet the obligations of the program; or 3) a set period, such as three months, passes from the time that the lender was notified of the mortgagor’s participation in the program. Thus, although the delay in the foreclosure process would provide the mortgagor with extra time to attempt a workout, it would be limited to a short period with specific constraints in an effort to both be fair to lenders and to avoid constitutional issues.356 In addition, at least the provision for delaying steps in the foreclosure process

354. Toy, supra note 351.
356. See supra Part II.
should be set to expire on its own terms within a year, again in an effort to comply with established constitutional constraints, unless extended by the legislature.

After orientation, the mediator would continue to work with the mortgagor, following up weekly until all required documentation, including for example, pay stubs, bank statements, tax returns, and a letter explaining the hardship that caused the default, has been gathered. The mediator would then perform an initial analysis of the mortgagor’s financial condition and determine, in light of the mortgagor’s income and other financial obligations, the maximum monthly mortgage payment that the mortgagor could reasonably afford, which, in line with current modification standards, should generally result in a total monthly debt obligation of roughly no more than a third of the mortgagor’s gross income. Then the mediator would determine whether typical modifications, such as extending the term or reducing the interest rate, would fall within the amount that a mortgagor is able to afford.

If it is clear that a modification is not likely to work, the mediator would then notify both the lender and the mortgagor as such, recommend that the lender accept a deed in lieu of foreclosure or short sale, and move forward with exit counseling for the mortgagor. However, if typical modifications have a reasonable likelihood of working, then the mediator would proceed with negotiating a modification, beginning with the submission of a recommendation to the lender identifying the maximum amount that the mortgagor is able to afford and what options might best meet the mortgagor’s needs. In most cases, the mediator would recommend converting adjustable rates to fixed, interest-only payments to amortized, and generally attempting to reduce the mortgagor’s monthly payment. Structuring the mediation process in this way would circumvent some of the problems that previous mediation efforts have had in failing to craft modifications that fully account for each mortgagor’s financial condition and therefore lead to a high redefault rate. It also would greatly reduce the strain on lender loss mitigation departments by eliminating the need for them to “coach” mortgagors through the workout process, allowing them to devote more resources to analyzing and responding to actual modification, deed in lieu, and short sale requests.

The mediation process would conclude with an exit counseling meeting with the mortgagor. If the mediator is able to successfully negotiate a modification,

357. See supra Part II.
358. For example, the Making Home Affordable program calls for modifications that maintain no more than a thirty-one percent debt-to-income ratio for mortgagors. Mary Ellen Podmolik, Homeowner Help, Chi. Trib., Mar. 5, 2009, at 19; see also Joe Alder, Agencies Clarify Mod Capital Rules, Am. Banker, June 29, 2009, at 12; Andrews, supra note 152; Flitter, supra note 327.
359. See Andrews, supra note 152.
360. See supra Part III.B.2.
361. See supra Part III.B.2.
the mediator would assist the mortgagor in executing the modification documentation and ensure that the mortgagor has the tools to successfully proceed—making a budget, saving, contacting other creditors to renegotiate payment agreements, and generally staying on track with the modification. If the mediation process fails, then the mediator would recommend that the lender accept a deed in lieu or a short sale, assist the mortgagor in finding a real estate agent and listing the property for sale, and ensure that the mortgagor understands that she remains responsible for the property until the foreclosure sale goes through and that she will need to be prepared to move at that time.

VI. CONCLUSION

Government responses to the foreclosure crisis must achieve common-sense solutions to what is, by any account, a tough problem. By its very nature, foreclosure is usually a losing situation for both the property owner and the lender. When properties have equity, defaulting homeowners are usually able to sell and recoup what they can—the difference between the sale price and the costs inherent in selling and paying off the debt secured by the property. Therefore, the properties at issue tend to be those with little or no equity. The property owner stands to lose his investment, which is often also his home, and the lender faces trying to sell a property that is already worth close to or less than what is owed, and which will likely continue to decrease in value after the commencement of foreclosure proceedings due to neglect and possible abandonment if the homeowner gives up and walks away.

“One size fits all” solutions are likely to fail to fully take account of the externalities that they will create, and therefore they can cause unintentional collateral damage. When property owners have already abandoned their properties, delaying the foreclosure process only serves to extend the time that the properties remain vacant, leading to myriad other problems: increased strain on code enforcement departments, increased crime, and a general decrease in surrounding property values. Moreover, not all the foreclosures are of owner-occupied homes; many are rental and investment properties from failed entrepreneurs. A single real estate investor might own several or even dozens of properties. Given that cash flow problems are the typical cause of mortgage default for rental property, investors in financial trouble simply do not have the means to care for a multitude of properties. In such cases, the lender

362. FOOTE ET AL., supra note 235, at 3.
364. See supra Part IV.B.
365. See supra Part IV.B.
366. See supra Part IV.B.
367. See supra Part IV.A.
368. See supra Part IV.A.
369. See supra Part IV.A.
needs to be able to quickly foreclose, take full responsibility and control of the
property, and work to sell the property to a new owner expediently to reduce the
likelihood of the problems inherent in having vacant properties.

Thus, efforts to help must be specifically tailored to avoid creating other
problems and should therefore be limited to homeowners who occupy their
properties, want to work out an alternative to foreclosure, and are likely to
succeed in doing so. The success of mediation programs, particularly those
implemented in Philadelphia and Connecticut, suggests that they are the most
effective at overcoming the problems inherent in existing modification efforts
and of actually providing relief to mortgagors. Most importantly, they can be
tailored to limit the negative side-effects that can result from “one size fits all”
solutions such as blanket moratoria.

SOVEREIGNTY SHOWDOWN IN BIG SKY COUNTRY (AND BEYOND): THE MONTANA FIREARMS FREEDOM ACT

Isaac Wayne Burkhart

What country can preserve its liberties if its rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms.1

I. INTRODUCTION

On April 15, 2009, Montana’s staunchly pro-gun governor, Brian Schweitzer (D),2 signed into law House Bill 246,3 the Montana Firearms Freedom Act (hereinafter “the Act” or “FFA”).4 The Act became effective on October 1, 2009, making certain Montana-made firearms, firearm accessories, and ammunition exempt from federal regulation, including registration.5 However, this is not the first time that Montana has attempted to thwart what it perceives as onerous federal regulation. In fact:

This is the state that has effectively, by law, decreed that every law-abiding citizen within the state is authorized to carry a firearm within a school zone; the state that nullified the federal requirements of REAL-ID . . . ; and [the state] which had even threatened to leave the union if the Supreme Court ruled against Second Amendment rights in the [District of Columbia v.] Heller case.6

* The author is a 2010 J.D. candidate at Salmon P. Chase College of Law, Northern Kentucky University and a 2003 graduate of Berea College.

6. Gun Rights: States Beginning to Resist Federal Intrusion, GUN DIGEST, May, 14, 2009, http://www.gundigest.com/article/gunrights_051409_statesresistsfed; see MONT. CODE ANN. § 45-8-360 (1995) (declaring that “a person who has not been convicted of a violent, felony crime and who is lawfully able to own or to possess a firearm under the Montana constitution is considered to be individually licensed and verified by the state of Montana within the meaning of the provisions regarding individual licensure and verification in the federal Gun-Free School Zones Act”); REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (establishing federal standards for state drivers’
As Gary Marbut, President of the Montana Shooting Sports Association (and one of the authors of the Montana FFA), has put it, “We tend to break trail here in Montana.”

During the FFA house debate, the sponsor of the bill, Rep. Joel Boniek, referenced the need “for Montana to be able to handle Montana’s business and affairs.” Boniek has also noted that “[f]irearms are inextricably linked to the history and culture of Montana,” but he emphasized that “the issue here is not about firearms.” Rather, Boniek contends that the heart of the FFA is about states’ rights, and “[g]uns are just the vehicle.” Similarly, Governor Schweitzer has explained that, “[i]t’s a gun bill, but it’s another way of demonstrating the sovereignty of the state of Montana.” After signing the FFA into law, Schweitzer indicated his approval of the legislation. “It doesn’t cost us any money, and I like guns,” he is reported to have said.

In order to assert an exemption of Montana-made firearms, accessories, and ammunition from federal regulation, supporters originally planned to find a “squeaky clean” Montanan that would inform the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE) of his intent to manufacture (in Montana) and sell (in Montana) twenty single shot .22 bolt action Montana-made licenses; Mont. Code Ann. § 61-5-128 (2007) (declaring that “[t]he state of Montana will not participate in the implementation of the REAL ID Act of 2005”); District of Columbia v. Heller, 128 S.Ct. 2783 (2008) (holding that the Second Amendment’s right to keep and bear arms is an individual right); see also Gary Marbut, Montana Rejects Federal Anti-Gun Law, The Guns Network, Feb. 2, 2000, http://gunsnet.net/forums/archive/index.php/t-9834.html; Letter from Brad Johnson, Mont. Sec’y of State, to Editor, Washington Times (Feb. 15, 2008) (on file with author), available at http://www.progunleaders.org/Heller/SoS%20Washington%20Times%20Letter.pdf (regarding the then upcoming case District of Columbia v. Heller, 128 S.Ct. 2783 (2008). Although the letter does not explicitly employ the term “secession,” it does strongly emphasize the bilateral agreement that was made between the United States and Montana at the time when Montana was admitted as a state: “[a] collective rights decision by the Court would violate the contract by which Montana entered into statehood, called the Compact with the United States and archived at Article I of the Montana Constitution. When this bilateral contract was entered into by Montana and the U.S. in 1889, the U.S. approved the right to bear arms in the Montana Constitution, guaranteeing the right of ‘any person’ to bear arms, clearly an individual right.”).


12. Deines, supra note 2.
youth rifles without complying with federal dealership licensing. Then, if the BATFE were to claim that such action was illegal, supporters of the FFA planned “to file a lawsuit in federal court with the goal of launching a legal showdown that lands in the U.S. Supreme Court.”

However, the BATFE made the first move, as it recently sent “open” letters to Federal Firearms Licensees (FFLs) in Montana and Tennessee (the first two states to enact a FFA), claiming that the FFA is preempted by federal law. Gary Marbut responded to these letters on the FFA’s website, stating that “[s]uch a response to the state-made guns bills by the BATFE has been expected.” Additionally, Marbut questioned the significance of the letters because they were addressed to gun manufacturers and dealers who are already licensed by the federal government. “Those people already are under the thumb of the Feds,” he said. “We’ve assumed they wouldn’t want to put their circumstances at risk in dabbling in the state-made guns business,” so “[t]he people who the letters are addressed to are pretty irrelevant to the whole discussion.” However, because “[t]he feds have thrown down the gauntlet,” Marbut expressed optimism that the letters would “help . . . establish standing to get this issue squarely before the federal courts.”

On October 1, 2009 (the day the Montana FFA became effective), the Montana Shooting Sports Association and the Second Amendment Foundation filed suit in the United States District Court for the District of Montana (Missoula, MT) seeking a declaratory
judgment and injunctive relief. As expected, the United States has filed a motion to dismiss.

This article discusses the substance of the Montana FFA, the status of similar legislation that has been introduced in other states, and the potential constitutionality (or unconstitutionality) of the Act based upon the Supreme Court’s Commerce Clause jurisprudence, particularly from the New Deal to the present.

II. HOUSE BILL 246: THE MONTANA FFA

A. Legislative Declaration of Authority

The Montana FFA cites the Second, Ninth, and Tenth Amendments of the United States Constitution, as well as Article II, section 12 of the Montana Constitution, in its legislative declarations of authority section of the Act. First, paragraph 1 explains that the Tenth Amendment “guarantees to the states and their people all powers not granted to the federal government elsewhere in the constitution and reserves to the state and people of Montana certain powers as they were understood at the time that Montana was admitted to statehood in 1889.” The Act further notes that the powers reserved to the state of Montana and its people are “a matter of contract between the state and people of Montana and the United States as of the time that the compact with the United States was agreed upon and adopted by Montana and the United States in 1889.”

Next, paragraph 2 notes that “[t]he Ninth Amendment to the United States Constitution guarantees to the people rights not granted in the Constitution and reserves to the people of Montana certain rights as they were understood at the time that Montana was admitted to statehood in 1889.” This paragraph also reiterates the position set forth in paragraph 1, that “the guaranty of those rights is a matter of contract between the state and people of Montana and the United States . . . .”

24. U.S. CONST. amend. II.
25. U.S. CONST. amend. IX.
26. U.S. CONST. amend. X.
28. Id. para. (1).
29. Id.
30. Id. para. (2).
31. Id.
Paragraph 3 declares that “[t]he regulation of intrastate commerce is vested in the states under the [Ninth] and [Tenth] [A]mendments to the United States [C]onstitution, particularly if not expressly preempted by federal law,” and “Congress has not expressly preempted state regulation of intrastate commerce pertaining to the manufacture on an intrastate basis of firearms, firearm accessories, and ammunition.”

