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The Cost of Scruples: A Call for Common Law Protection for the Professional Whistleblower

Terry Ann Halbert*

I. Introduction

Dr. Grace Pierce began to work for Ortho Pharmaceutical Corporation in May, 1971 as Associate Director of Medical Research. By March of 1973, she was Director of Medical Research/Therapeutics, responsible for overseeing development of therapeutic drugs. In early 1975, Dr. Pierce was on a team researching loperamide, a drug for the treatment of diarrhea in infants and older people. Lopermide was to be taken in liquid form, since the very young and the very old might have trouble swallowing pills. The drug was to be sweetened with saccharin. Each bottle would contain forty-four times the concentration of saccharin that the Food and Drug Administration permitted in a twelve-ounce can of artificially-sweetened soft drink.

Dr. Pierce and her project team, aware of the controversy surrounding saccharin as a possible carcinogen, began to submit memos to Ortho's management, urging an alternative formula before tests would be conducted on humans. The project team’s toxicologist, for instance, noted that saccharin was a “slow carcinogen;” that is, it produced benign and malignant tumors in laboratory test animals after seventeen years. The harm it might cause would be obvious only after a long period of time, and “any intentional exposure of any segment of the human population to a potential carcinogen is not to the best interest of public health or the Ortho Pharmaceutical Corporation.” It seemed, however, that the invitations had already been sent; that is, Ortho had no intention of moving the deadline for putting loperamide on the market. Pressure from company management made Dr. Pierce’s colleagues change their minds, and by April of 1975, the team voted to go ahead with clinical testing.

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Dr. Pierce held out for reformulation. As the only medical doctor on the team, responsible for setting up and monitoring tests on human beings, she felt it was her professional, ethical duty to resist, and she so informed her supervisor. In her deposition she said, “I wanted to be on that project but I didn’t want to take that high saccharin formula out to the clinical practice... I could not ethically take that out and give it to children.”2 As a result of her stand, Dr. Pierce was first demoted (or “re-assigned” as Ortho put it) and removed from all therapeutic drug projects. Later, she was told that Ortho’s management considered her unpromotable. In June of 1975, Dr. Pierce submitted her resignation.3 Dr. Pierce brought a lawsuit against her former employer for wrongful discharge. Ortho filed for summary judgment, pointing out that Dr. Pierce signed no contract, only a secrecy agreement, and her job had no fixed term. As an employee at will, Ortho argued, she could be fired for “good cause, or bad cause, or no cause at all.”4

In January of 1978, a New Jersey Superior Court granted Ortho’s motion, but the Appellate Division reversed, noting “that a growing minority of jurisdictions permit recovery where the employment termination contravenes a clear mandate of public policy.”5 Without immediately jumping on the bandwagon, the court sent the case back down for development of the facts at trial, adding that the public policy exception might be “particularly pertinent to professional employees whose activities might involve violations of ethical or like-standards having a substantial impact on matters of public interest, including health and safety.”6

The New Jersey Supreme Court, while recognizing a cause of action for wrongful discharge when a clear public policy has been violated, found that Ortho’s motion for summary judgment should have been granted.7 Public policy sources could include statutes, regulations and case law, and, the court added, a professional code of ethics. The court also mentioned a professional employee’s “special duty” to adhere to such a code, even when it obliges them to decline to perform acts required by their employers. The Court drew a line, however:

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2. Id. at 113.
3. Id. at 113-14.
4. NLRB v. McGahey, 233 F.2d 406, 413 (5th Cir. 1956).
6. Id.
"[A]n employee should not have the right to prevent his or her employer from pursuing its business because the employee perceives that a particular business decision violates the employee's personal morals as distinguished from the recognized code of ethics of the employee's profession." The Court stated that Dr. Pierce made her objections to loperamide before Ortho asked the FDA for approval of the formula, and, therefore there was no imminent risk to human beings. If the FDA had disapproved it and Ortho had then required Dr. Pierce to go ahead with human testing, the situation would have been different. Further, saccharin was not harmful, merely controversial. It was not as if Dr. Pierce was resisting the inclusion of cyanide in a drug to be given to babies. There was merely "a difference in medical opinions," in which Dr. Pierce found herself on the other side of the fence from her co-workers and superiors. According to the court, Dr. Pierce was, in effect, trying to force her employer to drop research on loperamide because she believed it was unsafe.

Justice Pashman, in dissent, listed various codes of medical ethics which forbade doctors from conducting drug tests on humans "where unnecessary medical risks have economic profit as their only justification." He pointed out that Dr. Pierce did not claim she had the right to put an end to the loperamide project; she only claimed the right to her professional autonomy. She merely expected to be able to express her opinions on the use of saccharin in the drug without suffering the loss of her job. Therefore, the majority's worry over granting doctors "complete veto power over desirable drug development [was] ill-conceived."

Justice Pashman stated the majority also turned a blind eye to the FDA's history of failing to monitor dangerous drugs. This very history made it all the more important for professionals to act on their ethical beliefs. The dissent believed that Dr. Pierce's reactions were timely,

8. Id. at 513.
9. Id.
10. Id. at 515-17. They were: The Declaration of Helsinki of the World Medical Association, the guidelines of the American Medical Association, and the "Nurenburg Code," as well as the Hippocratic Oath, which had been specifically mentioned by Dr. Pierce. Judge Pashman chided the majority for rejecting as irrelevant the general language of the Hippocratic Oath, as if that were the only source of ethics Dr. Pierce had relied upon. She did speak of standards, plural and if the majority faulted her for failing to be more specific, it was dismissing a claim merely because of a formal defect in the pleadings.
11. Id. at 519.
and that the danger she wished to avoid was imminent enough at the time she voiced her protest. Justice Pashman asked, "[w]ould the majority have Dr. Pierce wait until the first infant was placed before her, ready to receive the first dose of a drug containing forty-four times the concentration of saccharin permitted in twelve ounces of soda?"12

_Pierce v. Ortho_ is still good law in New Jersey.13 At present, most jurisdictions would deny a cause of action for wrongful discharge to professionals who, because they have taken a stand based on their ethical codes, now find themselves at odds with their employers, and then without a job at all. It is the thesis of this article that the professional whistleblower in private employment should be protected by the common law from retaliatory firing. This article first examines the development of employment-at-will and its counterdevelopments in statutes and contract and tort law. It focuses on the so-called public policy exception to employment-at-will, which some courts use to grant relief for these whistleblowers in case of wrongful discharge. Finally, this article describes the ways in which a professional employee's response to her ethical code is connected to public policy arguments as seen by: 1) the ethical codes themselves, and their importance to the professions and society as a whole; 2) the duty of the professional to consider the long-range consequences of decisionmaking in connection with long-range loyalty to an employer; and 3) the enormous and relatively unchecked power of large private employers to affect the quality of life in our society.

Professional whistleblowers are uniquely situated. Although myriad government regulations do exist, these employees play essential roles as buffers between private industry and the consuming public, especially when the former's focus on profits often clouds its judgment regarding the health and safety of the latter. In order to be effective as buffers, professionals who blow the whistle should be granted a cause of action for wrongful discharge, not only when their employer's actions violate a law or regulation, but also when these actions violate public

12. _Id._

13. See 199 N.J. Super. 18, 488 A.2d 229 (1985), where a nurse would not administer kidney dialysis to a terminally-ill double amputee, because, on previous occasions when she had performed the dialysis, the patient suffered severe internal hemorrhaging and cardiac arrest. She told her superiors that she had moral and philosophical objections to repeating the procedure, as expressed in the Code for Nurses, and asked to be reassigned. The nurse was again asked to dialyze the patient, however, and she refused and was fired. Citing _Pierce_, the New Jersey Superior Court found that there was no violation of public policy, and summary judgment was granted the defendant.
policy as reflected by professional codes of ethics.

II. Historical Background

Employment-at-will is a relatively recent doctrine. It was adopted more out of response to a rapidly industrializing economy than out of feudal tradition. Due to the shortage of labor caused by the Black Death, the Statute of Laborers was enacted in England in the mid-Fourteenth century. This law provided that a servant hired for an unstated time period was presumed to be hired for one year. Even after the statute was repealed, English courts still construed employment contracts of unstated duration as contracts for one year. This interpretation was followed by American courts until the 1880's. During the industrial revolution, however, pressure built to allow more flexibility in hiring and firing. Laissez-faire and freedom-to-contract were the favored economic ideologies, and a new rule regarding employment was needed. In 1877, Horace Woods first enunciated this new rule. "Wood's Rule," as it was to be known, stated that a hiring for an unspecified period was a hiring at will, terminable by either party.

The new principle of Woods Rule was given constitutional dimension during the Lochner era, when the Supreme Court struck down laws aimed at controlling employment conditions as violations of substantive due process. In Adair v. United States, for instance, an employee of a railroad was fired for belonging to a labor union. Federal legislation which would make this discharge a crime was held a deprivation of property and of personal liberty without due process. The Court described the situation as if it were equally in the interests of both parties to be free to contract for employment without interference from the state. It stated, "[t]he right of an employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such

17. Lochner v. New York, 198 U.S. 45 (1905) was the leading case. In Lochner, a state law setting maximum hours for labor in bakeries was struck down as a deprivation of liberty without due process.
employee.\textsuperscript{19}

In \textit{Coppage v. Kansas},\textsuperscript{20} similar state legislation was invalidated on fourteenth amendment grounds. \textit{Coppage} reflects a complete acceptance of freedom to contract, together with an acknowledgement of the unequal basis upon which the employer and the employee face each other. The Court wrote:

\begin{quote}
Since it is self evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate inequities of fortune that are the necessary result of the exercise of those rights.\textsuperscript{21}
\end{quote}

Twenty-two years later, the Supreme Court announced the first limitations on employment at will in \textit{NLRB v. Jones & Laughlin Steel Corp.}\textsuperscript{22} The Court upheld the National Labor Relations Act, explicitly approving the Act's protection of the right of employees to organize and form unions. The Court said, "[t]he Act does not interfere with the normal exercise of the right . . . to discharge. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self organization."\textsuperscript{23}

A large segment (29.9\%) of the American workforce is unionized,\textsuperscript{24} and their collective bargaining agreements provide that these employees may not be fired except for just cause. The proportion of workers protected by these provisions is dwindling, however.\textsuperscript{25} Further, as the worker's collar gets lighter, he or she is less and less likely to be a member of a union.\textsuperscript{26} The concept of organizing and confronting the employer as a group is virtually anathema to the professional employee, whose image has traditionally been one of dignified personal auton-

\begin{flushleft}
\begin{enumerate}
\item Id. at 174-75.
\item 236 U.S. 1 (1915).
\item Id. at 17.
\item Id. at 45-46.
\item A. SLOANE AND F. WHITNEY, LABOR RELATIONS 4 (1985).
\item Id. 20.9\% of the workforce was unionized in 1984, down from 24.7\% in 1970.
\item Id. at 6-7. The following list was based on figures provided by the U.S. Department of Labor:
\end{enumerate}
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Unionization, then, is not likely to be a major limitation on the discharge of professional workers.

A. Statutory Developments

Since the National Labor Relations Act of 1935, federal and state legislatures passed a number of statutes establishing civil remedies against employers who discharge employees because of their race, sex, age, or physical handicap. In addition, there is

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<tr>
<th>Industry</th>
<th>Percentage Unionized</th>
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<tr>
<td>Railroads</td>
<td>78.6</td>
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<td>Automobiles</td>
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<td>Primary metals</td>
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<tr>
<td>Postal</td>
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<td>Paper</td>
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<tr>
<td>Other transportation</td>
<td>42.9</td>
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<td>Telephone communication</td>
<td>40.1</td>
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<td>Stone, clay and glass</td>
<td>39.6</td>
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<tr>
<td>Construction</td>
<td>39.2</td>
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<tr>
<td>Fabricated metals</td>
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<td>Local government</td>
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<td>State government</td>
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<tr>
<td>Wholesale, retail trade</td>
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<td>Services, finance</td>
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The disparity will continue to have a great effect on overall union membership, since fewer and fewer American workers are employed in heavy industry, while the number of jobs in the white collar sector is on the rise.

27. Id. Professionals in unions include teachers (National Education Association and the American Federation of Teachers), college instructors (125,000 belong to the American Association of University Professors), and, to some extent, physicians (16,000), engineers (50,000), and lawyers (several thousand). But most of the professionals represented by unions work for the government or for large institutions. Those in the private sector are still vulnerable to employment-at-will. See also Note, A Remedy for the Discharge of Professional Employees Who Refuse to Perform Unethical or Illegal Acts: A Proposal in Aid of Professional Ethics, 28 Vand. L. Rev. 805, 19-20 (1975).


29. Anti-discrimination statutes have been passed in 49 states.


31. Id.


"whistleblower's" legislation on state and federal levels, protecting employees against dismissal for reporting violations of, for example, the Clean Air Act, ERISA, OSHA or the ERA. But a recent fifth circuit decision raises serious questions as to the effectiveness of such legislation for those who voice their concerns to their superiors instead of to the external enforcement agency. In Brown & Root, Inc., defendant contractor at a nuclear power plant in Texas allegedly fired a quality control inspector for reporting flawed welds to his corporate superiors. The plaintiff employee claimed that his reports were protected activity under the federal law preventing retaliation against an employee whistleblowing to enforce NRC regulations. The Fifth Circuit Court of Appeals, reversing the administrative law judge, found that the statute covered only whistleblowers who actually file their complaints with the NRC, not those who merely reported to their employers. Although there is a split in the circuits on this issue, the Department of Labor has chosen not to appeal the Fifth Circuit's ruling to the Supreme Court. Such a narrow interpretation of the statutory protection laid out by Congress bodes ill for professionals. The more discreet, intracorporate form of blowing the whistle might often be preferred by the professional, whose complaints are more likely to affect employer practice than those of the ordinary worker. Furthermore, the relative power of professionals might deter them from going straight to the regulatory authority, since, more than ordinary workers, they can be expected to identify with their employers' public image and long-range concerns. Perhaps this explains why, almost without exception, when professional whistleblowers attempt to sue for the tort of wrongful discharge, their complaints were expressed only to their superiors, not to the appropriate government agency, nor the media.

39. Id. at 1029-31.
40. Id. at 1036.
41. Mackowiak v. University, 735 F.2d 1159 (9th Cir. 1984).
42. Dr. Pierce vis-a-vis Ortho. See also Percival v. General Motors, 539 F.2d 1129 (8th Cir. 1976) (misrepresentations made to government, reported by engineer to
Further statutory encroachments on employment-at-will include state laws designed to prevent employers from intimidating their employees in certain ways. For example, such a law might make it illegal for an employer to threaten to fire any employee who will not vote as ordered. In Missouri, where such a statute existed, a worker was fired because he refused to vote for a certain judge. But when he brought a civil action against his boss, he lost because the law was a criminal sanction, and made no mention of a civil action for damages for the employee. Other examples of statutory inroads upon employment-at-will are the civil service rules which protect federal, state and local government employees against arbitrary dismissal.
In spite of these existing protections, there are still millions of American workers who, because they do not have a contract for a stated duration, could be summarily fired and have no redress. Thus, the existence of employment-at-will carries a tremendous potential impact in our society, in which it is far easier for an employer to replace an employee than for an employee to find a new job. The employment-at-will doctrine has been criticized by a number of scholars. Professor Lawrence E. Blades, in a seminal article of this ilk, describes it as a severe threat to individual freedom. He says:

We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs, they lose every resource...[S]uch dependence of the mass of the people upon others for all of their income is something new in the world. For our generation the substance of life is in another man’s hands.

B. Contract Law Developments

In many states, courts have set limits on an employer’s right to terminate at-will employees by using contract law. There are two main approaches: 1) to find a covenant of “good faith and fair dealing” im-

level, COLO. REV. STAT. §§ 24-50.5-103 and 105 (1980 Supp.) (state government employee’s disclosure of public interest information cannot be disciplined). For a list of statutes protecting whistleblowers at state level, see, 4 LAB. REL. REP. (BNA) 1:52 (1985).


49. See Blades, supra note 48, at 1404, quoting F. TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951).
plicit in the contract of employment, or 2) to imply a contractual term from an employer's handbook, policy statements, or behavior.

The first method of ameliorating the employment-at-will doctrine through contract principles is actually a contract-tort hybrid. Courts in some states have imposed a duty of good faith and fair dealing upon the parties. Under this theory, an employee may collect damages if he can show that his dismissal was motivated by bad faith or malice. The theory draws from tort law in that the duty imposed comes from public policy concerns rather than an express or implied promise made by the employer. However, it is generally described as sounding in contract, and damages have been limited accordingly.

Courts in only seven states hold employers to the good faith and fair dealing standard and they have been doing that gingerly. For instance, New Hampshire, the first state to use the good faith rule, has narrowed the rule's applicability to situations where employees are discharged because they performed acts that public policy would encourage, or refused to do that which public policy would condemn. In a Massachusetts case, the absence of good cause for discharge was held not to be the equivalent of an absence of good faith. Good faith was only one factor in determining fair dealing. In another Massachusetts case, , a salesman claimed that his employer fired him after twenty-five years of service in

53. See Monge, supra note 50, where a female employee was fired for refusing the sexual advances of her supervisor. This case pre-dates the development of sexual harassment theory under Title VII of the Civil Rights Act of 1964.
order to avoid paying him commissions. He was discharged one day after a customer placed a five-million dollar order with him. In general, Massachusetts expects an employee to demonstrate that a dismissal would financially benefit the employer at the employee’s expense before it questions an absence of bad faith. 57

The second application of contract principles is only slightly more popular. Fourteen states are willing to imply additional terms; usually, that the employer will only fire the employee for "just cause." 58 In this theory’s leading case, Toussaint v. Blue Cross and Blue Shield of Michigan, 59 Mr. Toussaint was handed a personnel manual at his hiring which included a “just cause” policy statement. Also, in response to his questions about job-security, he was told that if he was “doing his job” he would not be discharged. 60 The court found that such statements, written or oral, could amount to enforceable contractual promises. 61 Although an employer need not make such promises, once they are made, the employer enhances the employment relationship, “securing] an orderly, cooperative and loyal work force.” 62 The court also noted that terms could be implied although the policy manual that gave rise to them was never signed, contained no specific reference to the employee nor to his position, and could be changed unilaterally by the employer without notice to the employee. Further, the court stated it would not matter that the employee might not even realize that such a manual existed until after he or she was hired. 63 Another case in which a “just cause” provision could be implied from a personnel handbook and verbal assurances at hiring was Weiner v. McGraw-Hill, Inc. 64 The court explained that consideration for such a promise could be found in an employee’s detrimental reliance on it. Mr. Weiner had been lured away from another publisher with the promise, had seen it incorporated in the employment application, had stayed on with McGraw-Hill, turning down job offers because of it, and had actually had to use the “just cause” procedures himself in dismissing certain of his

58. Arizona, Arkansas, California, Idaho, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, New York, Oklahoma, Oregon, South Dakota.
60. Id. at 884.
61. Id. at 890.
62. Id. at 892.
63. Id.
own subordinates at McGraw. 65

Even where there was no booklet or manual, employees have been able to argue the existence of an implied promise to discharge for just cause. In Pugh v. See's Candles, Inc., 66 Mr. Pugh worked his way up from dishwasher to vice president in thirty-two years of employment. Right after a trip to Europe which he took with the president of See's and their respective families, he was summarily fired. When he asked why, the president told him that he should "look deep within [him]self" to find the answer, that "things were said by people in the trade that have come back to us." Up until this point, Pugh was considered an exemplary employee, honored by the company for his part in making the previous year the most successful in See's history. 67 The court held that the jury could find an implied promise not to behave arbitrarily toward employees, pointing to the length of his employment, the promotions and commendations he had received, See's policy of not firing administrative personnel without just cause, and assurances that Pugh had been given during his early years with the company that "if [he was] loyal to See's and [did] a good job, [his] future [would be] secure." 68 The above examples reflect a minority development, however. 69 Most courts would find that there was no consideration for any implied promise to employ permanently, for instance. In exchange for his or her labor, the employee collects a wage. Nothing extra is bargained for on either side. 70

Some argue that, in the face of the majority's tendency to adhere rigidly to traditional contract principles, an employee must negotiate more favorable terms at the outset. But this is an unrealistic expectation. Employees generally are not in a position to bargain effectively for job security. Only uniquely valuable employees would have such clout. Even among professionals, a group perhaps most likely to behave with a degree of educated assertiveness, the norm is to accept a job rather informally, often verbally. Not much in the way of terms of employment is specified, usually nothing regarding its duration. 71 Even where

65. Id. at 445.
67. Id. at 316-19.
68. Id. at 317, 329.
70. See Note, Employment Contracts of Unspecified Duration, 42 COLUM. L. REV. 107, 121 (1942); Blades, supra note 48, at 1420.
the minority rule of implied terms holds sway, employers can easily circumvent the implied promise possibility by inserting express provisions in a contract of employment insisting on their right to terminate at will. Such provisions have been upheld in Michigan, where Tous-saint was decided, for instance. 72

C. Tort Law Developments

In response to this vulnerability, courts in recent years have been willing to create a cause of action in tort for wrongful discharge, where an employee has been fired in circumstances which contradict sound public policy. In one group of such cases, the employees were dismissed for exercising a statutorily-given right. In Frampton v. Central Indiana Gas Co., 73 for example, the plaintiff alleged that she had been fired in retaliation for filing a worker’s compensation claim. Although the statute did not confer upon her a civil remedy, the court held that she had a cause of action. If employees could be intimidated in this way, they would not file claims, “opting, instead, to continue their employment without incident. The end result, of course, is that the employer would be effectively relieved of his obligation,” 74 and the public policy that underlay the statute would be contravened. In Perks v. Firestone, 75 the employer was investigating complaints that some of its suppliers were procuring prostitutes for employees. Plaintiff employee was told to take a polygraph test. When he refused, he was fired. Since making employment contingent upon taking such a test was a misdemeanor in Pennsylvania, the court held that public policy was violated by the dismissal, and reversed summary judgment for the defendant. 76 These cases illustrate that, where an employee has been fired for exercising a right con-

75. 611 F.2d 1363 (3rd Cir. 1979).
76. Id. at 1365. Not all jurisdictions have been that flexible with the public policy argument, using it to give teeth to employment-related statutes which are silent regarding an employee’s civil action for damages. For instance, in Kelly v. Mississippi Valley Ga Co., 397 So. 2d 874 (Miss. 1981), the court granted no cause of action where an employee was fired for filing a worker’s compensation claim. Also, the Arizona Supreme Court held in Larsen v. Motor Supply Co., 117 Ariz. 507, 573 P.2d 907 (1977), that an employee’s refusal to take a lie detector test did not entitle him to a cause of action where the statute was merely a criminal sanction against the employer.
ferred by statute, even in the absence of a corresponding personal rem-
edy, courts have been willing to grant a cause of action for wrongful discharge. The public policy is easy to spot, since it is statutorily-mandated and in the context of employer-employee relations.

What should be the result when the employer has violated a law, and the employee is fired for either refusing to go along with such behavior or making active efforts to end it? The statute involved in these situations typically has no direct bearing on the employment relationship and mentions neither an employee's right nor remedy. It is not easy to generalize about the case law in this area, perhaps because public policy, "the unruly horse of the law," can be many things to many judges. One commentator has described the decisions as "ad hoc judgment(s), uninformed by detailed examination of the merits of drawing the line in one place rather than another... an unpredictable and sometimes counterintuitive pattern of holdings..."77

The case law in this area is untidy. Amid the confusion, certain trends can be identified. These trends support the thesis of this article; that there is a clear public policy justification for granting a cause of action for wrongful discharge to the professional whistleblower.

Some jurisdictions simply will not create a right of action on public policy grounds. A New York plaintiff, an employee of 23 years, an assistant treasurer, alleged that he was fired for announcing to top management that he knew of illegal accounting practices involving at least 50 million dollars. He told them that secret pension reserves had improperly inflated the company's growth, allowing certain officers to receive unwarranted bonuses via a management incentive plan.78 In another case from New York, the plaintiff worked for Citibank and reported illegal foreign currency manipulation to his superiors.79 Neither of these whistleblowers had a cause of action, since New York does not recognize the tort of wrongful discharge as against public policy. Similarly, in Hinrichs v. Tranquilaire Hospital,80 plaintiff was fired for refusing to falsify medical records. The Alabama Supreme Court, clinging to the concept of the employer's right to terminate at will,

77. Note, Protecting Employees at Will, supra note 48, at 1949.
78. See Murphy, supra note 42, at 89-90.
described public policy as "too nebulous a standard," and affirmed summary judgment for the defendant.