Paragraph 4 of the Act again references a contract between the state and people of Montana and the United States, asserting that “the [S]econd [A]mendment to the United States [C]onstitution reserves to the people the right to keep and bear arms as that right was understood at the time that Montana was admitted to statehood in 1889, and the guaranty of the right is a matter of contract between the state and people of Montana and the United States as of the time that the compact with the United States was agreed upon and adopted by Montana and the United States in 1889.”

Finally, paragraph 5 references Article II, section 12, of the Montana constitution which, according to the Act, “clearly secures to Montana citizens, and prohibits government interference with, the right of individual Montana citizens to keep and bear arms.” The Act further notes that this provision of Montana’s constitution “was approved by congress and the people of Montana, and the right exists as it was understood at the time that the compact with the United States was agreed upon and adopted by Montana and the United States in 1889.”

B. Summary of the Act

The Montana FFA declares that “a personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in Montana and that remains within the borders of Montana is not subject to federal law or federal regulation, including registration, under the authority of Congress to regulate interstate commerce.” The Act requires that a firearm manufactured or sold under the Act “have the words ‘Made in Montana’ clearly stamped on a central metallic part, such as the receiver or frame.”

While the term “personal firearm” is not defined, the Act specifically excludes certain types of firearms from its scope. For instance, the Act does not

32. Id. para. (3).
33. MONT. CODE ANN. § 30-20-102, para. (4).
34. Id. para. (5); see also MONT. CONST. art. II, § 12, available at http://leg.mt.gov/css/Laws%20and%Constitution/Current%20Constitution.asp (“The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons.”).
36. Id. § 30-20-104.
37. Id. § 30-20-106.
apply to a firearm which “cannot be used and carried by one person,” 38 a firearm which has “a bore diameter greater than 1 ½ inches and that uses smokeless powder, not black powder, as a propellant,” 39 or “a firearm that discharges two or more projectiles with one activation of the trigger or other firing device.” 40 Also, the Act excludes “ammunition with a projectile that explodes using an explosion of chemical energy after the projectile leaves the firearm.” 41

Additionally, the Act purports to exempt from federal regulation Montana-made firearms which include “[g]eneric and insignificant parts that have other manufacturing or consumer product applications . . .” that may have been imported into Montana and used to produce the firearm. 42 Furthermore, the Act declares that, “basic materials, such as unmachined steel and unshaped wood, are not firearms, firearm accessories, or ammunition, and are not subject to congressional authority to regulate firearms, firearms accessories, or ammunition.” 43 Finally, the Act makes clear that “[f]irearm accessories that are imported into Montana from another state and that are subject to federal regulation as being in interstate commerce do not subject a firearm to federal regulation under interstate commerce because they are attached to or used in conjunction with a firearm in Montana.” 44

C. Similar FFAs Emerge In Other States

Several states have followed Montana’s lead, as seven other states – Alaska, 45 Arizona, 46 Idaho, 47 South Dakota, 48 Tennessee, 49 Utah, 50 and

38. Id. § 30-20-105.
39. Id.
40. Id.
42. Id. § 30-20-104.
43. Id.
44. Id.
Wyoming have enacted similar statutes, which are commonly referred to as FFA “clones.” Tennessee was the first state to enact a FFA clone, as the state’s governor, Phil Bredesen (D), allowed the bill to pass without his signature (presumably because the legislature had enough votes to override his veto). In a letter to Tennessee House Speaker Kent Williams, Governor Bredesen expressed concern about the constitutionality of the bill. Bredesen opined that the FFA is “a fringe constitutional theory that . . . will be quickly dispensed with by the federal courts.” Noting that he “share[s] the General Assembly’s commitment to federalism,” Bredesen indicated that he believes the state legislature “lacks the Constitutional authority to limit the power and authority of the federal government in this way . . . .” However, the sponsor of the bill in the Tennessee Senate, Mae Beavers, argued that the bill “takes a step in the right direction to restore to the states control of intrastate commerce and the regulation of firearms manufactured and sold within Tennessee.” Additionally, nineteen states – Alabama, Colorado, Florida, Indiana, Kansas, Kentucky, and others – have enacted similar statutes.


52 On June 3, 2009, the Tennessee State Senate approved S.B. 1610, the Tennessee FFA, by a vote of 22-7. The House companion bill, H.B. 1796 previously passed the House by a vote of 87-1.

53 The Tennessee legislature recently voted to override the governor’s veto of a bill that allows concealed carry permit holders to carry a weapon into a restaurant that serves alcohol so long as the permit holder is not drinking. On June 4, 2009, the state Senate voted 21-9 against Governor Bredesen’s veto, a day after the House also voted 69-27 to override. Thirty-seven other states have passed similar legislation. See A.P., State Lawmakers Approve Guns in Bars, available at http://www.msnbc.msn.com/id/31122117/ (Jun. 5, 2009).


56 Id.


60 See H.R. 21, 2010 Leg. Sess. (Fla. 2010), available at http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=42148&SessionIndex=-1&SessionId=64&BillText=&BillNumber=21&BillSponsorIndex=0&BillListIndex=0&BillStatuteText=&BillTypeIndex=0&BillReferredIndex=0&HouseChamber=H&BillSearchIndex=0; S. 98, 2010 Leg. Sess. (Fla. 2010), available at http://www.myfloridahouse.gov/
Louisiana, 64 Michigan, 65 Minnesota, 66 Missouri, 67 New Hampshire, 68 Ohio, 69 Oklahoma, 70 Pennsylvania, 71 South Carolina, 72 Texas, 73 Virginia, 74 Washington, 75 and West Virginia 76 – have introduced similar legislation, and legislators in other states have announced that their intent to introduce FFA clones. 77


77. Posting to Firearms Freedom Act Blog, The Firearms Freedom Act (FFA) is Sweeping the Nation, http://firearmsfreedomact.net/ (April 11, 2010) (indicating that legislators in Arkansas, Georgia, New Mexico, and North Carolina are intending to introduce a FFA clone).
The FFA compels an inquiry into several constitutional issues, including the scope of the Second Amendment, the Ninth Amendment, the Tenth Amendment, and the federal government’s power to regulate under the Commerce Clause. This Article will address the growing controversy surrounding the FFA by focusing on the history and evolution of the Commerce Clause. In particular, the Court’s deviation from the original meaning of the Commerce Clause during the New Deal will be addressed. Next, some modern cases which seem to have placed some limits on the scope of the federal government’s power to regulate under the Commerce Clause, including United States v. Lopez, United States v. Morrison, will be discussed. Finally, the FFA’s relationship to a broader state sovereignty movement will be noted, and conclusions regarding the potential constitutionality of the Act will be drawn in light of the Court’s recent decision in Gonzalez v. Raich.

II. A CONCISE HISTORY OF THE COMMERCE CLAUSE

The limited and enumerated powers of the federal government are contained in Article I, Section 8 of the United States Constitution in a series of eighteen individual clauses. The third of these, now commonly referred to as the “Commerce Clause” states that “[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several states.” While these words originally conveyed a “modest power” intended to “serve a narrow purpose,” the Court’s modern Commerce Clause jurisprudence has expanded the scope of this power to the extent that Congress can regulate almost anything under the Commerce Clause. Indeed, one judge has even questioned why “[a]fter reading [a modern Commerce Clause decision] . . . anyone would make the mistake of calling it the Commerce Clause instead of the ‘Hey, you-can-do-whatever-you-feel-like clause.’” The following sections will describe the origins of the Commerce Clause, its original meaning, its expansion through the New Deal, and the potential limitations on the federal government’s power to regulate under the Commerce Clause based on the Court’s modern jurisprudence.

80. 545 U.S. 1 (2005).
82. U.S. Const. art. I, § 8, cl. 3.
84. Id. at 37 (quoting Alex Kozinski, Introduction to Volume Nineteen, 19 HARV. J. L. & PUB. POL’Y 5 (1995)).
A. Origin and Original Meaning

The principle of federalism has been described as “a vexatious thorn in the side of American constitutional structure.”\(^{85}\) However, the proverbial tug-of-war between the federal and state governments that has occurred since the adoption of the Articles of Confederation in 1781 to the present day has, for the most part, resulted in an “uninterrupted national ascendancy.”\(^{86}\) In order to better understand the Commerce Clause controversy and the enduring struggle between the “so-called liberal or nationalist and [the] conservative or [federalist] political ideologies . . .,” it is necessary to first consider the historical origin and original meaning of the Commerce Clause.\(^{87}\)

Prior to the signing of the Declaration of Independence, Britain exercised control over commerce between the colonies and with foreign nations.\(^{88}\) Consequently, there had been “no significant commercial problems” in the colonies until independence from Britain was declared in 1776.\(^{89}\) However, the colonies’ newfound independence was accompanied with newfound challenges. In particular, the sudden lack of central control over commercial activity led to apprehension in individual states of having their trade subjected to “discriminatory restrictions either by states with conflicting commercial interests or a national government that might be controlled by such interests.”\(^{90}\) These concerns led to the formation of a national government under the Articles of Confederation which gave the newly formed Continental Congress no authority to regulate commerce among the states.\(^{91}\)

The result of this “lack of centralized authority,” along with the competing economic interests of the individual states, led to “economic chaos” in the newly formed nation,\(^{92}\) as the states “fettered, interrupted, and narrowed” interstate commerce by erecting trade barriers such as protective tariffs against goods which entered their borders.\(^{93}\) After the Articles of Confederation proved to be a failure, delegates from across the nation met in Philadelphia with the purpose of “forg[ing] a new government for the United States.”\(^{94}\) The delegates originally sought to remedy the fallacies of the Articles of Confederation through


\(^{86}\) *Id.* at 48.


\(^{89}\) *Id.*

\(^{90}\) *Id.* at 158-59.

\(^{91}\) *Id.* at 159.


\(^{93}\) Crook, *supra* note 85, at 50.
amendment, but it soon became clear that “an entirely new form of government” was warranted.95

At the time of the founding, the “limited and enumerated” powers that would eventually be set forth in Article I, section 8, of the Constitution were “the subject of considerable debate.”96 For example, much of the debate surrounding the scope of federal power was raised by the Anti-Federalists, who initially opposed the ratification of the Constitution.97 However, in the wake of the utter failure of the Articles of Confederation, “one clause avoided much of the Anti-Federalists’ wrath: the Commerce Clause.”98 Aside from an initial objection to the granting of a general police power to Congress, there was no debate in the Constitutional Convention over the grant of power to regulate commerce “among the several states.”99 Indeed, “[a]part from the need to negotiate treaties of commerce with other nations, the principle purpose for adopting a new Constitution was to deprive the states of the power to interfere with productive exchanges.”100

Although there is little direct history about the intent of the Commerce Clause, “[t]he most persuasive evidence of original meaning – statements made during the drafting and ratification of the Constitution as well as dictionary definitions and The Federalist Papers – strongly supports . . . [a] narrow interpretation of Congress’s power.”101 In examining these sources, as well as the 1,594 times that the term “commerce” appeared in the Pennsylvania Gazette from 1728-1800,102 constitutional scholar Randy E. Barnett has reached the following conclusions:

“Commerce” means the trade or exchange of goods (including the means of transporting them); “among the several states” means between persons of one state and another; and the term “to regulate” means “to make regular”—that is, to specify how an activity may be transacted—when applied to domestic commerce, but also includes the power to make “prohibitory regulations” when applied to foreign trade.

Although scholars have long disagreed on how broadly or narrowly that the term “commerce” should be construed,104 Barnett’s research has led him to make the following conclusion about the proper scope of Congress’s commerce power:

95. Nowak & Rotunda, supra note 88, at 159.
96. Levy & Mellor, supra note 83, at 37.
97. Levy & Mellor, supra note 83, at 38.
98. Levy & Mellor, supra note 83, at 38.
100. Barnett, supra note 93, at 133.
103. Id.
104. See, e.g., Grant S. Nelson & Robert J. Pushaw, Jr., Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control
Congress has power to specify rules to govern the manner by which people may exchange or trade goods from one state to another, to remove obstructions to domestic trade erected by states, and to both regulate and restrict the flow of goods to and from other nations (and the Indian tribes) for the purpose of promoting the domestic economy and foreign trade.105

The following section will examine the Court’s Commerce Clause jurisprudence, particularly its dramatic shift during the New Deal Court.