Among the state courts recognizing the public-policy-based cause of action for whistleblowers is California, where, in 1959, *Petermann v. Int'l Brotherhood of Teamsters* 81 was decided. There, the plaintiff was instructed by his employer to lie when testifying before a legislative investigatory committee. He refused and was fired. The court found that he had a cause of action, and described public policy as "that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against public good." 82 When his boss made plaintiff's continued employment depend upon his willingness to commit perjury, public policy was clearly violated. The effect "would be to encourage criminal conduct upon the part of both the employee and the employer, and would serve to contaminate the honest administration of public affairs." 83

*Petermann* has been cited in a number of whistleblower cases that have been heard in recent years. 84 Where a plaintiff appears to be unfairly stuck between the 'rock' of job loss and the 'hard place' of participation in an employer's illegal scam, some courts support an action for wrongful discharge. For example, where an employer would expect an employee to falsify pollution reports, 85 or take part in illegal price fixing, 86 these courts view public policy as support for "good citizenship;" in effect they forbid an employer from forcing an employee to commit a crime. The various encroachments on employment-at-will are often reviewed in these cases, producing such conclusions as "[t]he employer is not so absolute a sovereign of the job that there are not limits to his prerogative. One such limit is . . . the employer cannot condition em-

82. Id. at 27.
83. Id.
86. Tameny, supra note 84.
loyment upon required participation in unlawful conduct by the employee." At stake are the employee's interest in a clear conscience (and a clean record), and the public's interest in a well-functioning criminal justice system. The professional whistleblower can certainly point to this line of cases for a supportive definition of public policy. On the other hand, courts have frequently been influenced by the policy argument that employees must be loyal, and that whistleblowing is disloyal, a form of biting the hand that feeds. Although it could also be argued that protecting one's employer from the repercussions of illegal procedures (treble damages in antitrust suits, or personal injury damages in product liability suits) is real, long-term loyalty, many judges seem to favor the short-term variety.

It is interesting to examine the decisional law in the light of the loyalty issue. If we assume that the fewer waves made by the whistleblower the better, it would make sense for courts to be more comfortable granting a cause of action for wrongful discharge to passive whistleblowers, those who merely refuse to cooperate in illegal behavior, or merely register internal complaints, than to the more active variety of whistleblower, those who threaten to rock the corporate boat more severely by going public with their complaints. The decisions do not exhibit this logic. For instance, in 1980, a research technician working for a pharmaceutical manufacturer reported violations of the FDA's drug safety regulations to his supervisors. He was fired. The Indiana Supreme Court refused to grant a cause of action for merely doing what public policy encouraged, in light of the competing interest of an employer to be able to determine whom to employ. Yet, in Illinois in 1981, where the plaintiff reported crimes of fellow employees to the police, a cause of action for retaliatory discharge was stated. "There is no public policy more basic, nothing more implicit in the concept of ordered liberty than the enforcement of a state's criminal code."

87. Id. at 1136.
88. Harless, supra note 84, at 276; Sheets, supra note 84, at 388-89.
89. Petrik, supra note 42, at 590-92; Palmateer, supra note 85, at 879-80.
91. Id. at 1058.
92. Palmateer, supra note 85, at 878-79. In this case, the employee had worked for the defendant for sixteen years, and was a manager at the time he was fired. He was not, however, a "professional." Note that Palmateer was discharged for cooperating in the criminal investigation of fellow employees. The process would go on with or without his help. In this sense, although he became involved in a "public" exposure, he
The case law also does not exhibit uniformity in terms of supporting law enforcement by supporting the whistleblower. A comparison between two cases from the Eastern District of Pennsylvania, both involving the reporting of antitrust violations, provides an example of this sheer inconsistency. In a 1979 decision, the plaintiff refused to participate in his employer's anti-competitive violations where, for instance, Food Fair, but not Acme, was given price breaks. He claimed he was fired for refusing to commit a crime. The court held he had a cause of action for wrongful discharge. However, in another case, a dismissal was granted against another sales manager in 1982, where he objected to identical illegal discounting and was fired.

There is, however, a recognizable trend in the morass of public policy decisions; that is, to protect whistleblowers who are considered under an obligation to report wrongdoing. For example, Indiana's Supreme Court, in the Campbell case, denied a cause of action to the mere research technician who reported misconduct in the gathering of drug safety data for the FDA. But a federal court interpreting Indiana law found for a Mr. Perry, who had been fired for refusing to continue his participation in violations of antitrust law and for delivering evidence of these violations to his employer. Distinguishing Campbell, the court stated that Mr. Perry was "under a statutory duty to refrain from engaging in conspiracies in restraint of trade."

In some cases, the employee's job responsibilities include the responsibility to report and these whistleblowers are given more protection. For example, in Sheets v. Teddy's Frosted Foods, Inc., a quality control director for a frozen food company told his supervisors that certain meats and vegetables were substandard according to Connecticut law. Dismissal of his claim was reversed. In Harless v. First National Bank in Fairmont, another dismissal was reversed where the manager of a consumer credit department of a bank reported illegal overcharging practices on prepayment of installment loans. In Petrik v.

was not the initiator, and might therefore be classified as "passive."

93. McNulty, supra note 84.
94. Id. at 1119-20.
96. Campbell, supra note 90, at 1057.
98. Id. at 1389. But see, dissent in Campbell, supra note 90, at 1063.
99. Supra note 84.
100. Id. at 388.
101. Supra note 84.
Protecting the Professional Whistleblower

Monarch Printing Corp., a vice president of finance reported his suspicions of embezzlement of corporate funds. He too stated a claim for wrongful discharge. Perhaps the tendency to protect this type of whistleblower exists because, if they fail to object and allow the wrongdoing to continue, they are, in effect, promoting it in a more active sense than could a less powerful employee. In any case, these decisions seem to define public policy as follows: the more job responsibilities carried by the whistleblower, the greater should be his or her freedom to raise issues, such as those mentioned above, without risking retaliatory firing. This trend is obviously relevant to the dissenting professional employee.

Consistency is a chimera, however, even as to whistleblowers with considerable power and responsibility. A federal court in Michigan, for instance, granted summary judgment for the employer. In Percival v. General Motors, plaintiff was a mechanical engineer and an executive who worked for GM for 25 years. He claimed that he was fired for his complaint about GM’s deceptive practices, his refusal to give the federal government false information, and his attempts to correct certain misrepresentations made to the government. Here, plaintiff’s status gave even more weight to the defendant’s interests. “A large corporate employer such as GM . . . must be accorded wide latitude in determining whom it will employ in high and sensitive management positions, particularly where developments in the field of mechanical engineering are involved.”

At the losing end of the spectrum are employees who take it upon themselves to object to an employer’s practices which, though not necessarily illegal, may be, in the employee’s opinion, dangerous. Mr. Geary, for example, worked as a salesman of tubular products to the oil and gas industry, and believed that a certain new product was not adequately tested and, therefore, unsafe. When he told this to his superiors, he was ordered to follow directions and continue selling. Instead, he went to the vice president with his concerns. The product was eventually re-evaluated and withdrawn. In a sense, so was Mr. Geary; he was fired. Pennsylvania’s Supreme Court ruled against him, stating, “no public policy is violated when a company discharges an employee who is not qualified to make technical judgments for making a nui-

102. Supra note 42.
103. 539 F.2d 1126 (8th Cir. 1976).
104. Id. at 1130.
sance of himself." The court mentioned the employer's legitimate interest in hiring and retaining the best personnel available. The best personnel, it seemed to say, would be those who understood that employees should not go over the heads of their immediate supervisors. By doing just that, Mr. Geary displayed an inability to work effectively with fellow employees. An employer should have the right to discharge an employee for such a reason without worrying about being sued. These too, stated the court, are public policy concerns.  

III. The Professional Whistleblower

In this area of law, there is a special case; that of the professional employee who feels compelled to blow the whistle in response to the dictates of a professional ethical code. In such situations, an employer may not necessarily be violating any law, nor expecting the employee to participate in doing so. Where this is true, they resemble the Geary type of whistleblower cases in which the employee may be viewed as a meddling, inappropriate watchdog, who deserves to be fired. But, they also strongly resemble the cases in which employees are allowed a cause of action because their job responsibilities may require them to be aware of, and responsive to, certain problems. In addition, the professional whistleblower situation involves a new factor; that is, the argument that professional codes of ethics are, in part, designed to be in the public interest, and, therefore, it may well be an overriding public policy to encourage the professional to behave in accordance with such a code.

A. Ethics and Loyalty

The employer does have a legitimate interest in maintaining an efficient and loyal workforce. Even workers who are protected under section 7 of the National Labor Relations Act from being discharged for union organizing are not so protected for activities which are seen as "disruptive" or "insubordinate". "There is no more elemental cause for discharge of an employee than disloyalty to his employer."  

106. Id. at 178-79.
107. Id. at 179.
The professional employee, however, owes other loyalties; to the profession itself, and to the public at large. Ethical codes are the official guidelines by which a profession hopes to maintain both actual internal quality and the public's perception of that quality. They may be self-serving, but they also serve society as a whole by attempting to ensure that the power which professionals hold is intelligently and morally exercised. These codes insist that the professional, above all, respond to that which is best for the public in general. According to the ethical code of the National Society of Professional Engineers, for example, engineers must "use knowledge . . . for the advancement of human welfare," and where that brings them into conflict with their employer, they must "regard [their] duty to the public welfare as paramount."\(^{109}\) And, as a legal example, while lawyers are directed to "represent a client zealously, they may not counsel or assist a client in conduct that the lawyer knows to be illegal or fraudulent."\(^{110}\) Further:

A lawyer who receives information clearly establishing that: (1) his client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall promptly reveal the fraud to the affected person or tribunal, except when the information is protected as privileged communication.\(^{111}\)

Professional ethics codes do not simply urge quality performance; they clearly link performance with a public trust. These mixed loyalties of professionals set them apart from ordinary whistleblowers. Professionals respond, not only to the promptings of good citizenship, but to the promptings of their codes that direct them to speak out even if they must step on some important toes by doing so. If ordinary whistleblowers should not be forced to choose between losing a job and committing a crime, professionals surely deserve even more protection; for they are not only pressured to break the law, but also to go against

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110. Id., DR 7-102
111. Id., DR 7-102. The attorney-client privilege is expressed in Canon 4, but it extends only to past crimes, not to current or continuing crimes. Hinds v. State Bar, 19 Cal. 2d 87, 92-93, 119 P.2d 134, 137 (1941). Recently, however, the ABA voted to define "crimes" as crimes of violence. So-called "economic atrocities," such as securities fraud, which an attorney may know are in the planning stage, do not have to be reported.

https://nsuworks.nova.edu/nlr/vol10/iss1/1
professional ethical guidelines.

The whole question of loyalty to the employer is further complicated by the fact that a professional employee is frequently in a position to envision both the short-term and the long-term consequences of a course of action. At times, while short-term consequences seem to work, long-term consequences are worrisome. It is often this sort of realization that inspires a professional to blow the whistle. And it is certainly arguable that the employer’s interests were best served by such behavior. For example, in Edwards v. Citibank, Mr. Edwards went to his immediate supervisors, and then to the bank’s senior vice president for foreign exchange, about a practice called “parking.” This involved the bogus transfer of foreign exchange positions to shift profits to tax havens, like the Bahamas. Edwards was concerned that this was “just bad business . . . [W]e risk being tossed out on our rear-ends from some of these countries.” Similarly, a senior design engineer for Ford, Frank Camps, believed that the Pinto safety testing program was inadequate and even illegal. Ford was in a hurry to get federal certification for the Pinto, and it had to be cheap enough and light enough to compete with the VW and Japanese imports. To comply with federal windshield retention standards, Ford engineers designed the Pinto so that the energy produced by crash impact would be directed away from the front of the car towards the gas tank. Mr. Camp’s concern, which, unfortunately, proved to be well-founded, was that his employer’s reputation and financial stability would be seriously undermined if it had to defend this sort of design ploy in personal injury lawsuits. He began writing letters to management, feeling that he “faced the dilemma of either serving the best interest of the Ford Motor Company or submitting to the directives of [his] immediate supervisors.”