B. Expansion and the New Deal

During the first century of the Commerce Clause’s existence, there was a scant amount of case law construing it.106 At the time, “the primary use of the Clause was to preclude the kind of discriminatory state legislation that had once been permissible” under the Articles of Confederation.107 Accordingly, most of the Commerce Clause controversies arose from states that had “impermissibly frustrated interstate commerce.”108 Congress did not fully begin to exercise its commerce power until the late nineteenth century, when it passed the Interstate Commerce Act in 1887109 and the Sherman Antitrust Act in 1890.110 This legislation had the effect of “usher[ing] in a new era of federal regulation under the commerce power.”111

Even as Congress eventually began to exercise more regulatory power in the late nineteenth and early twentieth centuries, “the Supreme Court continued to

Over Social Issues, 85 IOWA L. REV. 1, 101 (1999) (contending that “the Framers and Ratifiers of the Constitution likely did not intend to so restrict ‘commerce’ [to the sale and transportation of goods between states], but rather sought to include all market-based activities such as production, banking, and insurance”). Other scholars have, like Barnett, endorsed a narrow construction. See, e.g., Raoul Berger, Judicial Manipulation of the Commerce Clause, 74 TEX. L. REV. 695, 703 (1996) (arguing that “the Founders conceived of ‘commerce’ as ‘trade,’ the interchange of goods by one State with another”); Richard A. Epstein, The Proper Scope of the Commerce Power, 73 VA. L. REV. 1387 (1987) (contending that “the commerce power should be limited to those matters that today are governed by the dormant commerce clause: interstate transportation, navigation and sales, and the activities closely incident to them. All else should be left to the states.”).

105. Barnett, supra note 93, at 146.
107. Gonzalez v. Raich, 545 U.S. 1, 16 (2005).
108. LEVY & MELLOR, supra note 83, at 39 (citing Robbins v. Taxing Dist. of Shelby Co., Tenn., 120 U.S. 489, 497 (1887); Walling v. Michigan, 116 U.S. 446, 461 (1886); and Case of State Freight Tax, 82 U.S. 232, 279-80 (1873) as examples of early Commerce Clause cases involving a state which had “impermissibly frustrated interstate commerce”). Today, these types of cases are commonly referred to as “Dormant” or “Negative” Commerce Clause cases. See also Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299 (1851); Veazie v. Moor, 55 U.S. (14 How.) 568, 14 L.Ed. 545 (1853); Kidd v. Pearson, 128 U.S. 1 (1888).
maintain a fairly restrained view of the commerce power.”112 This restrained view persisted into the 1930’s, as a majority of the Court stood as a barrier to President Franklin Delano Roosevelt’s New Deal, a “bold series of financial reforms and social policies” designed to confront the unprecedented national turmoil caused by the Great Depression.113 The sweeping reform of Roosevelt’s programs “quickly became a cause of judicial concern,” and the Court began to strike down legislation that it believed was reserved to the States by the Tenth Amendment.114

The most famous of these cases (and the one “which caused the greatest public uproar during the New Deal”)115 was _A.L.A. Schechter Poultry Corp. v. United States_.116 The case arose after Schechter Poultry Corporation (hereinafter Schechter) was convicted on eighteen counts of violations of the Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and about the City of New York, also known as the “Live Poultry Code.”117 Schechter was “a poultry slaughterhouse that purchased live poultry from suppliers in New York, and furnished live or slaughtered poultry to dealers and butchers selling directly to consumers.”118 Thus, “[a]lthough the vast majority of poultry sold in New York came from other states,” Schechter ordinarily “bought within New York City and resold its stock exclusively to local dealers.”119

The Court unanimously held that certain regulations promulgated under the authority of the National Industrial Recovery Act of 1933 were unconstitutional.120 The Court’s holding was based on two distinct conclusions. First, “allowing the President to approve and adopt trade codes constituted an excessive and unconstitutional delegation of power,” and, second, “the [A]ct exceeded the scope of the federal commerce power.”121 The Court held that the Act exceeded the scope of the federal Commerce Clause power because it “inappropriately permitted the regulation of commerce wholly within a state.”122 In reaching its conclusion, the Court observed that once Schechter had made its purchases, “[t]he interstate transactions in relation to that poultry then ended.”123 Thus, because Schechter “held the poultry at [its] slaughterhouse markets for slaughter and local sale to retail dealers and butchers who in turn sold directly to consumers[,] [n]either the slaughtering nor the sales by defendants were

112. Id.
113. Crook, _supra_ note 85, at 65.
114. Crook, _supra_ note 85, at 65.
117. Id. at 519.
119. EMANUEL, _supra_ note 115, at 31; see also Schechter, 295 U.S. at 520 (indicating that the Schechers occasionally purchased their poultry from commission men in Philadelphia).
121. NOWAK & ROTUNDA, _supra_ note 88, at 173.
122. BARNETT, _supra_ note 118, at 221.
123. _Schechter_, 295 U.S. at 543.
transactions in interstate commerce." Accordingly, the Court concluded that Congress had no constitutional authority to regulate local, wholly intrastate poultry sales (or the labor involved in those sales) which only indirectly affected interstate commerce.

In addition, the Court twice responded to those who contended that the Act was essential to address the national crisis of the time. First, the Court acknowledged:

Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, . . . but these powers . . . are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment.

The Court reinforced this assertion in a later passage:

It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it. Our growth and development have called for wide use of the commerce power of the federal government in its control over the expanded activities of interstate commerce, and in protecting that commerce from burdens, interferences, and conspiracies to restrain and monopolize it. But the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce “among the several States” and the internal concerns of a [s]tate. . . . [I]t is enough to say that the recuperative efforts of the federal government must be made in a manner consistent with the authority granted by the Constitution.

However, the seeming “triumph of the states against federal encroachment” was “ultimately short-lived,” when just two years later Justice Owen J. Roberts defected from the Court’s more conservative justices, Pierce Butler, James Clark McReynolds, George Sutherland, and Willis Van Devanter.

124. Id.
125. Id. at 551; see also Carter v. Carter Coal Co., 298 U.S. 238 (1936) (holding that the regulation of mine labor was beyond the scope of the commerce power because employer/employee relations were local in nature).
126. Schechter, 295 U.S. at 528.
127. Id. at 549-50.
128. Crook, supra note 85, at 67.
129. LEVY & MELLOR, supra note 83, at 39.
These four justices, who came to be known as the “Four Horsemen,” had consistently opposed the expansion of the federal government via President Roosevelt’s New Deal agenda and had “maintained a bulwark against the expansion of the Interstate Commerce Clause.” Roberts’ defection from his conservative counterparts is often referred to as the “switch in time that saved nine,” as it eliminated the need for Roosevelt’s scheme to increase the number of New Deal-friendly justices on the Supreme Court through the Judiciary Reorganization Bill of 1937. However, it also “marked the beginning of a sudden rapid expansion of the . . . Commerce Clause.”

The case which best exemplifies the dramatic shift in the Court’s treatment of the Commerce Clause (and the birth of the modern approach to Commerce Clause analysis) is *NLRB v. Jones & Laughlin Steel Corp.* In this landmark case, Justice Roberts became the “crucial fifth vote,” needed to uphold the constitutionality of the National Labor Relations Act as a proper exercise of Congress’s power to regulate under the Commerce Clause. The controversy began when the National Labor Relations Board (NLRB) alleged that Jones & Laughlin Steel Corporation (hereinafter Jones & Laughlin) had violated the National Labor Relations Act by “engaging in unfair labor practices affecting commerce.” The unfair labor practices alleged by the NLRB were that Jones & Laughlin had “discriminated against members of the union with regard to hire and tenure of employment” and had coerced, “and intimidated its employees in order to interfere with their self-organization.” The discrimination and coercion alleged was the wrongful discharge of certain employees.

The NLRB instructed Jones & Laughlin:

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130. *Levy & Mellor, supra* note 83, at 39. Other examples of cases in which the Court struck down New Deal era legislation as unconstitutional include Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (holding that part of the National Industrial Recovery Act was unconstitutional); United States v. Butler, 297 U.S. 1 (1936) (holding that certain provisions of the Agricultural Adjustment Act of 1933 were unconstitutional).

131. The Judiciary Reorganization Bill of 1937 is commonly referred to as the “court packing plan,” because Roosevelt devised the plan (which would have allowed him to appoint an additional six justices to the Court) as a “necessary way to allow social reforms and end the Depression.” *Nowak & Rotunda, supra* note 88, at 175. However, “[a]fter public announcement of the . . . bill, it was attacked and harshly criticized from all quarters.” Marian C. McKenna, *Franklin Roosevelt and the Great Constitutional War: The Court Packing Crisis of 1937* 338 (2002); see also *The M.E. Sharpe Library of Franklin D. Roosevelt Studies, Franklin D. Roosevelt and the Transformation of the Supreme Court* (Stephen K. Shaw et al. eds., 2004).


133. 301 U.S. 1 (1937).


137. *Id.*

138. *Id.*
to cease and desist from such discrimination and coercion, to offer reinstatement to ten of the employees named, to make good their losses in pay, and to post for thirty days notices that the corporation would not discharge or discriminate against members, or those desiring to become members, of the labor union.139

After Jones & Laughlin refused, the NLRB petitioned the circuit court to enforce the order.140 The circuit court denied the petition (concluding that it was outside the scope of federal power), but the Supreme Court granted certiorari.141 The majority concluded that the Court’s prior holdings in Schechter142 and Carter v. Carter Coal Co.143 were “not controlling” because Schechter involved activity whose effect on interstate commerce was too remote, and Carter Coal involved a statute that “not only went beyond any sustainable measure of protection of interstate commerce but [was] also inconsistent with due process.”144 The dissent, however, criticized the majority for “depart[ing] from [the] well-established principles” enunciated in Schechter and Carter Coal.145

In the end, the majority created a broad, sweeping Commerce Clause test that has survived to the present day. Under the substantial effects test set forth in Jones & Laughlin, purely intrastate activity can be regulated under the Commerce Clause so long as it has a “close and intimate relation to interstate commerce.”146 The Court also issued a companion opinion in which it relied on Jones & Laughlin to uphold the constitutionality of the National Labor Relations Act as applied to a minor clothing manufacturer.147 This decision further established the Court’s new-found willingness to recognize economic impact as a “substantial relationship to interstate commerce.”148

In 1941, the Court applied its substantial effects test to the Fair Labor Standards Act of 1938149 in United States v. Darby.150 At issue in Darby was whether Congress could, under its commerce power, prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages or hours per week did not conform to a federal mandate.151 Also at issue was whether Congress could establish a minimum wage, thereby proscribing the

139. Id.
140. Id.
141. Id. at 22.
143. 298 U.S. 238 (1936).
144. Jones & Laughlin, 301 U.S. at 40-41.
145. Id. at 76.
146. Id. at 37.
147. NOWAK & ROTUNDA, supra note 88, at 179 (referring to NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937)).
148. Id.
150. 312 U.S. 100 (1941).
151. Id. at 108.
employment of workmen in the production of goods intended for interstate commerce at wages or hours that failed to conform to the federal mandate.\footnote{152.
  \textit{Id.}}

Relying on the substantial effects test that it created in \textit{Jones & Laughlin}, the Court acknowledged that “the power of Congress over interstate commerce is not confined to the regulation of commerce among the states.”\footnote{153.
  \textit{Id.} at 118.} Rather, the Court concluded that the commerce power “extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.”\footnote{154.
  \textit{Id.}} Based on this conclusion, the Court reversed its decision in \textit{Hammer v. Dagenhart},\footnote{155.
  247 U.S. 251 (1918) (holding that Congress exceeded its power under the commerce clause when it enacted a statute that prohibited the transportation in interstate commerce of goods produced by child labor).} thereby finding the Act a proper exercise of Congress’s commerce power and continuing its trend of upholding federal legislation.

In the short hiatus between the federal government’s regulatory coups in \textit{Jones & Laughlin} and \textit{United States v. Darby}, Congress passed the Agricultural Adjustment Act of 1938 (AAA).\footnote{156.
  Agricultural Adjustment Act of 1938, 7 U.S.C. §§ 1281-1293 (2006).} One of the purposes of the AAA was “to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce.”\footnote{157.
  \textit{Id.} at 118.} In an effort to confront this problem, the AAA sought to prop up the price of wheat by directing the Secretary of Agriculture “to ascertain and proclaim each year a national acreage allotment for the next crop of wheat.”\footnote{159.
  \textit{Id.} at 118.} Subsequently, this allotment was “apportioned to the states and their counties, and [was] eventually broken up into allotments for individual farms.”\footnote{160.
  \textit{Id.} at 118.}

Although the AAA was designed to help struggling farmers, it also subjected those farmers who exceeded their quotas to fines unless they “stor[ed] the excess under regulations of the Secretary of Agriculture, or . . . deliver[ed] it up to the Secretary.”\footnote{161.
  \textit{Id.}} When a Montgomery County, Ohio farmer challenged the AAA as exceeding the scope of the federal government’s power to regulate under the Commerce Clause, few could have imagined that the result would lead to the Court’s “most significant expansion of federal power to date.”\footnote{162.
  \textit{Id.}}
Roscoe Filburn was the owner and operator of a small Ohio farm, “maintaining a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs.” In addition, he normally raised a small amount of winter wheat, which he used to feed his livestock and make flour. He sold the remaining portion of the wheat crop. Filburn sued Claude R. Wickard (the then Secretary of Agriculture of the United States), three members of the County Agricultural Conservation Committee for Montgomery County, Ohio, and a member of the State Agricultural Conservation Committee for Ohio to contest a $117.11 fine. The fine was assessed after Filburn grew twenty-three acres of wheat, over twice the amount of the 11.1 acre quota that had been imposed by Secretary Wickard. The result was a crop of 239 bushels above his allotment, and a fine of $0.49 per bushel (hence, the grand total of $117.11).