So, real loyalty to an employer, especially for the professional employee, may mean taking the long view. Many employers understand this and provide internal mechanisms for airing complaints and suggestions, no matter how unpopular these might be. A cause of action for

112. 100 Misc. 2d 59, 418 N.Y.S.2d 269, aff’d 74 A.D. 2553 (1979).
114. See Whistleblowing, supra note 1, at 123.
115. For an analysis of the benefits of dissent, and descriptions of how company policy can make the most effective use of it, see A. Urs, EXECUTIVE DISSENT, 9-14 & 162-79 (1978); Whistleblowing, supra note 1, at 141-51. See also F. Foulkes, PERSONNEL POLICIES IN LARGE NONUNION COMPANIES (1980); Rowe and Baker, Are You Hearing Enough Employee Concerns?, 62 HARV. BUS. REV. 127-35, May-June 1984.
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the wrongfully-dismissed whistleblower then, arguably, could reflect the employer's interest in loyalty, newly defined as a high-quality, thinking workforce. As the chief executive officer of the Greyhound Corporation puts it, "I want spirited managers who will challenge the system...I don't warm lukewarm employees. They breed mediocrity and a womb-to-tomb attitude."\(^{116}\)

Another argument for special treatment of the professional whistleblower is that they are licensed and regulated by the state, subject to disciplinary actions, both for violations of their own codes or of external regulations. This fact further illustrates the way in which professional employment is intertwined with the public interest. In 1982, a New Jersey pharmacist was in charge of the defendant employer’s drugstore, which was located inside defendant’s grocery store. The plaintiff’s superior told him that on the 4th of July the grocery would be open, but the pharmacy would be closed. The plaintiff believed that state regulations required the pharmacy to be open when the store itself was open. Therefore, acting on his belief, he went to work on July 4th and was fired. In reversing summary judgment for the pharmacist, the court saw a public policy issue reflected in the twin elements of state law and a professional code of ethics.\(^{117}\) Mr. Kalman, the plaintiff here, was not just concerned in case drugs were stolen or wrongly dispensed. He was also worried that his license might be revoked.\(^{118}\)

Professional whistleblowers are often in a position to be jeopardized, as their employers would be, by repercussions as serious as loss of employment. In this sense, too, they are set apart from the ordinary worker who responds out of concerns of conscience. For example, a superior court in California recently awarded $250,000 to an insurance company's staff attorney who alleged that he was fired for refusing to go along with their order that he “not...disclose to [insureds] offers to settle within the policy limits.” According to the plaintiff, state ethical rules demanded that he convey such news to policyholders.\(^{119}\) Lawyers can be disbarred for unethical handling of a settlement, for set-

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118. Id. at 729.
tling a case without a client's permission, or for not telling them about
an offer to settle. The Ford engineer began a barrage of letters com-
plaining about the Pinto tests, not just out of concern for his employer,
but also because he did not want to be made a scapegoat. He said:

At about this time, the concept that negligence in design as a basis
for liability was taking hold in legal circles, and I was fearful of
the consequences. Therefore, I wrote to management in order to
allay my fears that at some future date I would be held personally
liable for a Pinto fatality.

It has been demonstrated that, if there is any recognizable trend in
the case law dealing with the public-policy exception to employment-at-
will and whistleblowers, it lies in allowing a cause of action where the
whistleblowers' jobs make them responsible for reporting miscon-
duct. Engineers, architects, lawyers, accountants, doctors and other
professionals are very often highly-placed, charged with overseeing the
general quality of a project or a series of projects. Since, even more
than the ordinary employee who blows the whistle, these people are
expected to respond using independent judgment and foresight, it
makes particularly good sense to allow them to do so without risking
their jobs.

B. *Public Policy and Private Power*

That large corporations wield enormous power in American society
is a fact which has been noted and analyzed for decades. The corpo-

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121. *Whistleblowing*, supra note 1, at 123. See also Sethi, *The Expanding Scope of Executive Liability (Criminal and Civil) For Corporate Law Violations*, in *Private Enterprise and Public Purpose* 245-74 (1981) [hereinafter cited as *Private Enterprise*].

122. See supra, notes 96-102 and accompanying text.

rate giants have tremendous influence on our political system. Commentators have viewed large corporations as governments themselves, but governments with a difference, in that they are basically unaccountable to their constituents, their shareholders. As one scholar put it: "The official doctrine that the corporate directors are responsible to the stockholders is so irrelevant as to be ridiculous. The directors are, if reality is considered, effectively responsible to management, and management tends to be self-perpetuating." Whereas the power of government is constitutionally delimited by the system of checks and balances, by federalism, by the Bill of Rights, and by the electoral process, the power of private industry is, in the opinion of many, unchecked and unresponsive to either its shareholders or to the general public.

There is no denying the increasing degree to which these "governments" make decisions that gravely affect their "citizens." The safety of the cars we drive, the quality of the air we breathe — from relatively small details to ultimate issues, the large corporations exercise great power. Federal and state agencies do exist, and do issue regulations. However, they rely for their data on the very private industry that they aim to control. It is this reliance which makes the role of the whistleblower, especially the professional whistleblower, so crucial. When Ford sought federal certification of its Pinto, it expected Frank Camp to cooperate in feeding the government manipulated safety-test results. Grace Pierce knew that Ortho's recommendations to the FDA concerning the loperamide formula would probably be accepted, and although this situation did not involve falsified reports or any outright violation of a regulatory scheme, she perceived herself as the last line of defense precisely because the FDA relies on data provided by the pharmaceutical industry. This fact, and the relatively abyssmal record of the agency was mentioned by the dissent in Pierce:

124. See Harris, The Politics of Corporate Power, in Corporate Power, supra note 123; Swanson, Corporations and Electoral Activities: The Legal, Political and Managerial Implications of PACs, in Private Enterprise, supra note 121, at 355-72.
127. Whistleblowing, supra note 1, at 122.
128. Id. at 116.
In apparent ignorance of the past failures of official regulation to safeguard against pharmaceutical horrors, the majority implies that the necessity for administrative approval for human testing eliminates the need for active ethical professionals within the drug industry. But we do not know whether the United States Food and Drug Administration would be aware of the safer alternative to the proposed drug when it would pass upon defendant’s application for the more hazardous formula. The majority professes no such knowledge... This highlights the need for ethically autonomous professionals within the pharmaceutical industry... 129

Whistleblowing, then, is at present perhaps one of the most effective ways to encourage large corporations to attend to interests beyond their own. It would seem important that the common law evolve in a manner that preserves this mechanism. Instead, the doctrine of employment-at-will allows employers to retaliate freely against its watchdogs.

According to the Supreme Court of New Jersey, Grace Pierce was, in effect, claiming that she had a right to veto Ortho’s development of loperamide because, in her opinion, it was too risky. This would never do: “[c]haos would result if a single doctor engaged in research were allowed to determine, according to his or her individual conscience, whether a project could continue.” 130

The cases do not suggest that whistleblowers must be fired in order to free their bosses to continue whatever practices were disturbing to the complaining employee. Rather, the firings appear to be in retaliation for disruptive disloyal behavior. Grace Pierce was removed from therapeutic drug research, and eventually made to feel that she had to leave Ortho. Meanwhile, the loperamide program went on with replacement personnel. Eventually, however, the company decided not to market the formula Dr. Pierce had protested. So, in that case, the objectionable project continued while she was reassigned, and ended after she was fired. 131 In the Edwards case, “parking” continued unimpeded,


130. Pierce, supra note 7, at 514.

131. Whistleblowing, supra note 1, at 116. In other cases, whistleblowers’ suggestions for improvements were followed, and then they were fired. For instance, in Geary, supra note 105, the product complained about was withdrawn from production, and then Mr. Geary was discharged. In Adams v. Budd Co., 583 F. Supp. 711 (E.D.
before and after Mr. Edwards expressed his concern over it to his immediate supervisors and then to Citibank's senior vice president for foreign exchange. And he was dismissed in a way that clearly indicated how slight were the effects: "You drew your gun and you didn't shoot," said his boss, "now we're going to shoot you." 132

If whistleblowers were able to exercise ultimate control over their employers' practices, surely they would not bother blowing the whistle in the first place. It is far more plausible that they are fired, not because employers were forced to rid themselves of the offending employees before they could act as they saw fit, but as punishment for making waves.

IV. Conclusion

Although private employers must be free to fire employees for a variety of reasons, because of the above-mentioned characteristics distinguishing the professional employee from any other kind, they should be protected by the common law for expressing concern over, not just a present illegal activity, but a potentially illegal or unethical activity. It is especially important to empower these employees to respond to behavior which is not, strictly speaking, illegal, in the light of the fact that large private employers represent tremendous concentrations of power, and in the light of the imperfect record of government agencies to make drugs, cars, and nuclear power plants safe for the American public. A cause of action based on the public policy exception to employment-at-will should be available to those whose professional code of ethics has prompted them to blow the whistle.
Amendments to the Florida Condominium Act: A Proposal

John G. Mac'Kie, III*

On June 4, 1984, pursuant to the creation of the Florida Mobile Home Act,¹ the Division of Florida Land Sales and Condominiums was redesignated as the Division of Florida Land Sales, Condominiums, and Mobile Homes. In drafting the Mobile Home Act, the objective of the Florida Legislature was to strike a balance between the interests of the park owners and tenants of the mobile home parks. This legislation, like its Condominium Act² predecessor, continues the trend toward consumer protection in the real property area.

While the original Condominium Act provided only a basic framework for the creation and operation of condominiums, amendments adopted in the early 1970’s began increasingly to detail the rights and duties of developers and unit owners.³ It has been suggested that the numerous amendments to the Condominium Act are evidence that the legislature sought to address problems without a clear understanding of the concept of condominium ownership.⁴ The view that the frequent modifications of the Condominium Act is indicative of the legislature’s inability to effectively deal with condominium problems is unwarranted. Certainly, the Florida Legislature has acted frequently to regulate the development and operation of residential condominiums. In doing so through amendments to the Condominium Act, however, the legislature has responded positively to the pleas of constituents for legislation to establish rights and protections for purchasers, developers, unit owners, lending institutions, and the associations that are established to operate the condominiums. Analysis of the Mobile Home Act suggests two additional amendments to the Condominium Act be

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1. FLA. STAT. § 720 (1983).
adopted to better serve the interests of both condominium unit owners and developers. The first amendment would impose, on those condominium associations that have reserved a right-of-first-refusal, a forty-five day limit in which to decide whether or not to exercise the preemptive right. The amendment is a necessary response to the judicial enforcement of right-of-first-refusal provisions that chill sales and remove property from commerce by granting condominium associations unreasonably long periods of time to decide whether or not to purchase. The second amendment would require the Condominium Division to furnish standardized prospectus forms to developers. This would facilitate compliance with section 718.504 and curtail the perpetual findings by the Condominium Division that such filings are deficient, causing costly delays to developers.

Amendment One: 45-Day Limit on the Right-of-First-Refusal

During the century and a half that followed the Norman Conquest, the landowner who attempted to convey his property might meet with opposition from his feudal overlord who objected to the transfer because the proposed transferee was not a suitable person to perform the feudal services due for the land. The enactment in 1290 of the Statute of Westminster III, commonly known as \textit{Quia Emptores}, however, abolished such restrictions on alienation by providing "[t]hat from henceforth it shall be lawful to every freeman to sell at his own pleasure his lands and tenements, or part of them . . . This statute extendeth but only to lands holden in fee simple." Since the passage of \textit{Quia Emptores}, the right of free and unlimited alienation has been

5. The imposition of a 45-day limit on the time condominium associations have to decide whether or not to purchase would be in keeping with prior legislative expressions of reasonableness concerning the duration of rights-of-first-refusal. Section 720.110 of the Mobile Home Act provides for a 45-day period during which the mobile home park tenants, through the Homeowners’ Association, have the right to purchase the park before it can be sold to a third party. Additionally, section 718.612 of the Condominium Act gives a tenant of an apartment being converted into a condominium a 45-day period within which to exercise a right-of-first-refusal to purchase the unit in which he resides.

6. Florida courts have consistently upheld right-of-first-refusal provisions without regard to the duration of the time period granted the association to make its preemptive election. \textit{See infra} notes 41-61 and accompanying text.


recognized as an inherent quality of a fee simple estate. Today, however, some condominium owners in Florida are being deprived of this right by the judicial enforcement of unreasonable right-of-first-refusal provisions.

A right-of-first-refusal is a covenant often included in the condominium declaration whereby the association is granted the opportunity to purchase a unit in the project before it can be sold to a third party. In order to exercise the right, the association must purchase for the same price and on the same terms that the owner is willing to accept from a third party in a bona fide offer. Restraints in the form of a right-of-first-refusal are being upheld by the Florida courts as a legitimate device for association retention of control over unwanted transferees. As a consequence, a condominium owner in Florida who wishes to sell his unit may find his conveyance unduly hindered, not by a feudal overlord, but by the condominium association's right-of-first-refusal that grants the association an unreasonable time period to decide whether or not to exercise its preemptive option.

The rule against restraints on alienation is designed to free property from unjustifiable encumbrances tending to make it less marketable. The policy against such restraints is based on the belief that restraints "remove property from commerce, concentrate wealth, prejudice creditors, and discourage property improvements." Clearly, a right-of-first-refusal which grants the association an unreasonable period of time to decide whether or not to exercise its preemptive option defeats the rule against restraints on alienation by taking property out of commerce. Where such a right-of-first-refusal exists, both the prospective purchaser and the seller must be prepared to wait until the association decides whether or not to exercise the option. If the right-of-first-refusal grants an unreasonably long period of time for the association to decide whether or not to purchase, many prospective buyers

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10. See supra note 6 and accompanying text.
13. Fla. Stat. § 718.104(5) (1983) provides that the rule against perpetuities shall not be applied to defeat a right given any person or entity by the declaration for the purpose of allowing unit owners to retain reasonable control over the use, occupancy, and transfer of condominium units. Thus, preemptions, rights-of-first-refusal, options, and similar devices are exempted from the rule against perpetuities in the condominium context.
would not make offers because they would not want to be bound for a long period of time without an assurance that they would get the property. 14 Thus there definitely would be a restraint on alienation.

The background for the Florida courts' interpretation of the right-of-first-refusal clauses as reasonable can be found in cases dealing with cooperatives. 15 In a New York case in 1886, 16 the court upheld the right of the cooperative association to enjoin the tenant's proposed sublease of his apartment. 17 In upholding the injunction because the proposed subletting would violate the cooperative's rules and would result in "an invasion and demolition of the design of construction," 18 the court intimated that the cooperative apartment was a special arrangement which should be protected by the law. 19 Half a century later, in 68 Beacon Street v. Sohier, 20 the Massachusetts Supreme Court upheld a non-assignability clause in a ninety-nine year proprietary lease of a stock cooperative. 21 The court reasoned that

[t]he rule against restraints on alienation is not violated because an inalienable estate was not created. The corporation as owner of the estate could sell the property at any time and such sale could be authorized by the written consent of the holders of eighty-seven and one-half percent of the capital stock. 22

During the latter years of the depression, Mrs. Belle Harris assigned her ninety-nine year lease and shares of stock in 1158 Fifth Avenue, Inc. to Penthouse Properties, Inc. 23 Mrs. Harris' cooperative asso-

15. A cooperative apartment consists of "[d]welling units in a multi-dwelling complex in which each owner has an interest in the entire complex and a lease of his own apartment, though he does not own his apartment as in the case of a condominium." BLACK'S LAW DICTIONARY 302 (5th ed. 1979). See Ross, Condominiums and Preemptive Options: The Right of First Refusal, 18 HASTINGS L.J. 585 (1967) for a general discussion of this line of cases.
17. Id. at 548.
18. Id.
19. Id. Even from the beginning a distinction was drawn between the cooperative form of ownership and estates in fee simple.
22. Id. The fact that the entire property could be sold on the authorization of tenants holding 871/2% of the stock does not address that particular tenant's right of free alienability.
23. Penthouse Properties, Inc. v. 1158 Fifth Ave., Inc., 256 A.D. 685, 11
ciation refused to accept the transfer, refused to take rental payments from the assignee, and sued Mrs. Harris for past-due rent.\textsuperscript{24} The New York court stated that while there is a rule against restraining the transfer of property, in the case of a proprietary lease, “the special nature of ownership of cooperative apartment houses by tenant owners requires that they be not included in the general rule”\textsuperscript{25} against such restraints. The court observed that the special nature of cooperative ownership extends from the fact that the failure of one tenant to pay his portion of maintenance charges increases the liability of the other tenant stockholders.\textsuperscript{26} Another New York case\textsuperscript{27} in 1959 upheld a stock cooperative’s refusal to consent to an assignment of stock and the lease, and implied that the discretion of a cooperative corporation based on non-discriminatory grounds was not reviewable by the courts.\textsuperscript{28}

A case that exemplifies the misguided liberality with which the courts treat right-of-first-refusal clauses is \textit{Gale v. York Center Community Cooperative, Inc.}\textsuperscript{29} The cooperative in this Illinois case took a curious form. Characteristically, the cooperative housing association held legal title to the real estate, and the members were entitled to the perpetual use and occupancy of their respective dwellings. This cooperative, however, was atypical in that it was not an apartment complex, but consisted of a subdivision of seventy-two single family homes. The form of ownership was further distinguishable from the traditional stock cooperative in that the residents, although members of the cooperative association, had obtained their own financing, made their own mortgage payments, arranged and paid for the insurance on their homes, and otherwise conducted themselves as the owners of the dwell-

\textsuperscript{24} Id.
\textsuperscript{25} 254 A.D. 692, 11 N.Y.S.2d 423.
\textsuperscript{26} Id.
\textsuperscript{28} 6 N.Y.2d at 434, 160 N.E.2d at 724, 190 N.Y.S.2d at 75.
\textsuperscript{29} 171 N.E.2d 30 (N.Y. 1960).
ings they occupied.\textsuperscript{30} The membership contract provided that when a member sought to withdraw, the association had twelve months in which to purchase the membership at any of three prices: 1) the selling price in the seller's notice to the association; 2) an agreed-on price; or 3) an impartial appraisal. If the association's right was not exercised within the twelve-month period, the membership could be sold on the market, but the association still retained a ninety-day right of redemption.\textsuperscript{31} These provisions were challenged as unlawful restraints on alienation, and despite the exceedingly long period of time allowed the association to exercise its option, and even though the association was not a traditional stock cooperative, the Illinois court upheld the restraint on transfer.\textsuperscript{32} In reaching its decision, the court said:

From the authorities . . . examined, it would appear that the crucial inquiry should be directed at the utility of the restraint as compared with the injurious consequences that will flow from its enforcement. If accepted social and economic considerations dictate that a partial restraint is reasonably necessary for their fulfillment, such a restraint should be sustained. No restraint should be sustained simply because it is limited in time, or the class of persons excluded is not total, or all modes of alienation are not prohibited. These qualifications lessen the degree to which restraints violate general public policy against restraining alienation of property and should be considered to that extent; but they are not, in themselves, sufficient to overcome it. In short, the law of property, like other areas of the law, is not a mathematical science but takes shape at the direction of social and economic forces in an ever-changing society, and decisions should be made to turn on these considerations.\textsuperscript{33}

Thus, in \textit{Gale} the court balanced the utility of the restraint with the injurious consequences that flowed from its enforcement and found the restrictions to be both reasonably necessary to the continuance of the cooperative association and not productive of injurious consequences since their effect in keeping "property out of commerce was entirely problematical."\textsuperscript{34} The court's reasoning is unsound. Clearly, the restrictions were not necessary to the continuance of the cooperat-

\begin{itemize}
  \item \textsuperscript{30} \textit{Id.} at 32.
  \item \textsuperscript{31} \textit{Id.}
  \item \textsuperscript{32} \textit{Id.} at 33.
  \item \textsuperscript{33} \textit{Id.}
  \item \textsuperscript{34} \textit{Id.} at 34.
\end{itemize}
tive association. There was no blanket mortgage on the property. Instead, each resident procured his own financing. Consequently, the risk of foreclosure in *Gale* was individualized. There was no financial interdependence among the members of the cooperative association, and in the absence of such financial interdependence, the need for the restraint simply was not compelling. Further, the injurious consequences which can flow from enforcement of such restraints are not problematic; they are very real. A prospective buyer faced the possibility of waiting a year to purchase, finally doing so, and then having the cooperative association exercise its right of redemption ninety days later. Such a prospect has a chilling effect on sales and works to remove property from commerce.

The approach taken by Florida courts when asked to rule on the validity of right-of-first-refusal provisions is similar to that taken by the Illinois Supreme Court in *Gale*. The test applied by Florida courts with respect to restraints on alienation is that of reasonableness. The validity or invalidity of a restraint is said to depend upon its long-term effect on the improvement and marketability of the property. In practice, this test of reasonableness involves a balancing of the interests of communal harmony against the policy favoring free alienation and use of property. It is apparent that, to date, Florida courts find that maintaining a community that is both socially and financially homogenous is of paramount importance because the close proximity of condominium living presupposes social compatibility among tenants.

The Florida courts refuse to address the reasonableness of the duration of the time period within which condominium associations may exercise the right-of-first-refusal. Like the Illinois Supreme Court in *Gale*, Florida courts fail to distinguish between cases involving stock cooperatives and those involving the condominium form of ownership. This distinction is critical in order to properly determine whether a particular restraint is reasonable or unreasonable. A restriction that is valid for a cooperative may well be an unreasonable restraint on alienation when applied to condominium ownership. This is due to the special nature of the cooperative in that it requires permanence of tenancy,

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36. *Id.*
37. *See* Boyer & Spiegel, *Land Use Control: Pre-emptions, Perpetuities and Similar Restraints*, 20 U. MIAMI L. REV. 148, 180 (1965) (discusses why the length of time during which the preemptionor has to decide should be a factor in determining reasonableness).
social compatibility, and financial responsibility for its very existence.\textsuperscript{38}

The policy dictated by the special nature of the cooperative does not apply to condominiums. The distinctions that demand disparate treatment are two-fold. First and foremost, there is no financial interdependence of condominium unit owners as there is in cooperative ownership. While cooperatives generally have a blanket mortgage on the entire project, condominium owners finance their units individually. Therefore, the need for a financial screening device is not crucial for condominium associations. The objective of obtaining financial compatibility may adequately be served by setting a sales price that tends to discourage "undesirables". Secondly, the condominium unit is exclusively a fee interest rather than a hybrid-type leasehold.\textsuperscript{39} While the cooperative member occupies his unit as a mere tenant, the condominium owner acquires a fee simple interest in the real property. Thus, in cooperatives, restraints on alienation may be more easily upheld, while restrictions on the transfer of condominium units demand stricter scrutiny.

Regarding restraints on the alienation of condominium parcels, the Florida cases may be broken down into two categories; those involving restraints on leasing which are quite sensibly upheld as partial restraints,\textsuperscript{40} and those granting a right-of-first-refusal to the interested condominium association, which warrant closer analysis.

A 1961 decision, Blair v. Kingsley,\textsuperscript{41} illustrates the lengths to which Florida courts will go to find that restraints on alienation in the form of preemptive rights are reasonable. In that case, the plaintiffs alleged that the restrictive covenant in their deed was an unreasonable restraint upon alienation in that it allowed the grantor a right-of-first-refusal to purchase the property for one year, should the property be

\textsuperscript{38} Parker, \textit{supra} note 11, at 1819.

\textsuperscript{39} \textit{Id.}

\textsuperscript{40} \textit{See, e.g.,} Pine Island Condominium "F" Ass'n, Inc. v. Waters, 374 So. 2d 1033 (Fla. 4th Dist. Ct. App. 1979) (not unreasonable for association to withhold approval where owner in default); Seagate Condominium Ass'n, Inc. v. Duffy, 330 So. 2d 484 (Fla. 4th Dist. Ct. App. 1976) (leasing restrictions not unlimited and, therefore, reasonable since owners could change restriction by amending declaration); Kroop v. Caravella Condominium, Inc., 323 So. 2d 307 (Fla. 3d Dist. Ct. App. 1975) (amendment to declaration allowing owners to rent units no more than once held not an unreasonable restraint); Holiday Out in America at St. Lucie, Inc. v. Bowes, 285 So. 2d 63 (Fla. 4th Dist. Ct. App. 1975) (rental restriction valid since owners could sell at any time).

\textsuperscript{41} 128 So. 2d 889 (Fla. 2d Dist. Ct. App. 1961).
offered for sale within twelve years of the deed. The plaintiffs alleged several grounds on which they contended the court could find the restraint unreasonable, including "that the one year allowed to the defendant for the exercise of this covenant would require...a very patient purchaser." The defendant-developer offered several justifications for inclusion of the covenant, indicating that the plaintiffs had notice of it at the time of purchase and that many of the other grantees were in favor of the restriction. Further, the developer insisted that he would not have sold the land to the plaintiffs without inclusion of the covenant in the deed. In finding the one-year restraint to be reasonable, the court stated:

We are favored by the citation of numerous cases and annotations, including several Florida cases. From our study of both the research books and the decisions, we are convinced that the instant covenant is valid and should be upheld, whether it be called a pre-emption...or an option to repurchase.

The court offered no further explanation of its reasoning in upholding the restraint. If there was any balancing of interests by the court, the scale was certainly weighted in favor of the developer in find-

42. Id. at 890. The covenant read in pertinent part:
Grantees herein, by acceptance of this deed, and in consideration of the sale and conveyance of the herein described property, hereby agree and covenant with the grantor herein, his heirs or assigns, that in the event grantees, their heirs or assigns, shall offer for sale the above described property within a period of 12 years from date, that said grantor, his heirs, assigns or nominee, shall have the first right of refusal to purchase said property and shall have a period of one year in which to purchase same. The purchase price shall be the fair market value, which shall be determined by the owner of the above described property appointing one appraiser, the grantor herein appointing one appraiser, and the two appraisers appointing a third, and the determination of any two of the three appraisers shall fix a fair value. Id.