Objecting to the imposition of the quota and the fine, Filburn sought to enjoin the enforcement of the penalty imposed by the AAA. In addition, he challenged the quotas imposed by the AAA, alleging that the provisions, as applied to him, were unconstitutional because they exceeded the government’s power to regulate interstate commerce. Filburn contended that Congress did not have the constitutional authority to regulate the production and consumption of his wheat because such activities are “local in character, and their effects upon interstate commerce are at most ‘indirect.’” The Court disagreed, finding that “homegrown wheat . . . competes with wheat in commerce,” and “Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.” Thus, the Court created the aggregate effect theory, the “second major expansion of [the] Commerce Clause power.”

From its decision in Schechter to its decision in Wickard (a period of only seven years), the Court completely reversed course – from a unanimous vote in Schechter (finding no constitutional authority to regulate local, wholly intrastate activity) to a unanimous vote in Wickard (finding constitutional authority to regulate wholly intrastate activity which in the aggregate has a substantial effect on interstate commerce). One might ponder how (and why) the Court moved so rapidly from one extreme to the other. However, the answer to this riddle

164. Id.
165. Id. at 114-15.
166. Id. at 114.
167. Id.
168. Id. at 113.
170. Id. at 119.
171. Id. at 128-29.
172. Emanuel, supra note 115, at 34.
becomes clear upon learning that President Roosevelt was able to appoint seven justices (four of whom replaced the “Four Horsemen”) to the Court in the five years between Jones & Laughlin (1937) and Wickard (1942). In the end, the New Deal trilogy had the effect of transforming the Commerce Clause from its original function as “a shield against interference by the states” into “a sword wielded by the federal government.” As one scholar has observed, “Jones & Laughlin and Darby may have been the death of federalism; Wickard was its epitaph.”

C. A Possible Retraction?

1. United States v. Lopez

After the Court’s creation of the “substantial effect” test in Jones & Laughlin, the Court did not strike down a single piece of federal legislation for exceeding Congress’s power to regulate under the Commerce Clause for nearly sixty years. This lengthy hiatus is unsurprising in light of the fact that the test set forth in Jones & Laughlin coupled with the aggregate effect doctrine in Wickard allowed Congress via the Commerce Clause to “reach actions each of which has miniscule or no effect upon interstate commerce at all.” Thus, the Jones & Laughlin and Wickard cases created a Commerce Clause “test” that gave Congress the authority to regulate any activity that it has a rational basis for concluding that, in the aggregate, might have a substantial effect on interstate commerce. In 1995, however, the Court decided a landmark case that finally drew a line in the sand.

The controversy in United States v. Lopez had its genesis at Edison High School in San Antonio, where a twelfth-grade student, Alfonso Lopez, was arrested for carrying a concealed .38 caliber handgun and five rounds of ammunition into his school. Initially, Lopez was charged with violating a
Texas statute that prohibited the possession of firearms on school property, but these charges were dismissed the following day after federal agents charged Lopez with violating the Gun Free School Zone Act of 1990 (GFSZA). This Act made it a federal offense for “any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.” Lopez was eventually convicted in the United States District Court for the Western District of Texas and sentenced to six months’ imprisonment and two years’ supervised release.

On appeal, Lopez challenged his conviction, alleging that the GFSZA exceeded Congress’s power to legislate under the Commerce Clause. The Fifth Circuit agreed, holding that the GFSZA was beyond the scope of Congress’s commerce power. The Supreme Court granted certiorari. Chief Justice Rehnquist, writing for the majority, began with a historical analysis of the Commerce Clause, noting that during the first century of the Commerce Clause, activities such as production, manufacturing, and mining were distinguished from “commerce” and held to be “within the province of state governments.” The opinion also acknowledged the more expansive view that was developed during the New Deal era, but it stopped short of overruling any of those opinions. Chief Justice Rehnquist wrote:

Admittedly, some of our prior cases have taken long steps down that road [toward a federal police power of the sort retained by the States], giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local.

Thus, in Lopez, it seems that the majority sought only to prevent further expansion of the commerce power (rather than to undo the expansion that had already taken place). However, at least one justice may have been willing to go further. In his concurrence, Justice Thomas observed that the Court’s case

181. Id.; see also Tex. Penal Code Ann. § 46.03(a)(1) (Supp. 1994).
183. Lopez, 514 U.S. at 551 (citing 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V)). “The term ‘school zone’ is defined as ‘in, or on the grounds of, a public, parochial or private school’ or ‘within a distance of 1,000 feet from the grounds of a public, parochial or private school.’” Id. at n.1 (citing 18 U.S.C. § 921(a)(25)).
184. Id. at 552.
185. Id.
186. Id.; see also United States v. Lopez, 2 F.3d 1342, 1367-68 (5th Cir. 1993).
187. Lopez, 514 U.S. at 554.
188. See id.
189. Id. at 567-68.
190. See id. at 568 (Thomas, J., concurring).
law has “drifted far from the original understanding of the Commerce Clause.”

Justice Thomas was particularly critical of the substantial effects test, stating that “[t]his test, if taken to its logical extreme, would give Congress a ‘police power’ over all aspects of American life.” Justice Thomas further chastised the Court for “never com[ing] to grips with the implication of [the] substantial effects formula,” suggesting that in a future case the Court should replace this “innovation of the 20th century” with a standard which is more faithful to the original understanding of the Commerce Clause.

According to Justice Thomas, the original understanding of the term “commerce” (at the time of ratification) “consisted of selling, buying, and bartering, as well as transporting for these purposes.” He cited several dictionaries of the time, as well as the etymology of the word “commerce,” which literally means “with merchandise” to support this assertion. Thus, Justice Thomas concluded that “[t]he Constitution . . . uses the word ‘commerce’ in a narrower sense than our case law might suggest.” In addition, Justice Thomas criticized the substantial effects test, which he said the Constitution “does not support.” Rather, he contended that “much if not all of Art. I, § 8 (including portions of the Commerce Clause itself), would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce.” Finally, Justice Thomas took issue with Wickard’s “aggregation principle,” which he depicted as “clever, but [without a] stopping point.” Based on these observations, Justice Thomas urged the Court to “reconsider the substantial effects test in a future case.”

2. United States v. Morrison

In 2000, the Court struck down another federal statute for exceeding the scope of the Commerce Clause power in United States v. Morrison. Morrison involved a challenge to the Violence Against Women Act, a statute that “provide[d] a federal civil remedy for the victims of gender-motivated
Chief Justice Rehnquist, writing for the majority, held that the Commerce Clause does not provide Congress with the authority to regulate noneconomic, intrastate, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. In reaching this conclusion, the Court noted that “the Constitution requires a distinction between what is truly national and what is truly local.”

Both *Lopez* and *Morrison* attempted to distinguish *Wickard* rather than overrule it. The distinguishing factor, according to the Court, was that *Lopez* and *Morrison* involved criminal statutes that sought to regulate noneconomic activity, whereas the AAA in *Wickard* involved economic activity.

### III. The Commerce Clause Applied to the FFA

In 2005, the Commerce Clause returned to the forefront in *Gonzalez v. Raich*, a case that “arguably obliterate[d] what little progress *Lopez* and *Morrison* represented.” At issue in *Raich* was whether Congress could regulate the purely intrastate, noncommercial, medicinal use of marijuana. The controversy began after two California residents, Angel Raich and Diane Monson (hereinafter collectively referred to as Raich), challenged the Controlled Substances Act (CSA). The CSA, passed in 1970 as part of President Nixon’s “war on drugs,” created five schedules of controlled substances. Marijuana is categorized as a Schedule I substance, indicating that Congress found it to have a high potential for abuse, no currently accepted medical use in the United States, and a lack of accepted safety for use under medical supervision. Based on its classification as a Schedule I substance under the CSA, it is illegal to manufacture, distribute, dispense, or possess marijuana in the United States unless it is used as part of a Food and Drug Administration preapproved research study. The wisdom of this classification has been a subject of debate for many years.

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205. *Morrison*, 529 U.S. at 617.
206. *Id.*
211. *Raich*, 545 U.S. at 5.
215. *Id.* §§ 823(f), 841(a)(1), 844(a).
216. *Raich*, 545 U.S. at 15 (noting that “[t]he Court of Appeals for the District of Columbia Circuit has reviewed the petition to reschedule marijuana on five separate occasions over the course of 30 years, ultimately upholding the Administrator’s final order”); see also Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1133 (D.C. Cir. 1994).
Raich conceded that passing the CSA was a valid exercise of congressional authority within Congress’s commerce power. Rather than attack the CSA on its face, Raich launched a “quite limited” as-applied challenge to the CSA, alleging that “the CSA’s categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress’s authority under the Commerce Clause.” Raich relied on the Compassionate Use Act of 1996, a California law that authorized the use of marijuana for medicinal purposes. This legislation was intended “to ensure that ‘seriously ill’ residents of [California] have access to marijuana for medical purposes, and to encourage federal and state governments to take steps toward ensuring the safe and affordable distribution of the drug to patients in need.”

“Relying heavily on *Wickard,*” Justice Stevens’ majority opinion held that the CSA, as applied to Raich, was a constitutional exercise of Congress’s commerce power. Justice Scalia concurred with the judgment of the Court but wrote separately because “[his] understanding of the doctrinal foundation on which [the Court’s] holding rests [was], if not inconsistent with that of the Court, at least more nuanced.” Essentially, Justice Scalia reached the same conclusion as the majority, but only because he believed that regulation of purely intrastate activity can be reached by the Necessary and Proper Clause. Under this approach, Justice Scalia acknowledged a broad and sweeping power: “Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.” Accordingly, Justice Scalia joined the majority in finding the CSA constitutional as applied to Raich.

Justice O’Connor authored a dissenting opinion in which Chief Justice Rehnquist and Justice Thomas joined (as to all but part III). Justice O’Connor contended that the Court’s decisions in *Lopez* and *Morrison* were controlling and that the availability of medicinal marijuana should properly be regulated by California as part of its police power “to define criminal law and to protect the health, safety, and welfare of [its] citizens.” Additionally, Justice Thomas separately authored a vigorous dissent. The first paragraph of his dissent

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218. *Id.* at 15.
219. CAL. HEALTH & SAFETY CODE §§ 11362.7-.9 (West 2009).
221. LEVY & MELLOR, `supra` note 83, at 46.
222. *Raich*, 545 U.S. at 33 (Scalia, J., concurring).
223. *Id.* at 34; see U.S. CONST. art I, § 8, cl. 18.
224. *Raich*, 545 U.S. at 35.
225. *Id.* at 42
226. *Id.* at 42 (O’Connor, J., dissenting).
227. *Id.*
228. See *id.* at 57-75 (Thomas, J., dissenting).
summarizes his disapproval of the Court’s continuing reliance on the New Deal era’s expansive interpretation of the Commerce Clause:

Respondents Diana Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything— and the Federal Government is no longer one of limited and enumerated powers.229

Again, Justice Thomas criticized the substantial effects test and chided the Court for its “rewriting” of the Commerce Clause under the assumption that “unless the Commerce Clause covers the entire web of human activity, Congress will be left powerless to regulate the national economy effectively.”230

A. Raich and The FFA Compared

Raich is the most recent case in which the Court decided whether the Commerce Clause can be used to regulate purely intrastate activity. Thus, based on the analogous nature of the issues, the lower federal courts would certainly rely on Raich to determine the constitutionality (or unconstitutionality) of the FFA. The following section will compare and contrast the activity involved in Raich and the activity involved in the FFA.