43. Id. The other two rationales offered by the plaintiffs were 1) "that the appraisers' valuation will not reflect those subjective factors which influence prospective purchasers," and 2) "that a flexible real estate market could easily change values during the same one year period." Id.

44. Id.

45. Id.

46. Id. The defendant further pointed out that he had waived his right every time a grantee had wanted to sell so far. Id.

47. Id. at 891.
ing that the restraint was reasonable. The court appeared to give little weight to the fact that if the plaintiff attempted to sell his property, it was subject to repurchase by the developer for twelve years.

In *Chianese v. Culley* the plaintiffs contracted to purchase a condominium unit from Culley, who refused to close the transaction because the condominium association asserted its rights under the declaration. The declaration provided that the association had sixty days within which to either approve of a proposed purchaser or furnish another purchaser on terms equally favorable to the seller. The association provided an alternate purchaser as provided in the declaration, but at that point, Chianese, who had originally contracted to purchase from Culley, brought this lawsuit, alleging that the covenant in the declaration was an "illegal restraint against alienation of property and that the defendants were discriminating against the plaintiffs on the basis of their religion or national origin." Culley then issued a deed to Chianese, but the condominium association refused to recognize the trans-

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49. *Id.* at 1346. The declaration provided in pertinent part:

Election of Association. Within sixty (60) days after receipt of such notice, the Association must approve the transaction or furnish a purchaser or lessee approved by the Association who will accept terms as favorable to the seller as the terms stated in the notice. Such purchaser or lessee furnished by the Association may have not less than sixty (60) days subsequent to the date of approval within which to close the transaction. The approval of the Association shall be in recordable form and delivered to the purchaser or lessee.

*Id.* at 1345.

50. *Id.* at 1345. This article is not focusing on the discriminatory aspects of rights-of-first-refusal but on the purely legal question of reasonableness of the restraint itself, based primarily on the amount of time allowed for exercise of the right-of-first-refusal.

For a case considering the possible discriminatory results, see *Capital Fed. Sav. & Loan Ass'n v. Smith*, 136 Colo. 265, 316 P.2d 252 (1967). The court there stated:

No matter by what various terms the covenant under consideration may be classified by astute counsel, it is still a racial restriction in violation of the Fourteenth Amendment to the Federal Constitution. That this is so has been definitely decided by the decisions of the Supreme Court of the United States. High sounding phrases or outmoded common law terms cannot alter the effect of the agreement embraced in the instant case. While the hands may seem to be the hands of Esau to a blind Isaac, the voice is definitely Jacob's. We cannot give our judicial approval or blessing to a contract such as is here involved.

*Id.* at 255.
action. In deciding whether or not the clause constituted an illegal restraint on alienation, the court held that the provision granting the association sixty days either to approve the sale or furnish another purchaser on the same terms was a valid right-of-first-refusal. The court stated that covenants restricting the use of land are not favored, but that they will be upheld "if they are confined to lawful purposes, are within reasonable bounds, and are expressed in clear language." Despite this language, the court never addressed the issue of whether or not the sixty-day duration of the preemptive right was reasonable, but relied instead on the fact that the case did not involve an absolute restraint. Under the court's analysis, the restraint was not absolute because the property could be sold at the close of the period granted the association to exercise its preemptive right. Presumably, the provision would be upheld as a valid right-of-first-refusal regardless of whether the period was of a duration of sixty days or sixty years. It appears that in balancing the interests represented by this case, the need for a socially homogenous community weighed heavily, while the policy favoring free alienation of property was essentially ignored.

*Watergate Corporation v. Reagan* involved a right-of-first-refusal, not in the condominium context, but with respect to a parcel of raw land. The case merits note, however, in light of the court's cavalier sanctioning of the preemptive right that was at issue. In fact, neither the time the right-of-first-refusal was executed, nor the time of its exercise is ever mentioned in the decision. In ruling that the right-of-first-refusal did not impose an unlawful restraint upon the free alienation of the property, the court stated its absurd rationale: "[A]lienability is not restrained at all, but is in fact enhanced because the seller has two potential buyers instead of one." The Supreme Court of Florida addressed the question of the reasonableness of the right-of-first-refusal in 1980. In that case, the Fifth Circuit Court of Appeals certified questions to the Florida Supreme Court to determine the state's law concerning whether a repurchase option in a deed violated the rule against unreasonable restraints on

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51. 397 F. Supp. at 1345.
52. *Id.* at 1347.
54. 321 So. 2d 133 (Fla. 4th Dist. Ct. App. 1975).
55. *Id.* at 136.
alienation. The deed in question provided that, should the grantee desire to sell his property, he must offer it to the grantor for the price of the amount paid by the grantee plus the cost of all permanent improvements on the land. The covenant provided the grantor sixty days to exercise their option, after which the grantee had the right to sell the property to other parties. The Florida Supreme Court set forth the policy underlying the rule against unreasonable restraints, stating that the rule “is principally concerned with the duration of a restraint on the property.” Incongruously, in the next paragraph of the decision, the court stated that “[i]t is generally agreed that an option restraint is reasonable if the option price is at market or appraised value, irrespective of the duration of the option”. The court’s failure to consider the duration of the preemptive option flies in the face of the court’s stated rule of reasonableness in restraint-on-alienation cases.

The position taken by the Florida courts that the duration of restraints is immaterial to their validity is untenable. The stubborn fact is that where a right-of-first-refusal is granted, alienation cannot take place until either the preemptionor makes the election to purchase or the time allotted expires. The more extended the preemption period, the less likely it is that a purchaser will be willing to be bound for the period of time during which he is committed, but the condominium association is not. Such a prospect has a chilling effect on sales and works to remove property from commerce. Despite this, condominium associations that have included a right-of-first-refusal in the condominium declaration are presently under no legislative or judicial time constraint whatever to decide whether or not to exercise their preemptive right. As the cases discussed have shown, provisions granting condo-

57.  Id. at 611. The Fifth Circuit also questioned whether the covenant violated the rule against perpetuities, and whether or not the deed could be rescinded if the covenant was void. Id.

The Florida legislature settled the perpetuities question with regard to condominiums by statute: FLA. STAT. § 718.104(5) (1983). See supra note 5 and accompanying text.

58. 383 So. 2d at 611.

59. Id. at 614 (emphasis added).

60. Id. (emphasis added). The court noted several Florida decisions that have so held: Watergate Corp. v. Reagan, 321 So. 2d 133 (Fla. 4th Dist. Ct. App. 1975) (see supra notes 48 & 49 and accompanying text); Blair v. Kingsley, 128 So. 2d 889 (Fla. 2d Dist. Ct. App. 1961) (see supra notes 35-41 and accompanying text); and Wing, Inc. v. Arnold, 107 So. 2d 765 (Fla. 3d Dist. Ct. App. 1958).

61. 383 So. 2d at 614.
Condominium associations unreasonably long periods of time to purchase are routinely upheld by the courts. The judicial enforcement of these unreasonable right-of-first-refusal provisions amounts to the sanctioning of illegal restraints on alienation.

In the Mobile Home Act, the Florida legislature provided for a forty-five day period during which the mobile home park tenants, through the homeowners’ association, have the right to purchase the park before it can be sold to a third party. While this provision may have little practical significance for mobile home park tenants, who in most instances will lack the necessary financial resources to exercise the right-of-first-refusal, the forty-five day limitation lights the path for a much needed change in condominium law. Since the judiciary declines to consider the time period during which the condominium association may decide whether or not to purchase as a factor in determining whether alienation has been illegally impeded, it is incumbent on the legislature to redress the injurious effects of restraints. This could be accomplished by drafting a provision for the Condominium Act limiting the time which the condominium association has to declare its intention to purchase to forty-five days.

Amendment Two: Standardized Prospectus Form

In 1979, the Division of Florida Land Sales and Condominiums conducted an in-house review of deficiency letters sent to developers and found that approximately ninety percent of the filings made with the Division were deficient. The majority of the deficiencies related to the failure of the developer to provide the information required by the statute; only a small percentage of the deficiencies were substantive in nature. Most of the deficiencies consisted of failure to include required caveats, improper budgeting or assessment calculations, confusion regarding which version of the Condominium Act is current, and a “failure to properly assimilate the necessary filing materials and organize those materials in the fashion required by the rules of the Division.”

Clearly, a problem relating to compliance with the non-substantive filing requirements of the Condominium Act exists. A solution to this dilemma exists in standardization of forms delineating the items re-

63. FLA. STAT. § 718.504 (1976).
64. Andrews, supra note 62.
required by the Condominium Act for inclusion in the prospectus.

A standardized prospectus form could alleviate the plethora of unsuccessful though voluminous attempts by developers to comply with the "laundry list" of items required for inclusion in the prospectus. Condominium documentation is copious enough — it is not uncommon for offering plans to run over two hundred pages of single-spaced type. The requirement of extensive disclosure by the Bureau of Condominiums often results in "creative drafting." While creative drafting is often the hallmark of a good lawyer, it may cause problems when the project at hand requires strict adherence to statutory requirements. Creative drafting of documents often produces lengthy, complex, and unreadable results.

There is a call within the Real Property Bar for standardization of a multitude of documents in the condominium field. These attorneys point out that standardization would simplify the various forms required by the Condominium Act, such as the declaration and bylaws. One commentator, in calling for a standardized set of condominium bylaws, equated them with "the procedural requirements for incorporation and for creation of the bylaws governing the operation of a corporation once it is legally created." This writer, however, opposes an across-the-board standardization of all condominium documents, especially the standardization of bylaws. The day-to-day workings of a condominium cannot be equated to that of a commercial corporation. Greater flexibility must be allowed in drafting operating rules for unit owners. The formulation of bylaws is an area of condominium documentation that often calls for creative drafting on the part of an experienced real estate attorney. The prospectus, on the other hand, is

65. See, e.g., Fla. Stat. § 718.504 (1976): "(b) A description of the condominium property, including, without limitation:
   1. The number of buildings, the number of units in each building, the number of bathrooms and bedrooms in each unit, and the total number of units," or "2. A reference to the location in the disclosure materials of the lease or other agreements providing for the use of those facilities."
68. One enterprising developer went so far as to provide "a translation...written [in] humanese." See Windjammer of Pensacola Beach File, Bureau of Condominiums, Division of Florida Land Sales and Condominiums.
70. Id.
strictly statutory in its requirements, and those requirements could best be met by the Bureau of Condominium furnishing standardized forms for the prospectus.

A former chief of the Bureau of Condominiums called the “filing of condominium documents with the Division... the most complicated and lengthy” of the types of filings required by the Condominium Act. As evidenced by the Division’s review of deficiency letters, numerous errors in filing are made by developers attempting to comply with the statutory requirements. In an attempt to identify and eliminate these errors, the processing of the prospectus and other documents is divided into two phases. Initially, the Bureau reviews the documents to determine whether they have been submitted in the form prescribed by section 7D-17.05(1) of the Florida Administrative Code. The Bureau is allowed ten business days to make this determination. If the documents have not been submitted in proper form, the developer is so notified, and the documents are not reviewed until corrections are made. Once submitted in proper form, the documents are examined by the Condominium Division staff, which has another forty-five days in which to notify the developer of any deficiencies. It is evident that the finding of a deficiency results in substantial delays. These delays become significant in light of the fact that closings on contracts are prohibited until the examination process is completed and notification is received from the Division. The delays are costly in terms of the additional legal expenses incurred, but much more significantly, in that failure to adhere to the project’s original timetable may well jeopardize the developer’s financing arrangements by cutting off the flow of down payments received from prospective unit purchasers.

In order to remedy these costly delays, the developer must have a clear picture of the procedural requirements of the documents he must file with the Bureau of Condominiums. The Bureau examines a prospectus in order to ensure it meets the statutory requirements of disclosure. The examiner also compares the various documents filed with the Bureau in order to determine any internal inconsistencies or other deficiencies. From its examination of multitudes of condominium docu-

71. Faye Mayberry, former chief of the Bureau of Condominiums, is now head of the Mobile Home Division.


73. See supra note 62 and accompanying text.

74. Mayberry, supra note 72, at 141.
ments, the Bureau compiled a list of common deficiencies found in a prospectus, all consisting of failure to make required disclosures:

1. Omission of the estimated completion date in the prospectus or the purchase agreement as required by Section 718.504(4)(b)(3), F.S.

2. Failure to provide a description of facilities to be used in common with other condominiums as required by Section 718.504(7), F.S. and failure to include use agreements or other documents related to facilities serving unit owners but not owned by them.

3. Omission in the prospectus of the identity of the supplier of utilities and other services, as required by Section 718.504(18), F.S.