First, whether the activity in Raich was “economic” was at least debatable. The marijuana was grown, possessed, and consumed by the respondents (or their caregivers).231 It was never sold or produced with the intent to sell.232 On the other hand, the activity involved in the FFA is indisputably economic, as the firearms would be produced for sale and sold within the borders of a state. In Raich, the majority defined “economics” broadly as “the production, distribution, and consumption of commodities,”233 while the dissent suggested that “economic activity usually relates directly to commercial activity.”234 However, regardless of whether economic activity is defined broadly or narrowly, the activity involved in the FFA is certainly encompassed by either definition.

Thus, based on the economic nature of the activity involved and the existence of a broad federal regulatory scheme, the Court would likely distinguish the activity involved in the FFA from the noneconomic activity involved in Lopez and Morrison. Instead, the Court would most likely rely on its decisions in Wickard and Raich in order to find that the sale of Montana-made

229. Id. at 57-58.
230. Raich, 545 U.S. at 70 (Thomas, J., dissenting).
231. Id. at 9 (majority opinion).
232. Id.
233. Id. at 25 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).
234. Id. at 50 (O’Connor, J., dissenting).
firearms within the state of Montana has a substantial effect (in the aggregate) on interstate commerce, thereby subjecting the Montana-made firearms to the federal regulation under the commerce power.

However, a few more distinctions can be made between the activity involved in Raich and the activity involved in the FFA. First, in Raich, the Court was concerned with the difficulty of enforcing the CSA if marijuana used for medical purposes was permitted. The Court noted that marijuana grown locally is indistinguishable from marijuana grown elsewhere, and this fact could lead to its “diversion into illicit channels.” In his concurring opinion, Justice Scalia made the following observation:

Not only is it impossible to distinguish “controlled substances manufactured and distributed intrastate” from “controlled substances manufactured and distributed interstate,” but it hardly makes sense to speak in such terms. Drugs like marijuana are fungible commodities. As the Court explains, marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market—and this is so whether or not the possession is for medicinal use or lawful use under the laws of a particular State.

Similarly, the majority had “no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.” On the other hand, the firearms involved in the FFA are clearly distinguishable from other firearms that have moved in interstate commerce. The Act explicitly provides that Montana-made firearms that are exempt from federal regulation must have “the words ‘Made in Montana’ clearly stamped on a central metallic part, such as the receiver or frame.” In addition, although the concern of Montana-made firearms entering the interstate market is similar to the concerns raised in Raich (because of the ease with which firearms can be transported across state lines), the enforcement of federal law would not be hampered because the firearms would be immediately identifiable as Montana-made firearms.

Finally, the activity in Raich can be distinguished from the FFA because the activity in Raich did not involve the exercise of a constitutional right. The FFA, on the other hand, involves the exercise of Second Amendment rights, as the Court in District of Columbia v. Heller finally established that the right to bear arms is an individual right.

235. Id. at 22.
236. Raich, 545 U.S. at 22 (majority opinion).
237. Id. at 40 (Scalia, J., concurring).
238. Id. at 22 (majority opinion).
B. Conclusions

The FFA makes much of the fact that the manufacturing and selling of firearms within the state of Montana is purely intrastate commerce. Although the distinction between interstate and intrastate commerce should be significant to a Commerce Clause analysis, the Court has rendered this distinction meaningless in over a half of a century of precedent. In particular, the Court’s New Deal jurisprudence makes clear that purely intrastate, local activity will not hamper Congress’s ability to regulate under the Commerce Clause. Although this reading of the Commerce Clause is contrary to its original meaning, stare decisis has locked in this troubling precedent as controlling. Based on the Court’s flawed decision in Wickard and its continuing reliance on Wickard in Raich, the federal courts are almost certain to “shoot down” the FFA based on the Supreme Court’s expansive interpretation of the Commerce Clause.

While this law is unlikely to survive in the lower federal courts, it is possible that the Supreme Court could someday take up Justice Thomas’ request to “temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.” However, this possibility is remote because only Justice Thomas has made it clear that he would like to revisit the Court’s Commerce Clause cases from the New Deal. One scholar has questioned whether “too much water has passed over the dam for there to be a candid judicial reexamination of the Commerce Clause that looks only to first principles.”

Indeed, even Justice Thomas has admitted that a “wholesale abandonment” of recent decisions may not be possible, acknowledging that, although he “might be willing to return to the original understanding,” many critics “believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years.” Thus, Justice Thomas has expressed concern that “consideration of stare decisis and reliance interests may convince us that we cannot wipe the slate clean.”

The Court, it seems, is unwilling to abandon its Commerce Clause jurisprudence in favor of a position that returns the federal government’s power to its intended limits. Nonetheless, Justice Thomas, despite the above reservations, has been persistent in calling for a reexamination. His concurrence in United States v. Morrison reads:

The majority opinion correctly applies our decision in United States v. Lopez, [citations omitted], and I join it in full. I write separately only to express my view that the very notion of a “substantial effects” test

244. Epstein, supra note 104, at 1387.
245. Lopez, 514 U.S. at 601 (Thomas, J., concurring).
246. Id.
under the Commerce Clause is inconsistent with the original understanding of Congress’s powers and with this Court’s early Commerce Clause cases. By continuing to apply this rootless and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits. Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.\footnote{United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring).}

In the end, this author believes that Justice Thomas is correct. A “test” that cannot be failed is not a test. The Court should either abandon its so-called Commerce Clause “test” or simply acknowledge the sweeping principle that its own jurisprudence has created: Congress can regulate any economic activity that it damn well pleases. However, the Court should be aware that its dismissal of the Tenth Amendment (and its creation of an all-mighty police-power wielding federal government) will not come without resistance. The FFA is a measure that is symbolic of a growing movement to scale back the federal government’s influence over those activities that were originally and properly regulated by the states, namely public health, safety, and morals. Perhaps the Court will someday take up Justice Thomas’s offer to revisit and temper its Commerce Clause jurisprudence. Meanwhile, the natives are getting restless.
SEXT ED.: STUDENTS’ FOURTH AMENDMENT RIGHTS IN A TECHNOLOGICAL AGE

Richard Hartsock*

I. INTRODUCTION

Nearly four out of every five teenagers in America own and carry a cell phone,1 including nearly half of the twenty million “tweens.”2 With the rise in cell phone use and ownership in our young population, mobile devices are inevitably finding their ways into the halls, lockers, and classrooms of public schools across America. In response to this influx of new technology, principals and other school administrators must be equipped with legal tools sufficient to ensure that these mobile devices are not used for activities that violate laws, school rules, or school policies, particularly activities which could potentially threaten a student’s well-being.

Recently, “sexting” has become popular among American teenagers.3 “Sexting” is “the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones or over the Internet.”4 One survey found that thirty-nine percent of teens polled claimed to have participated in sexting.5 While teens seem to believe that sending these messages and images via cell phone is simply “fun and games,” there can be unexpected consequences, including unwanted physical aggression, the attachment of social stigma, and psychological trauma.6 Because

* Richard Hartsock is a 2010 Juris Doctor Candidate at Salmon P. Chase College of Law, Northern Kentucky University. He graduated with a Bachelor’s Degree in Political Science and Broadcasting from Western Kentucky University in 2007. The author would like to thank his best friend and wife for her patience and support throughout the process of writing this article. He would also like to thank his editor, Michelle Hoff, for her tireless efforts and constant, meaningful feedback.

of the dangers associated with these activities and the prevalent use of cell phones by teens and tweens, school administrators should be given broad discretion concerning the time and manner of searches of cell phones conducted on school grounds.

This note argues that courts should construe students’ constitutional rights and privileges narrowly to allow broad discretion to school administrators for searches of electronic media and devices brought onto school grounds by students. This note will examine the constitutionality of school searches, by first analyzing relevant Fourth Amendment jurisprudence and then analyzing the hypothetical case of Jane Doe, Fred Roe, and the New Age School District, who find themselves in a federal district court case concerning a cell phone search in which evidence of “sexting” was found.

II. SCHOOL SEARCH JURISPRUDENCE

A. New Jersey v. T.L.O.

The seminal case in school search jurisprudence is *New Jersey v. T.L.O.* On March 7, 1980, a fourteen-year-old student, T.L.O., was caught smoking in a bathroom stall with another student. The teacher took the two students to the vice principal’s office, where the other student admitted to smoking, in violation of school rules. However, T.L.O. denied that she had been smoking and denied ever smoking at all. Consequently, the vice principal took T.L.O. into his private office, demanded to see the contents of her purse, and upon searching the contents found a pack of cigarettes and cigarette rolling papers. Because the vice principal associated rolling papers with the use of marijuana, he proceeded to thoroughly search T.L.O.’s purse, where he found a small amount of marijuana, a pipe, empty plastic bags, a substantial number of dollar bills, an index card which appeared to be a list of students who owed T.L.O. money, and two pieces of correspondence implicating T.L.O. in dealing marijuana.

After calling T.L.O.’s mother, the vice principal called the police, who requested that T.L.O. be brought to the police station by her mother. T.L.O. subsequently confessed to selling marijuana at her school. The State of New Jersey brought delinquency charges against T.L.O. based on her confession and the evidence seized by the vice principal from T.L.O.’s purse.
In juvenile court, T.L.O. moved to suppress all evidence found by the vice principal, claiming that it was obtained in violation of her Fourth Amendment right against unlawful searches and seizures. The court denied the motion to suppress, but held that the Fourth Amendment applies to searches conducted by school officials. The judge stated that:

[A] school official may properly conduct a search of a student’s person if the official has a reasonable suspicion that a crime has been or is in the process of being committed, or reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policies.

In applying this reasonable search standard, the juvenile court concluded that because the vice principal’s suspicion that T.L.O. had been smoking cigarettes was reasonable, he was entitled to search her purse for evidence of that particular policy violation. Upon searching for cigarettes, the vice principal saw what he believed to be evidence of marijuana use, which then entitled him to expand his search for evidence of other drug related activity. T.L.O. was eventually sentenced to one year of probation for being delinquent.

T.L.O. appealed the juvenile court’s decision to the New Jersey Superior Court Appellate Division, which affirmed the juvenile court’s Fourth Amendment ruling, but, nevertheless, remanded the case on Fifth Amendment grounds. On appeal, the New Jersey Supreme Court (“NJSC”) reversed the Appellate Division’s decision and ordered suppression of the fruits of the vice principal’s search. The court agreed that the Fourth Amendment applies to school searches by school officials, and further agreed that such a search is lawful so long as there are “reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order.” However, the majority found that because simply possessing cigarettes did not violate school rules, the contents of T.L.O.’s purse were unrelated to the accusation that she had been smoking in the bathroom.

14. Id.
15. Id.
17. Id.
18. Id. at 329-30 (citing T.L.O., 428 A.2d at 1334).
23. Id.
24. Id. at 330-31 (quoting T.L.O., 463 A.2d at 941-42).
25. Id. at 331.
Furthermore, the court found that because no one had told the vice principal that T.L.O. had cigarettes in her purse, he had no reasonable suspicion to search for them.26 Finally, the court stated that finding the rolling papers inside her purse did not justify “‘rummaging’ through [her] papers and effects . . . .”27

The United States Supreme Court granted certiorari, and ultimately reversed the NJSC decision, holding that the vice principal’s search did not violate the Fourth Amendment.28 At the outset, the Court explicitly found that the Fourth Amendment applies to searches conducted by school officials.29 Next, the Court discussed the standard of reasonableness to which school officials would be held when searching students or their effects.30 The Court began by acknowledging that “the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, [but] what is reasonable depends on the context within which a search takes place.”31 The Court then stated that subjective expectations of privacy that are unreasonable or illegitimate are not protected, but only those expectations that society is “prepared to exercise as legitimate” fall within the Fourth Amendment’s guarantee.32 The Court ultimately held, contrary to the State of New Jersey’s assertion, that school children do have some legitimate expectations of privacy while present on school grounds.33

Based upon these findings, the Court then set about fashioning a rule of law to govern the reasonableness of school searches.34 In an effort to “strike [a] balance” between the officials’ need to maintain order and discipline and the legitimate privacy expectations of students, the Court discussed several Fourth Amendment concerns in turn, first holding that the warrant requirement does not