4. Omission in the prospectus of the purchaser closing expenses as required by Section 718.504(2)(1), F.S.

5. Omission in the prospectus of the relevant experience of the developer and chief operating officer as required by Section 718.504(22), F.S.

6. Failure to provide complete disclosure relating to recreational facilities as required by Section 718.504(6), especially the number of people the facility will accommodate.

7. Failure to specify the number of buildings, units in each building, bathrooms and bedrooms and the total number of units as required by Section 718.504(4)(b)(1), F.S.

8. Failure to explain the manner in which the apportionment of common expenses and ownership was determined as required by Section 718.504(19), F.S.\textsuperscript{75}

By virtue of its experience and expertise in examination of the condominium prospectus and other documents, the Bureau of Condominiums clearly has the wherewithal to create a prospectus form that would avoid these common pitfalls. Again, it is the Mobile Home Act\textsuperscript{76} that lights the legislative path. Section 720.302(7) of that Act requires the Mobile Home Division to provide a form prospectus which may be prepared and filed by park owners. The form allows the park owners to adhere to the disclosure requirements of section 720.303 by responding

\textsuperscript{75} MAYBERRY, AVOIDING PITFALLS IN FILING WITH THE DIVISION (available upon request from the Bureau of Condominiums, Division of Florida Land Sales and Condominiums, Tallahassee).

\textsuperscript{76} FLA. STAT. § 720 (1976).
to questions and requests for specific information to be provided. A similar form, provided by the Bureau of Condominiums, could alleviate the deficiencies in the filing of prospectus requirements for condominium developers, thereby eliminating delay and waste in the development of condominium projects.

Conclusion

It is incumbent on the Florida legislature to act once again to improve the Condominium Act. The solution to the two problem areas discussed in this article is found in the Mobile Home Act. In that Act, a forty-five day time limit was placed on the preemptive right of mobile home park tenants to purchase a park before it can be sold to a third party. Such a limitation is reasonable in its duration and recommends itself for adoption into the Condominium Act. In order to protect condominium owners and purchasers, a forty-five day limit, similarly, should be imposed on the time period that condominium associations have to decide whether or not to exercise their rights-of-first-refusal. This limitation would redress the judicial sanctioning of preemptive options that are unreasonable in duration and chill sales, removing property from commerce. Finally, the Mobile Home Act requires that park owners be provided a form prospectus. An amendment to the Condominium Act should similarly require the Condominium Division to furnish standardized prospectus forms to developers in order to facilitate compliance with the extensive disclosure requirements of section 718.504 and eliminate costly delays that result from deficient filings.

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77. FLA. STAT. § 720.320(7) (1976).
When Open-Meeting Laws Confront State Legislatures: How Privacy Survives in the Capitol

I. Introduction

The relationship between Florida legislators and the Tallahassee press corps deteriorated during the 1981 session as blue-coated guards stood watch to prevent reporters from entering private meetings dealing with the state budget. At one point sergeants at arms evicted reporters from the Speaker of the House's office when reporters refused to leave a leadership negotiating session.

Battle lines formed. Legislators wanted privacy to ensure effective negotiating on the major issues affecting state government. Media interests argued that Florida's liberal open-meeting law granted them access to back-room bargaining sessions, the traditional smoke-filled rooms where significant political deals often take place.

The outgrowth of the discontent took the form of a suit by thirteen newspapers seeking declaratory relief that Florida's Legislature cannot hold secret committee meetings. The suit bounced through Florida's court system for two years before reaching the Florida Supreme Court. The court declared that the judiciary did not have jurisdiction to intervene in the Legislature's rule-making powers.

The case illustrates how friction develops between legislators and media interests over the meaning of open-meeting laws and court chal-

3. FLA. STAT. ANN. § 286.011(1) (West 1974 & Supp. 1985). In pertinent part the Statute reads:
   All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.
5. Id.
lenges. Legislators require some opportunity for private give and take.\(^6\) Resourceful legislators wishing to skirt open-meeting requirements can defeat the intent of even the most stringent statute by avoiding diligent reporters.\(^7\) Yet persistent efforts by media or the public can drive legislators to fairly extraordinary measures to achieve private discussions. "All you accomplish is to drive it into obscure places like a fishing camp or the board room of some state university," one long-time observer of legislative behavior remarked. "It's a question of where do you want to have it."\(^8\)

Open-meeting laws are earning acceptance as a visible part of the process under which all state legislatures become more open to public scrutiny.\(^9\) But logical limits develop peculiar to each state's open-meeting regime as to just how far the wary adversaries among the political and journalistic ranks will go.\(^10\)

This Note examines the history of open-meeting statutes in state legislatures and explores the impact of the laws on the legislatures. Leading cases on the subject illustrate a judicial temperament of reluctance to interpose restrictions on legislators who meet secretly. Finally, the paper isolates factors crucial to establishing a healthy climate in which the public can gain the greatest benefit from open-meeting laws.

II. Openness and State Legislatures: A Brief Historical Perspective

The public's ability to attend legislative meetings was not a common-law right.\(^11\) The Constitutional Convention met privately, a re-

\(^{6}\) Telephone interview with Alan Rosenthal, Director, Rutgers University, Center for Legislative Research and Service. (Aug. 12, 1985).

\(^{7}\) Telephone interview with Ralph Haben (Aug. 31, 1985). Haben was defendant in Miami Herald Publishing Co. v. Haben, No. 82-84 (Fla. 2d Cir. Ct. 1982), rev'd sub nom. Moffitt v. Willis, 459 So. 2d 1018 (Fla. 1984). Haben said at no time during his term as speaker did the Florida open-meeting law prevent him from meeting privately with his lieutenants or Senate counterparts to discuss critical legislation. "We always found a way," Haben said. "We'd meet late at night, early in the morning. We'd get it done." See also Wickam, Let the Sun Shine In: Open-Meeting Legislation Can Be Our Key to Closed Doors in State and Local Government, 68 NW. U.L. REV. 480 (1973).

\(^{8}\) Telephone interview with Allen Morris, Clerk of the Florida House of Representatives. (Aug. 12, 1985).

\(^{9}\) Rosenthal, supra note 6.

\(^{10}\) Palm Beach Post, Apr. 28, 1985, at F7, col. 3.

requirement considered crucial by one political historian. The impetus for much of the public's right to attend legislative meetings comes from the various state constitutions. These constitutional rights usually allow the public to attend legislative sessions, and leave undefined whether committee meetings or informal gatherings are subject to public purview. The provisions may allow a legislature to call secret sessions for the welfare of the state as it sees fit, or may specify closed-meeting exceptions.

The last major phenomenon in the field of open government as applied to state legislatures and lower levels of government stems from the passage of open-meeting laws. Developed primarily since the end of World War II, the wave of sunshine legislation affords the public access to government in nearly every state.

13. Cross, supra note 11, at 182.
14. Id. at 183.
15. See VT. CONST. ch. 2, § 8.
17. Sunshine law is a popular name for open-meeting laws.
III. Scope of State Statutes

Many open-meeting laws employ policy statements to create a philosophical justification for the statute. The statement may recognize the value of an informed electorate in a functioning democracy, or it may use more elaborate phraseology to extol how the public delegates but does not yield their sovereignty to the government decision-makers. That popular theme, that government exists to serve the public, may also lead to enumerated rights of public participation. The statute may require that a member of the public need not register to attend a meeting, shall have opportunity under legislative rules to address the body and won't face expulsion unless he commits a breach of the peace.

The policy statements generally aim at all public agencies that fall under the ambit of the open-meeting statute. Although they acknowledge the benefits of openness, the statutes allow legislators a variety of means to negotiate with one another privately. A few statutes exclude the legislature from the provisions of the open-meeting law. Others recognize the right of the legislature to create its own procedures and rules. This approach short-circuits disputes on the separation-of-powers issue that has spawned a major portion of open-meeting litigation.

One narrowly crafted statute keeps only political party meetings and legislative rules or sifting committees out of the Sunshine. Such limitations, like one that precludes open discussion of possible violations on disclosure documents signed by legislative members, can become fairly esoteric. Another statute shields impeachment proceedings from public scrutiny. Whatever the laudable motives behind protecting the

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25. See infra notes 60-70 and accompanying text.
Open-meeting Laws

legislative membership in provisions dealing with possible wrongdoings, such strictures create a dangerous precedent. Open-meeting statutes are designed by nature to put a spotlight on the people who voluntarily seek public office. Legislatures should not use those statutes as a tool for deflecting possible criticism of their conduct.

Legislators gain protection for secret meetings in a number of states by virtue of party affiliation. Several states exempt party caucuses from open-meeting requirements. Alaska protects the party membership meetings which select leadership candidates under a provision that allows secret votes to organize the legislature.

Without question, the most extensively used method of allowing secret meetings is the executive session. In most states, with Florida and North Dakota as exceptions, executive sessions exclude the public. Typically the meeting law specifies that the legislature must call for a closed session during an open meeting and must ratify the secret decisions in a later open meeting. Where the statute requires a public vote to hold an executive session, the majority may be a simple or an extraordinary majority.

One group of activities covered by many executive sessions relates to matters where disclosure of the state’s position harms the public interest. One such exception pertains to collective bargaining, allowing secret discussions over negotiating strategy, while perhaps allowing for the bargaining sessions to take place in a public forum. A number of states authorize secret meetings discussing pending governmental real property purchases. A third category relates to personnel decisions. A fourth category specifies that a governmental body may meet with

30. ALASKA STAT. § 44.62.310(a) (1976).
32. See IND. CODE ANN. § 5-14-1.5-3(5)(f) (Burns Supp. 1983).
35. ME. REV. STAT. ANN. tit. 1, § 405.3 (1979). An extraordinary majority means a 3/5 majority in the Maine statute. The percentage may vary from state to state, but in any event an extraordinary majority refers to a vote total higher than the simple 50 percent plus one majority.
36. Id. tit. 1, § 405.6D.
counsel to discuss litigation, sometimes even anticipated litigation.\textsuperscript{39} A fifth type of covered subject matter deals with private meetings concerning criminal investigations.\textsuperscript{40} All of these categories express a sound reservation: Open-meeting laws that purport to aid the public should not have the opposite effect. Statutes creating these types of exceptions should contain safeguards for keeping a record of the outcome of the meetings. Arguably, the most desirable method would provide the fullest disclosure of the proceedings at a later date when there is no longer any adverse effect on the public.

Even if the legislature's role in these types of issues remains at the policy-making level rather than the actual negotiating stage, the events are matters of public interest. The monetary and emotional components of these areas of subject matter render them pertinent to a wide cross section of the public as well as providing grist for innumerable media reports.

A number of legislatures allow secret meetings out of a sense of fairness to individuals involved. Typical language may allow private meetings for the "prevention of needless injury to the reputation of an individual."\textsuperscript{41} The relevant New Hampshire statute provides a safeguard against abuse by officials. The law requires that the threatened reputation be that of a person "other than a member of the body or agency itself."\textsuperscript{42} Many statutes of this type permit the individual to call for an open meeting.\textsuperscript{43} Determining whether debate will enhance or harm a reputation at times requires a level of clairvoyance not usually available except through hindsight. Thus, executive sessions based on reputation are an area open to abuse. Despite the wisdom of not wishing to bloody anyone's nose needlessly, matters of personal character and fitness may be important. Obviously a state would not want to hire a convicted embezzler to revise its banking laws, and the qualifications of a consultant to fill that position would be a matter of vital public interest that should receive public debate.

Exceptions for individuals may be so broad as to allow closed meetings for "matters of individual privacy."\textsuperscript{44} Even though that particular section requires a balancing test that "individual privacy must

\begin{itemize}
\item \textsuperscript{39} \textit{Id.}, § 10:4-12b(7).
\item \textsuperscript{40} N.C. GEN. STAT. § 143-318.11(15) (1983).
\item \textsuperscript{41} NEB. REV. STAT. § 84-1410(1) (1976).
\item \textsuperscript{42} N.H. REV. STAT. ANN. § 91-A:3II.(c) (1978 & Supp. 1983).
\item \textsuperscript{43} \textit{Id.}
\item \textsuperscript{44} MONT. CODE ANN. § 2-3-203(2) (1983).
\end{itemize}
Open-meeting Laws

clearly exceed the merits of public disclosure,"45 potential for abuse exists. One additional type of individuality exception allows for secret meetings when a donor requesting anonymity wishes to make a bequest.46

Another group of executive-session grounds applies to specific boards or commissions and is not likely to pertain extensively to legislatures. A number of states allow for closed meetings covering student disciplinary matters,47 parole boards48 and grand juries.49 In earthquake-prone California there is even a provision that seeks to prevent panic from disclosure of alarming predictions of future shocks.50

One unusual approach seeking accommodation between the need for privacy counterposed to a desire for public awareness arises in Oregon's statute. That law provides reporters access to any executive session other than collective bargaining strategy sessions, provided that legislators may require the reporters not to write about meeting specifics.61 While the approach offers opportunity for background information, the method contains less than effective means to ensure that the public learns about the discussion.