26. Id.
27. Id. (citing T.L.O., 463 A.2d at 942-43, which found that, even though opening T.L.O.’s purse was reasonable, they would be “hard pressed to sustain the balance of the search”); see T.L.O., 463 A.2d at 942-43 (quoting State v. Smith, 113 N.J. Super. 120, 135 (N.J. Super. Ct. App. Div. 1971) (stating that “[t]he sight of rolling papers might justify looking for drugs but not wholesale rummaging or browsing through the person’s papers in the unparticularized hope of uncovering evidence of a crime”)).
29. Id.
30. See id. at 337-43.
31. Id. at 337.
32. Id. at 338 (quoting Hudson v. Palmer, 468 U.S. 517, 526 (1984)).
33. Id. at 338-39 (finding that the State made this assertion based on “two factual premises: (1) the fundamental incompatibility of expectations of privacy within the maintenance of the sound educational environment; and (2) the minimal interest of the child in bringing any items of personal property into the school”). The Court described these premises as “severely flawed,” stating that the difficulty in maintaining discipline within a school is not so dire as to effectively remove all privacy rights from children while at school. Id. The Court further stated that “[w]e are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment.” Id.
34. T.L.O., 469 U.S. at 342-43 (explaining that the Court sought to introduce a rule that “neither unduly burden[s] the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusion upon the privacy of schoolchildren,” but also a rule that “ensure[s] that the interest of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools”).
apply to school officials when searching a student under their care.35 Next, the Court noted that a probable cause standard is not required within schools, but rather that a reasonable suspicion standard would suffice.36 It established that the determination of reasonableness is a two step analysis: (1) whether the search was justified at its inception; and (2) whether the search, as conducted, “was reasonably related in scope to the circumstances which justified the interference in the first place.”37 The Court then stated that a search is “justified at its inception” when “there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.”38 The Court further clarified the second step of the analysis, stating that a search is “permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”39

In applying this standard to the instant case, the Court recognized that the standard applied by the NJSC was “not substantially different from the standard that we have adopted today.”40 However, the Court described NJSC’s application as “a somewhat crabbed notion of reasonableness” and found the vice principal’s search to be in “no sense unreasonable for Fourth Amendment purposes.”41 The Court began the application of its newly established rule by stating that although it was the evidence obtained during the second search that was at issue, the reasonableness of the first search for the cigarettes would ultimately determine whether the drug evidence would be suppressed.42

The Court denounced the NJSC’s finding that the first search was unreasonable.43 Again, the NJSC had held that because mere possession of cigarettes was not a violation of school rules, and because T.L.O. had been accused of smoking cigarettes, a search for cigarettes in her purse would have no bearing on determining that she violated a school rule.44 The NJSC also had held that, regardless of the reasonableness of the search itself, there were no

35. Id. at 340. The Court stated that the warrant requirement “is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.” Id.
36. Id. at 340-41.
37. Id. at 341.
38. Id. at 342.
39. Id. (stating that the court was “unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules,” but instead focused on the student who was searched). Id. at n.9.
40. T.L.O., 469 U.S. at 343.
41. Id.
42. Id. at 344.
43. Id. at 344-45.
44. Id. at 344.
reasonable grounds to suspect T.L.O. had cigarettes. The Court disagreed with both.

In finding both of the NJSC’s holdings “implausible,” the Court highlighted the fact that T.L.O. was accused of smoking, denied the act of smoking, and denied ever smoking at all. Under these circumstances, the Court found that possession of cigarettes would clearly be relevant to showing T.L.O. had been smoking. Thus, according to the Court, if the vice principal had reasonable suspicion to believe he would find cigarettes in T.L.O.’s purse, then the search was justified. The Court also held that the vice principal had reasonable suspicion upon which to base his search. A teacher had reported two students smoking in the bathroom, which clearly gave the vice principal reason to believe that the girls had cigarettes on them, and that a purse “was the obvious place in which to find them.” This logical inference gave rise to the reasonable suspicion exercised by the vice principal, which the Court noted did not require absolute certainty of finding evidence of smoking.

In light of its conclusion that the first search was reasonable, the Court applied the same standard to the second search for marijuana. While T.L.O. did not disagree with the vice principal’s belief that rolling papers were an indicia of marijuana use, she did argue that the vice principal exceeded the bounds of reasonableness when he read the letters implicating her in drug dealing. The Court disposed of this argument quickly, finding that simply discovering the rolling papers created reasonable suspicion of drug activity, which then allowed the vice principal to further explore T.L.O.’s purse, where he found the remaining paraphernalia. The Court reversed the NJSC’s suppression of the evidence in the delinquency proceeding.

In sum, T.L.O. established the Court’s two-pronged test for determining the reasonableness of a school administrator’s search of a student or of student property conducted on school premises. For the search to be reasonable, it must

45. Id.
46. T.L.O., 469 U.S. at 345 (referring to T.L.O., 463 A.2d at 942). According to the NJSC, the vice principal had a “good hunch” at best. Id.
47. Id.
48. Id. (addressing that the Court recognized that mere possession of the cigarettes would neither prove that T.L.O. had been smoking in the bathroom nor that she was lying about ever smoking at all; however, the Court also noted that evidence need not conclusively prove the fact in issue).
49. Id.
50. Id.
51. Id. at 346.
52. T.L.O., 469 U.S. at 346.
53. Id. at 347.
54. Id.
55. Id.
56. Id. at 347-48.
be (1) justified at its inception, and (2) “reasonably related in scope to the circumstances which justified the interference in the first place.”

B. T.L.O. Applied

The test set forth in T.L.O. has been applied to several factual situations concerning different types of school searches. Each case involved different levels of intrusion, yet found T.L.O. to be the controlling precedent.

1. Vernonia School District 47J v. Acton

The school board (“District”) in Vernonia School District 47J v. Acton implemented mandatory random urine testing for high school students wishing to participate in school-sponsored athletics, with the “expressed purpose . . . to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs.” In order to participate in athletics, the District required both the students and parents to sign a consent-to-test form. Each student was tested at the beginning of the sport’s season, and ten percent of the athletes were randomly tested throughout the season. Proper safeguards, including monitors, numbering for the specimens, and means of preventing tampering, were used. The samples were sent to an independent laboratory, which produced results with a 99.94% rate of accuracy. The laboratory would mail the results back to the District, and only the superintendent, principals, vice principals, and athletic directors had access to the results. Upon receiving a positive test, a second confirmation test was completed as soon as possible. If the second test was also positive, parents were notified and the student was given several options, such as participating in a six week program that included weekly urine tests or suspension from athletic participation for the remainder of the current season and the subsequent season.

James Acton (“Acton”) was a seventh grade student who signed up to play football, but he and his parents refused to sign the consent-to-test form; thus he

57. Id. at 341.
59. Id.
60. Id.
61. Id.
62. Id. at 650-51. In Vernonia, the lab routinely tested for amphetamines, cocaine and marijuana, though the District was able to request tests for other drugs. Id. at 650. Furthermore, no personal, identifying information concerning the student being tested was sent along with the sample. Id. at 651. The identity of the student was not used to determine what drugs would be tested for. Id.
63. Id. at 651.
64. Vernonia, 515 U.S. at 651.
65. Id. Prior to the next season in which the student would be eligible to participate, the student was to be retested; a second offence resulted in suspension for the remainder of the current season and the subsequent season, while a third offence resulted in suspension for the remainder of the current season and the following two seasons. Id.
was not allowed to participate. Acton filed suit, claiming the policy violated his Fourth and Fourteenth Amendment rights, but the district court dismissed the claim on the merits. On appeal, the Ninth Circuit reversed the trial court, finding the policy violative of both the Fourth and Fourteenth Amendments.

The United States Supreme Court granted certiorari, and vacated and remanded the Ninth Circuit’s decision. The Court first described the “reasonableness” standard, which “is judged by balancing the search’s intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.” The Court noted the normal “probable cause” requirement for Fourth Amendment searches, but went on to note that “special needs” within schools have led to a more relaxed standard for school officials, not necessarily requiring individualized suspicion for certain types of searches.

The Court engaged in a three-fold analysis considering: the scope of the legitimate expectation of privacy of the student; the nature of the intrusion complained of; and the nature of the governmental interest involved. With regard to the student’s legitimate expectation of privacy, the Court, citing T.L.O., reaffirmed the holding that school children have a lower expectation of privacy on school grounds. The Court noted that the school’s “custodial and tutelary responsibility for children” must be taken into account when determining reasonableness. It stated that less privacy can reasonably be expected by student-athletes, due to the communal nature of sports and the students’ assent to being held to a higher standard of regulation than other non-athlete students.

Turning to the character of the intrusion complained of, the Court stated that the degree of intrusion depends on the method of attaining the urine sample. The Court explained the method by which the urine samples are collected: males

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66. Id.
69. Vernonia, 515 U.S. at 666.
71. Id. at 653 (citing New Jersey v. T.L.O., 469 U.S. 325, 342 n.8 (1985)). Although T.L.O. was clearly an “individualized suspicion” case – one in which there is a high probability that the person has engaged in unlawful conduct – and therefore it did not have the occasion to address the issue, the Court noted that “the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion.” Id.
72. Id. at 655.
73. Id. at 658.
74. Id. at 660.
75. Vernonia, 515 U.S. at 654-55.
76. Id. at 656.
77. Id. at 657.
78. Id. at 658.
produce samples while standing in front of a urinal along a wall while females are allowed to use a closed stall, both of which are normal ways to use the restroom in public facilities. The majority also examined whether the results of the urinalysis were too intrusive. The Court noted that the drug tests were standard – not individualized to certain students – and the test results were only disclosed to a very limited number of administrators. The Court concluded that the invasion of privacy was not significant.

Finally, the Court discussed the nature and immediacy of the governmental interest. It explained that requiring a compelling state interest does not “describe[] a fixed, minimum quantum of governmental concern,” but “describes an interest that appears important enough to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy.” In applying this governmental interest standard, the Court held that the interest of deterring drug use was at least important, if not compelling. It refused to question the district court’s finding that the drug problem was rising to pandemic proportions, foreclosing any argument that the immediacy of the issue created special circumstances. The majority opined that one effective way of curtailing the drug problem at this school was to implement the District’s system of drug testing student-athletes, and found this form of search constitutional.

2. Brannum v. Overton County School Board

Brannum v. Overton County School Board involved the installation and operation of video cameras in a middle school’s locker rooms. In an effort to bolster security in the middle school, the school board approved video camera

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79. Id.
80. Id.
82. Id.
83. Id. at 659-60 (stating that Acton argued that requiring disclosure of prescription medication resulted in a significant invasion of privacy). While the Court recognized that this was of concern, it stated that the Policy did not disclose the possibility of disclosing this information privately, and that a challenge of the policy on its face does not require the Court to “assume the worst” possible scenario. Id. at 660.
84. Id. at 660.
85. Id. at 661 (emphasis in original).
86. Id.
88. Id. at 663, 665. But see Tamara A. Dugan, Putting the Glee Club to the Test: Reconsidering Mandatory Suspicionless Drug Testing of Students Participating in Extracurricular Activities, 28 J. Legis. 147, 178 (2002) (stating that most school drug policies are ineffective because they simply suspend students from extracurricular activities, which “remov[es] troubled students from school guidance” and “free[s] up more time for student drug use”).
89. 516 F.3d 489, 492 (6th Cir. 2008).
installation throughout the school building. The cameras were installed facing exterior doors, in hallways leading to exterior doors, and in the locker rooms. The images captured by the cameras were displayed on the assistant principal’s office computer and saved on the computer’s hard drive. The images were also available via remote access, which was accessible through an internet connection by using a username and password. The default username and password had never been changed, and records showed that the locker room images were accessed ninety-eight times remotely over approximately a six-month period.

Players from a visiting girls’ basketball team noticed the cameras and notified their coach. Although the coach was assured by the principal that the cameras were not active, they were in fact active and actually captured images of the players in their undergarments. The visiting coach contacted the principal at her school, who in turn contacted the director of the middle school which had installed the cameras. The director, principal, and two other school officials viewed the images and removed the cameras later that day.

After establishing jurisdiction to hear the case, the Sixth Circuit proceeded to analyze the merits. While the court noted that neither it nor the United States Supreme Court previously had addressed the question of video surveillance implicating Fourth Amendment rights, it concluded that this method of surveillance is governed by the Fourth Amendment. The court quoted Vernonia, stating that “the ‘reasonableness’ inquiry cannot disregard the schools’ custodial and tutelary responsibility for children.” The court then applied the two prong T.L.O. test.

The court found that installing the cameras to increase security had “an appropriate and common sense purpose.” In finding that the installation of the video cameras was unreasonable in scope, however, the court noted that although the reasonable expectation of privacy in a school locker room is less than outside the school, it does not mean the expectation is nonexistent.

90. Id.
91. Id.
92. Id.
93. Id.
94. Id.
95. Brannum, 516 F.3d at 492.
96. Id.
97. Id. at 492-93.
98. Id. at 493.
99. Id.
100. Id. at 494-95.
101. Brannum, 516 F.3d at 495 (citing Acton v. Vernonia, 515 U.S. 646, 656 (1995)).
102. Id. at 495-98.
103. Id. at 496.
104. Id.
athletics, while the students and parents in this case had no knowledge of the use of the video cameras and, therefore, had a reasonable expectation of privacy.\footnote{105}

The court found that no procedural safeguards were implemented to prevent the students from being seen naked, and that the broad scope of the “secret surveillance” was a significant invasion of their reasonable expectation of privacy.\footnote{106} The court, referencing \textit{T.L.O.}, held that in order to pass constitutional muster, “the means [used to search] must be congruent to the end sought.”\footnote{107} The installation of video cameras in locker rooms was not justified because there was nothing in the record to show that the school officials were concerned about security issues in locker rooms.\footnote{108} Therefore, the court found that videotaping the locker room was an unconstitutional search under the Fourth Amendment.\footnote{109}

3. \textit{Cornfield by Lewis v. Consolidated High School District No. 230}

In \textit{Cornfield by Lewis v. Consolidated High School District No. 230}, the Seventh Circuit, applying the standard set forth in \textit{T.L.O.}, found a strip search of a student reasonable.\footnote{110} After finding the student, Cornfield, outside the school building in violation of school rules, a teacher’s aide noticed a large bulge in Cornfield’s pelvic area.\footnote{111} The following day, Cornfield’s teacher, who had also observed the bulge, pulled Cornfield into the dean’s office on suspicion of “crotching” drugs.\footnote{112} When confronted with the accusation, Cornfield began yelling obscenities.\footnote{113} He then requested that the officials call his mother to seek consent for a search, but his mother refused to consent.\footnote{114} The teacher and the dean escorted Cornfield to an empty locker room, where he was required to remove his street clothes and change into a gym uniform.\footnote{115} Both men visually searched Cornfield’s naked body from approximately twelve to fifteen feet away and physically inspected his clothing, but found no evidence of drugs or other contraband.\footnote{116} Cornfield was then allowed to go home and subsequently filed suit for violation of his Fourth, Fifth and Fourteenth Amendment rights.\footnote{117}

In applying \textit{T.L.O.’s} two-step analysis, the court noted, when applying the first prong, that:

\begin{itemize}
\item \textit{Id.} 991 F.2d 1316, 1327-28 (7th Cir. 1993).
\item \textit{Id.} at 1319.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 497.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 498.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 498-500.
\end{itemize}
‘Justified at its inception’ . . . does not mean that a school administrator has the right to search a student who merely acts in a way that creates a reasonable suspicion that the student has violated some regulation or law. Rather, a search is warranted only if the student’s conduct creates a reasonable suspicion that a particular regulation or law has been violated, with the search serving to produce evidence of that violation.118

Cornfield’s teacher based his suspicion of drug activity on several actions and statements made by Cornfield.119 The court found that although Cornfield denied many of the incidents and statements upon which the officials based their suspicion, the officials relied on more than mere statements made by Cornfield to establish their particularized suspicion, and thus the cumulative effect created a reasonable suspicion that Cornfield was crotcheting drugs.120 Therefore, the court found the search was justified at its inception.121

In analyzing the second prong of the test, whether the search was permissible in scope, the court first found that Cornfield’s age, sixteen at the time, made the potential impact of the strip search substantial.122 Regardless, the court found that a strip search was not unreasonably intrusive.123 The court reiterated the fact that only two school officials saw Cornfield during the search, each stayed a reasonable distance away from him while he was naked, there was never any physical contact between the officials and Cornfield, and no cavity search was administered.124 Furthermore, the officials allowed Cornfield to wear a gym uniform while they physically searched his clothing.125 Because the court found that the officials acted reasonably when they strip searched Cornfield, the second prong of the T.L.O. test was met, and the search was held constitutional.126

4. Safford Unified School District No. 1 v. Redding

The United States Supreme Court most recently applied T.L.O. in Safford Unified School District v. Redding.127 This case involved the strip search of a then thirteen-year-old middle school female, Redding, in search of pills.128 Redding was initially called in to be questioned by the school’s assistant

118. Id. at 1320 (emphasis in original).
119. Id. at 1322 (finding that the actions and statements included statements by Cornfield that he was dealing drugs and that he would test positive for marijuana). The teacher also believed that Cornfield had failed to complete a drug rehabilitation program. Id. These were just a few of the accusations that were used against Cornfield. Id.
120. Id. at 1323.
121. Id.
122. Cornfield, 991 F.2d at 1323.
123. Id.
124. Id.
125. Id.
126. Id. at 1328.
128. Id. at 2638.
principal, Wilson, concerning a day planner that zipped closed and contained knives, lighters, a permanent marker, and a cigarette. While Redding admitted that the planner belonged to her, she claimed she had lent it to a classmate a few days earlier and stated that none of the items in the planner belonged to her. Wilson then showed Redding an assortment of prescription strength ibuprofen and non-prescription strength naproxen pills, but Redding denied having any knowledge of or owning the pills. Wilson informed Redding that she had received a report that Redding was supplying students with these pills, which Redding denied. Redding then consented to a search of her belongings.

In the initial search of Redding’s belongings, the administrators found nothing. Wilson then instructed an administrative assistant to escort Redding to the nurse’s office, where Redding was instructed to remove her socks, shoes and jacket, and eventually was required to remove her pants and t-shirt. Redding was made to shake out, but not remove, her undergarments, partially exposing her breasts and pelvic area. The search was not fruitful. Subsequently, Redding’s mother filed suit against the school and the administrators who participated in the search, claiming that the strip search was a violation of Redding’s Fourth Amendment rights.

The district court granted the school’s motion for summary judgment, finding no Fourth Amendment violation. On appeal, the Ninth Circuit affirmed. However, the Ninth Circuit granted rehearing en banc, and affirmed in part, reversed in part and remanded, finding that the search was not justified at its inception, the search was not reasonable in its scope, and the right to be free from unwarranted strip searches was a clearly established constitutional right. The United States Supreme Court granted certiorari, and oral arguments were heard on April 21, 2009.

The Court began by analyzing the constitutionality of the initial searches of Redding’s belongings and outer clothing, finding that reasonable suspicion justified the search in light of the objects found in the planner, the pills provided

129. Id.
130. Id.
131. Id.
132. Id.
133. Redding, 129 S. Ct. at 2638.
134. Id.
135. Id.
136. Id.
137. Id.
138. Id.
140. Redding v. Safford Unified Sch. Dist. No. 1, 504 F.3d 828, 829 (9th Cir. 2007), reh’g en banc, 514 F.3d 1383 (9th Cir. 2008), cert. granted, 129 S. Ct. 987 (2009).
by another student, and the reports from other students that Redding was involved in distributing pills.\textsuperscript{143} The Court also noted that because Redding was reported to have possessed these items, it was reasonable to believe that she was carrying more on her person or in her bag.\textsuperscript{144} However, the Court concluded that the strip search of Redding was unreasonable and thus unconstitutional.\textsuperscript{145} It also noted that the scope of the strip search was excessively intrusive in light of the \textit{T.L.O.} standard, which requires consideration of the sex and age of the student and the nature of the infractions.\textsuperscript{146} He noted the limited threat associated with the type of pills allegedly being distributed and found that Wilson had no reason to believe that Redding was hiding any pills in her undergarments.\textsuperscript{147} The majority found the “combination of these deficiencies . . . fatal to finding the search reasonable.”\textsuperscript{148} Although the Court ultimately found the strip search violative of the Fourth Amendment, the school officials were granted qualified immunity.\textsuperscript{149} Overall, the \textit{Redding} decision was unremarkable, simply applying the \textit{T.L.O.} framework rather than altering or expanding its scope.

\section*{III. THE HYPOTHETICAL CASE\textsuperscript{150}}

\textbf{A. Facts, Case and Decision}

New Age High School (\textquotedblleft School\textquotedblright) is a public high school in Briarsville in the State of Hoffman and is part of New Age School District (\textquotedblleft District\textquotedblright).\textsuperscript{151} The stated goal of the District and the School is to allow students somewhat more freedom in an effort to prepare them for “real life” and to foster an environment of growth and educational stimulation. Students choose from a wide range of

\begin{itemize}
\item \textsuperscript{143} \textit{Redding}, 129 S. Ct. at 2640-41.
\item \textsuperscript{144} \textit{Id.} at 2641.
\item \textsuperscript{145} \textit{Id.} at 2642.
\item \textsuperscript{146} \textit{Id.}
\item \textsuperscript{147} \textit{Id.}
\item \textsuperscript{148} \textit{Id.} at 2643.
\item \textsuperscript{149} \textit{Redding}, 129 S. Ct. at 2644 (finding that at the time of the Redding strip search, the law was not clearly established concerning the legality of strip searches: “[T]he cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law. We conclude that qualified immunity is warranted.

\item \textsuperscript{150} These facts are entirely hypothetical, and any similarity with names, situations, etc., is entirely coincidental. This hypothetical was created in order to show a potential fact situation in which school administrators would be allowed to search cell phones for evidence of sexting or other activity under the circumstances.
\item \textsuperscript{151} The precedent of the United States Supreme Court is binding upon all federal district courts in the State of Hoffman. Furthermore, Hoffman lies in the jurisdiction of the Thirteenth Circuit and this circuit has no decisions concerning the application of the Fourth Amendment to any situation. Therefore, there are no Thirteenth Circuit opinions available to bind the circuit over another circuit’s holdings.
\end{itemize}
classes in addition to some required courses. Many types of technology are implemented into the curriculum at the School, including laptop computers and presentation technology. While the use of cell phones during instructional periods and class changes is strictly prohibited, students may use cell phones prior to first period, during lunch, and immediately following the final period.152 Although the School has more relaxed rules regarding usage of cell phones and other technology, the District has a prohibition on possessing, procuring, or distributing “inappropriate material” during school hours by any means.153

Jane Doe (“Jane”) is a sixteen-year-old sophomore at the School.154 She, like most teenagers today, has a cell phone and uses it quite frequently for text messaging, picture messaging, internet access, and the many other applications now offered on cell phones. Like many girls her age, she also has a boyfriend, Fred Roe (“Fred”). Fred is equally tech-savvy and carries a similar cell phone. Despite the School’s rule banning the use of cell phones during instructional time, Jane was caught text messaging Fred during her math class when her phone made a loud noise upon receiving a message. The math teacher immediately confiscated the cell phone and wrote Jane a referral to the vice principal, Frank Young (“Young”). Jane was ordered to report to Young’s office the next morning.

Prior to receiving the referral concerning Jane’s use of her cell phone in class, Young and other administrators had received several reports from concerned students who reported that Jane and Fred were engaging in “sexting” during class and frequently engaged in the activity outside of school hours. These reports came from at least five students described by Young as “close to the situation,” meaning that they are friends with Jane and/or Fred. At least one student admitted to actually seeing several of the illicit messages sent between Jane and Fred. All students independently expressed concern about Jane’s well-being in particular, based on comments heard from other students who remained unidentified. These comments ranged from simple knowledge about the messages and opinions garnered about Jane, to statements about actions that male students would take, knowing that Jane would participate in “sexting.” The students feared that Jane would become the target of unwanted sexual advances

152. This prohibition is plainly spelled out in the District Student Compliance Guide (“Guide”) and the School Student Handbook (“Handbook”), which are distributed to all students on the first day of each school year. Students and parents are required to sign a form stating that they have read and understand the contents of each.

153. The Guide and Handbook each define possessing as “having any prohibited material on a student’s person or in his or her personal affects, vehicle or locker, in any tangible or intangible medium.” Distributing is defined as “passing prohibited material by any physical or electric means from person to person.” Procuring is defined as “obtaining prohibited material by any physical or electronic means.” Inappropriate material is defined as “material which depicts nude, semi-nude or suggestive pictures, which are determined to be such upon examination by a school administrator.” This definition does not include drugs or alcohol, which are covered specifically by other sections of the Guide and Handbook.

154. Jane’s signature form is on file in the School office, along with her parents’ signed form.
once other students discovered her participation in the messaging. Based on these reports and upon receiving possession of Jane’s cell phone, Young examined the contents of Jane’s message inbox and outbox, along with her in-phone picture album. Young found over twenty messages containing nude and semi-nude images of both Jane and Fred, which had been sent both during school hours and outside of school hours, according to the time and date stamps on the messages. Young immediately notified the principal, who also examined the messages. The administrators then created and signed a joint report of their findings.

In Young’s office, Jane admitted to using her cell phone during class and was given a one day in-school suspension for violating the ban on the use of cell phones during the restricted time frame.155 At this time, Young began asking Jane questions about sending illicit sexual messages. Jane immediately denied sending any messages and appeared to Young to become very nervous. Young then informed Jane that based on reports received from other students, he had looked through her phone and found the messages sent to Fred. He told her that Fred would be called in later to meet with him separately for an examination of his phone. Young then informed Jane that her parents had been called, and they had been informed of the contents found on the phone. Jane was very upset that Young had looked through her phone. Young explained to her that sending or possessing these types of messages was not only a violation of School and District policies, but that it was also very dangerous to her well-being. Young retained the cell phone until Jane’s parents came to pick it up.

Young then called Fred into his office for a meeting and requested that Fred bring his cell phone. Young ordered Fred to turn over his cell phone, which Fred refused to do. Young then threatened out-of-school suspension for insubordination if Fred did not follow the directive. When Fred demanded to know why Young wanted to see his phone, Young told him that he had received reports of illicit sexual messages being sent between him and Jane. Fred fervently denied this, but eventually retrieved the phone from his backpack and gave it to Young. Young examined the phone’s message boxes and picture folder but found each empty. After finding no direct evidence on the phone, Young returned the phone to Fred. Young then placed a call to Fred’s parents, informing them of his findings concerning both Fred and Jane. Fred was not punished.

After consulting with attorneys, the parents of both Jane and Fred filed lawsuits in the United States District Court for the Central District of Hoffman. Each lawsuit was pled virtually identically to the other, claiming violations of

155. The potential due process implications of in-school suspension are beyond the ambit of this article. For a recent federal court of appeals’ decision regarding a student’s due process right to education, see Laney v. Farley, 501 F.3d 577 (6th Cir. 2007).
each student’s Fourth Amendment rights against unlawful searches. The complaints claimed that the searches of the cell phones were unreasonable, since they were not justified at their inception and were not reasonable in their scope. The School, after the discovery phase was substantially completed, filed motions for summary judgment, claiming that no Fourth Amendment violation occurred.

The district court engaged in a lengthy analysis in considering the School’s position, found that no Fourth Amendment violation occurred, and granted the motions for summary judgment. The court held that the searches were justified at their inception and permissible in their scope. The court further noted that because the School acts in loco parentis while the students are present in school, the School had the right to curtail activity that is likely to be detrimental to a student’s well-being.

B. Analysis of Decision

As the Court stated in T.L.O., the Fourth Amendment applies to searches conducted by school officials. The two pronged approach created by the T.L.O. majority was satisfied here, making the search reasonable.

First, Young’s searches of the contents of the phones were justified at their inception. Regardless of how the cell phones were procured - either through confiscation, as with Jane, or by request to search, as with Fred - Young based his request to search each phone on several reports from different students about the activities occurring between Jane and Fred. Furthermore, based on the reports, it was reasonable to believe that a search of the cell phones would produce evidence of a violation of the school policy against possessing “inappropriate materials.” The initial search in Redding which led to the strip search of a thirteen year old female student was based partially on reports from students concerning Redding’s connection with the pills. Of course in Redding, the student reports were combined with other factors that led Wilson to believe Redding was involved with the distribution of pills. Because several students came forward with similar stories regarding the activities between Jane and Fred, it cannot be said that Young was merely acting on a hunch. Without a report, Young should have merely held Jane’s phone until a parent came to

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156. Because the lawsuits concerned the same legal issues and no party objected, the suits were consolidated.
158. See Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2640-41 (2009) (Supreme Court’s determination in Redding that suspicion to search was reasonable based, in part, on student reports). See also supra note 153 (defining “inappropriate material”).
159. See Redding, 129 S. Ct. at 2640-41; see also Ralph D. Mawdsley and Jacqueline Joy Cumming, Reliability of Student Informants and Strip Searches, 231 EDUC. L. REP. 1 (2008) (expressing that the reliability of student informants is a question constantly dealt with by school administrators, and suggesting how to be handle student informants).
160. See Redding, 129 S. Ct. at 2640-41.
retrieve it, and Fred would have never been called to his office. Young never acted without reasonable suspicion.

Second, Young’s searches were permissible in their scope. T.L.O. mandates that a search is “permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” The strip search for pills in Redding failed this prong of the T.L.O. test; the Court found that Redding’s subjective expectation of privacy was reasonable in light of “consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure.” While Jane and Fred obviously subjectively expect privacy concerning their individual cell phones, this expectation is not enough for the court to find the expectation reasonable. Because Jane and Fred texted during school instructional time, their belief that cell phone use is a private matter would not insulate their phones from a reasonable search. This level of intrusiveness simply does not rise to the unconstitutional level announced in Redding, although this type of search is arguably somewhat more intrusive than a simple search of a locker or of a student’s outer clothing.

When judging the reasonableness of a search based on the standard described in Vernonia, this hypothetical search also passes constitutional muster. The only element of the Vernonia court’s analysis which has not yet been addressed concerns the governmental interest served by the search. There can be no doubt that curtailing the sharing of illicit images in school between underage students is an important, if not compelling, governmental interest.

The Sixth Circuit in Brannum distinguished between locker room surveillance cameras and the drug testing situation in Vernonia. In Brannum the Court found that the students and parents still retained a legitimate expectation of privacy because they did not know of the surveillance camera installation. This differed from drug testing athletes, who voluntarily consented, along with their parents, to participate in athletics and to be subjected to stricter regulation by school officials. Similarly, while one may have a reasonable expectation of privacy concerning the use of a cell phone outside of

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161. See T.L.O., 469 U.S. at 342.
162. Redding, 129 S. Ct. at 2641.
163. See T.L.O., 469 U.S. at 338.
164. This, of course, assumes that the messages sent during class were not illegal images. Administrators may also have a right to search a student’s cell phone if they have reasonable suspicion that a law is being or has been violated. See id. at 342.
166. This compelling government interest may also arise from the in loco parentis status of administrators, and when the two interests are combined, the right to search would likely become more absolute.
167. See Brannum v. Overton County Sch. Bd., 516 F.3d 489, 496 (6th Cir. 2008).
168. See id.
169. See id.
school, once the cell phone is brought onto school grounds containing prohibited material, the expectation of privacy is diluted. This is especially true where (1) the school and district have specific rules regarding “inappropriate material” and timing of cell phone use and (2) the students have clear notice of the rules, because they and their parents acknowledged that they had read the Guide and Handbook thoroughly.\textsuperscript{170}

The Court’s statement in \textit{Vernonia}, holding that the reasonableness of a search must also take into account the school’s “custodial and tutelary responsibility for children,” also lends support to the district court’s finding in the hypothetical case.\textsuperscript{171} The \textit{Vernonia} Court stated that schools act \textit{in loco parentis} in some situations.\textsuperscript{172} The \textit{Vernonia} Court cited to \textit{T.L.O.}, focusing on \textit{T.L.O.}’s assertion, indeed its mandate, that a school environment conducive to learning and safety “requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.”\textsuperscript{173} The \textit{Vernonia} Court further stated that although school officials’ control over children does not rise to the level of a “duty to protect,” officials do have the right and the duty to “inculcate the habits and manners of civility” while observing the constitutional rights “appropriate for children in school.”\textsuperscript{174} This responsibility and duty should be construed to extend to protecting young teens from exchanging material that could result in physical or psychological injury. In the hypothetical case, the School and District rules prohibiting the possession, procurement, and distribution of inappropriate material\textsuperscript{175} dictate the officials’ responsibility to safeguard the students’ well-being in this regard. Had the administration failed to implement these rules and a student was injured, they likely could have been found liable for failing to act responsibly.

In the case of Jane Doe and Fred Roe, the requisite individualized suspicion was established. While the \textit{T.L.O.} Court stated that individualized suspicion may not be required,\textsuperscript{176} the \textit{Vernonia} Court at least implicitly held that individualized suspicion would be required for \textit{some} searches.\textsuperscript{177} Thus, random searches of student cell phones would not be constitutionally permissible without individualized suspicion, regardless of whether the search was being conducted by a school administrator or a police officer, because of the reasonable

\begin{footnotesize}

\footnotetext{170}{See supra note 152.}
\footnotetext{171}{See \textit{Vernonia Sch. Dist. 47J v. Acton}, 515 U.S. 646, 656 (1995).}
\footnotetext{172}{Id. at 655.}
\footnotetext{174}{Id. at 655-56.}
\footnotetext{175}{See supra note 153 and accompanying text.}
\footnotetext{176}{See \textit{Vernonia}, 515 U.S. at 653 (citing \textit{T.L.O.}, 469 U.S. at 342 n.8); see supra Part B.1.}
\footnotetext{177}{\textit{Vernonia}, 515 U.S. at 653.}
\end{footnotesize}
expectation of privacy concerning cell phones. There is a minimum suspicion requirement with regard to criminal activity both outside of the school premises (probable cause) and on campus (reasonable suspicion). As the majority stated in Redding, “[t]he lesser standard for school searches could as readily be described as a moderate chance of finding evidence of wrongdoing.”

The students in the hypothetical case would likely counter with two main arguments, essentially arguing that the two prongs of the T.L.O. test were not met. First, Jane and Fred would argue that the searches were not justified at their inception. They would likely base this argument on the fact that student informants are unreliable. However, a court would not likely be receptive to this argument. T.L.O. requires the initial search be based upon “reasonable grounds” for suspecting that a violation of school rules is occurring or has occurred. The Court in Redding found the initial search, the “non-strip” search, reasonable under the circumstances, based in part on student informants’ reports. It was only the scope of the search that the Court found unconstitutional. In this hypothetical case, the search was conducted based solely upon student reports. However, the sheer number of reports received, along with the consistency of stories from independent parties, would justify the searches of Jane and Fred’s phones.

Second, Jane and Fred would argue that the searches were not permissible in their scope. This argument, however, fails simply because the searches were justified at their inception. It is important to remember that Young searched only the parts of the cell phone that could contain inappropriate material, as defined by the Guide and Handbook. There was no further search beyond those areas. Unlike the administrator in Redding, Young searched only as far as was justified when he discovered inappropriate material.

In light of the Court’s holding in T.L.O., the hypothetical School and District’s establishment of uniform rules and policies to justified the search – even absent any suspicion that an actual law has been or is being broken. As the Court in T.L.O. held, a search is only justified at its inception if there are reasonable grounds for suspecting that the search will uncover evidence of a past or current violation of school rules or the law. Thus, a court would have to examine the rules and policies of an individual school or district to determine whether the search would be likely to produce evidence of a punishable offense.

179. See T.L.O., 469 U.S. at 340.
181. See T.L.O., 469 U.S. at 341.
182. See Redding, 129 S. Ct. at 2640-41.
183. See id. at 2642.
184. See supra Part III.A.
185. See T.L.O., 469 U.S. at 342.
Likewise, if a violation of a law is suspected, the individual laws of the state must be examined. For example, in cases of sexting, some states’ child pornography laws are written broadly enough to include sexually explicit images or messages sent by minors to minors.\(^ {186}\) In such a case, a school official may be justified in searching a cell phone for explicit images if there are reasonable grounds for suspecting that a search would uncover illegal images.

In conclusion, the searches conducted by school administrators in the hypothetical case of Jane Doe and Fred Roe meet the test set forth in *New Jersey v. T.L.O.* The searches were both justified at their inception and limited in their scope.\(^ {187}\) Furthermore, the administrators had a particularized suspicion, as required by *Cornfield*.\(^ {188}\) Because the searches were reasonable, they did not violate the students’ Fourth Amendment rights. The district court properly granted the School’s motions for summary judgment, finding no constitutional violations.

**IV. CONCLUSION**

The Supreme Court has established that students do not completely surrender all constitutional rights upon entering school premises.\(^ {189}\) However, because schools are playing a quasi-parental role while students are in attendance, administrators are afforded discretion to take the necessary steps to ensure the well-being of the students during the school day. As the law currently stands, school administrators must have reasonable suspicion of a violation of school rules or policies or law to search a student, a less stringent standard than probable cause.\(^ {190}\) That search must be (1) justified at its inception and (2) permissible in its scope.\(^ {191}\) Although the Court in *T.L.O.* stated that there is no requirement of individualized suspicion,\(^ {192}\) the Court has moved toward requiring individualized suspicion in some circumstances.\(^ {193}\) Furthermore, the *in loco parentis* doctrine allows administrators to exercise much discretion to search students’ electronic devices for materials prohibited by school rules or the law – both for the safety of the students and the efficiency of the school environment.\(^ {194}\)

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\(^ {187}\) *T.L.O.*, 469 U.S. at 341.

\(^ {188}\) *Cornfield by Lewis v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1320 (7th Cir. 1993).


\(^ {190}\) *See T.L.O.*, 469 U.S. at 340.

\(^ {191}\) *See id.* at 340-41.

\(^ {192}\) *See Vernonia Sch. Dist. 473 v. Acton*, 515 U.S. 646, 653 (1995); *see supra* Part B.1.

\(^ {193}\) *See, e.g.*, *supra* Part II.B.1.

\(^ {194}\) *See, e.g.*, *T.L.O.*, 469 U.S. 325; *Vernonia*, 515 U.S. 646.