Broadly phrased exceptions to open-meeting requirements allow executive sessions that are in the public interest62 or are in the best interest of the state.63 Catch-all clauses justifying secrecy on national security grounds exist in California64 and Washington,65 while West Virginia allows secret meetings in the event of threatened foreign attack.66

Legislatures express concern that incidental contact between members does not constitute a sunshine-law violation even if the members talk shop when they meet. Usually the statutes allow for chance meetings,67 or provide that the law does not apply to legislators attending

45. Id.
conferences where no formal business will take place. Providing this leeway creates the necessary framework for friendships and the type of social fabric inherent in a healthy legislative environment. Some states guard against persons disguising meetings as chance meetings by warning against using the privilege to circumvent the open-meeting law.

This survey of statutory provisions shows that legislators retain ample opportunity for private discussion of legislative matters. While no state embraces all the statutory schemes to allow needed private conversations, each state does provide avenues for private conversations. Even in a state such as Florida, where no statutory exceptions exist, legislators still hold extensive conversations on the floors of both the House and Senate as well as in the "bubble" passageway between the chambers. Phones are available on the rostrum of each chamber, allowing leadership to deal and compromise during sessions. Additionally, legislators may assign their staffs to talk to other members.

The exceptions show that open-meeting statutes merely provide a frame inside of which lawmakers can hash out issues privately. No study exists that examines all the ways legislators can meet secretly.

The situation is so extensive that one observer of legislative behavior remarked, "The really big decisions are reached off the floors."

IV. Case Law Analysis

Commentary directed at Florida's sunshine law criticizes the statute for providing too few private-meeting exceptions. After its passage in 1967, the Florida statute quickly gained broad impact in a series of decisions relating to local school boards and a town council. The District Court of Appeal, Second District, in a case challenging the authority of a school board to hold private meetings, wasted little

62. Van Gieson, supra note 2.
63. Id.
64. Rosenthal, supra note 6.
65. Morris, supra note 8.
time in dispensing prior case law which required that only formal meetings be open to the public. 68 The case established that every step in the decision-making process amounts to an indispensable requisite to formal action within the meaning of the statute. 69 "Every thought, as well as every affirmative act . . . is a matter of public concern. . . ." 70

Soon after that decision, the Florida Supreme Court banned another school board’s practice of convening privately to discuss personnel and real estate matters and lawyer-client consultations. 71 "Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made." 72

In a third case, the Florida Supreme Court ruled that a zoning advisory board appointed by a town council must adhere to the provisions of the statute. 73 A purpose of the sunshine law "was to prevent at non-public meetings the crystallization of secret decisions to a point just short of ceremonial acceptance." 74 The message to public officials was clear; when in doubt, keep the meeting open. 75

Whether the vigorous interpretations of the open-meeting act apply to the Florida Legislature remains a matter of conjecture. Ironically, no written records exist of the committee meetings which discussed the law and there was little debate on the Senate floor 76 that would suggest whether the Legislature intended to include itself in the coverage. Although remarks by the bill’s sponsor indicate that the legislation included the Senate, 77 the matter remains unsettled. One circuit court decided that the Legislature did not intend to include itself. 78

68. Turk v. Richard, 47 So. 2d 543 (Fla. 1950) (as construed in Times Publishing Co. v. Williams, 222 So. 2d 470, 473 (Fla. 2d Dist. Ct. App. 1969)).
69. Williams, 222 So. 2d at 473.
70. Id.
71. Board of Pub. Instruction of Broward County v. Doran, 224 So. 2d 693 (Fla. 1969).
72. Id. at 699.
73. Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974).
74. Id. at 477.
75. Id.
77. 118 Cong. Rec. 26912 (1972).
78. Memorandum in Support of Motion to Dismiss for Defendant, at 8, Miami Herald Publishing Co. v. Haben, No. 82-84 (Fla. 2d Cir. Ct. 1982), rev’d sub nom.
The Senate later tabled a bill that specifically included itself under the sunshine law.\textsuperscript{79}

Legal sentiment that would include legislative matters under the law persisted. The Attorney General reported that two or more legislators could not hold a secret meeting with respect to legislative matters if they intended to violate the sunshine law.\textsuperscript{80} A later opinion holding that the Legislature came under the act reasoned that the act contained substantive matter and went beyond the rule-making powers of the Legislature.\textsuperscript{81}

Despite the debate whether the law affected the Legislature, it appears that Florida's lawmakers provided a relatively high degree of access to the public — at least through their representatives in the media — all during the life of the sunshine law.\textsuperscript{82} In at least one instance a nationally acclaimed newspaper dispatched a reporter to Tallahassee to record the Legislature's workings as a model for reform efforts in the paper's home state.\textsuperscript{83} The situation was so conducive to openness that at times in 1979 and 1980 during Hyatt Brown's term as Speaker of the House, reporters had access to the daily morning strategy sessions between House leaders.\textsuperscript{84}

That press paradise did not continue under the leadership of Speaker Ralph Haben and Senate President W.D. Childers in the term beginning in 1981. Near the end of the legislative session in May, leadership in both the House and Senate met privately to discuss the important education, transportation and tax issues vital to the appropriations bill. Reporters were upset at their exclusion from the meetings as well as decisions to post sergeants at arms to bar entry to Senate meetings.\textsuperscript{85} While the relative openness continued, dissatisfaction mounted. A group of thirteen newspapers sued Haben and Childers in circuit court seeking a declaratory judgment whether the Legislature could exclude the public from meetings the newspapers alleged to be committee meetings.

\textsuperscript{79} J. of the [Fla.] Senate 371 (1976).
\textsuperscript{80} Annual Report of the [Fla.] Att'ys Gen. 25 (1972).
\textsuperscript{82} Van Gieson, \textit{supra} note 2.
\textsuperscript{83} \textit{Lipman}, \textit{supra} note 1.
\textsuperscript{84} \textit{Lipman} recalls that one "blue-coat" guard stationed at Childers' office often carried a handgun, further increasing tensions.
meetings. After an initial finding by the circuit court that it had jurisdiction over the matter, the Florida Supreme Court eventually reversed the decision and dismissed the case. The verdict did not decide to whom the law applies. Rather the majority relied on the separation-of-powers doctrine under the Florida Constitution. The Constitution's grant of power to each chamber to set its own rules circumscribed the court's authority to intervene in only those cases in which the constitutionality of legislative enactments was at issue. Two dissents, joined variously by three of the seven-member panel, urged jurisdiction on allegations that the meetings violated statutes and the federal and state constitutions.

Analysis of pertinent cases testing the applicability of open-meeting laws to legislatures in various states shows the separation-of-powers argument to be highly convincing. And, as shown in the forthcoming cases, exceptions for secret meetings provided legislators with additional weapons sufficient to defeat many allegations that they violated open-meeting requirements.

In News-Journal Co. v. Boulden, a Delaware newspaper sought injunctive relief under the state open-meeting statute against legislators belonging to the majority party who caucused privately. The chancery judge found that while the legislature and caucuses fell under the ambit of the open-meeting act, the plaintiff, in suing a majority of the House of Representatives, in effect, sued the House. In dismissing the case, the court ruled that the House had authority to set its own rules.

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86. Complaint at 1, Miami Herald Publishing Co. v. Haben, No. 82-84 (Fla. 2d Cir. Ct. 1982), rev'd sub nom. Moffitt v. Willis, 459 So. 2d 1018 (Fla. 1984).
87. Moffitt v. Willis, 459 So. 2d 1018, 1019 (Fla. 1984).
88. Id. at 1022. H. Lee Moffitt and Curtis Peterson succeeded to the positions of House Speaker and Senate President, respectively, by the time the Supreme Court rendered its decision on Oct. 18, 1984. They substituted as parties for their predecessors.
89. Id. at 1021.
90. Id. at 1021, 1022; see also FLA. CONST. art. 2, § 3.
91. FLA. CONST., art. 3, § 4(a).
92. Moffitt, 459 So. 2d, at 1021.
93. Id. at 1022, 1023. The newspapers asserted that the legislators violated FLA. STAT. ANN. §§ 286.011 and 11.142 (West 1974 & Supp. 1985) and FLA. CONST. art. 1, §§ 1 and 4; art. 2, § 8; and art. 3, § 4(a) and (b). The newspapers also alleged a violation of U.S. CONST. amend 1.
95. Id.
96. Id.
and govern its own proceedings.\textsuperscript{97}

A former Speaker of the House of Alaska argued that his ouster by a dissident majority was invalid, in part because the group allegedly violated that state’s notice provisions for open meetings.\textsuperscript{98} While finding the proceedings raucous, the Supreme Court of Alaska found nonjusticiable the question whether the prevailing membership had given reasonable notice under state statute.\textsuperscript{99} Not only was the controversy a matter of internal House organization, but the statute also specifically exempts organizational meetings from open-meeting requirements.\textsuperscript{100}

A case reaching the opposite conclusion on the separation-of-powers issue found that the Wisconsin Supreme Court had jurisdiction to hear a district attorney’s allegations seeking declaratory relief when legislators met privately to discuss state financial matters.\textsuperscript{101} Because all the members cited by plaintiff belonged to the same political party, however, the court held that they enjoyed protection for the secret meetings based on the state exception allowing closed partisan caucuses.\textsuperscript{102}

Justices in the Colorado Supreme Court did not rely on separation-of-powers arguments in a case alleging that a state Senate committee chairman failed to list only those bills that his committee might reasonably expect to discuss on a given day and thus did not supply proper notice for a public meeting.\textsuperscript{103} The majority of the court found the chairman’s customary listing of all bills pending before the committee sufficient to supply notice, adding that, “The Open Meetings Law, however, was not intended to interfere with the ability of public officials to perform their duties in a reasonable manner.”\textsuperscript{104}

The Colorado Supreme Court later held that legislative caucuses must take place in the sunshine.\textsuperscript{105} Although the state Constitution granted the Legislature the right to set its own rules, the court found no violation of the separation-of-powers doctrine.\textsuperscript{106} The per curiam decision noted that the Legislature had adopted the open-meeting law as

\textsuperscript{97} Id.
\textsuperscript{98} Malone v. Meekins, 650 P.2d 351 (Alaska 1982).
\textsuperscript{99} Id. at 359.
\textsuperscript{100} Id.
\textsuperscript{101} State ex rel. Lynch v. Conta, 239 N.W.2d 313 (Wis. 1976).
\textsuperscript{102} Id. at 337.
\textsuperscript{103} Benson v. McCormick, 578 P.2d 651 (Colo. 1978).
\textsuperscript{104} Id. at 653.
\textsuperscript{105} Cole v. State, 673 P.2d 345 (Colo. 1983).
\textsuperscript{106} Id. at 349.
its internal rule and had not set any other standards for caucuses.\textsuperscript{107} The Pennsylvania Supreme Court decided that when legislative committees discuss policy-making business they are subject to open-meeting requirements.\textsuperscript{108} The court found, however, that a complaint alleging a failure to provide adequate notice for a meeting in which the committee voted to send the Senate a nomination for membership on the state Public Utility Commission did not violate that state’s open-meeting statute.\textsuperscript{109} The vote pertained to an executive nomination which, the court decided, was an allowable exception as specified in the statute.\textsuperscript{110} Notwithstanding arguments based on separation of powers or exemptions, legislators have also argued successfully that an open-meeting statute did not pertain to the legislature.\textsuperscript{111}

V. Toward the Future

Debate over the limits of open-meeting laws as they pertain to state legislatures appears to be widespread. The question remains as to the forum and nature of efforts to refine the meanings of the laws. In a state such as Florida, which has an expansive sunshine law, the opinions vary widely. One aggressive member of the Tallahassee press corps seeks a court challenge to the present regime under which leadership in both chambers hold secret strategy sessions. “The newspapers should just flat sue on the basis of the sunshine law and decide it.”\textsuperscript{112} A former speaker of the House holds firm convictions that only the meetings formally required by the Florida Constitution — from committee meetings to daily legislative sessions — should take place in the sunshine.\textsuperscript{113} In his analysis, informal meetings between leaders may require privacy.\textsuperscript{114}

The diversity of opinion suggests that incidents and personalities may play a major role in refining an understanding of the limits of Florida’s and other states’ sunshine laws. During the 1984 Florida legislative session sergeants at arms evicted a small contingent of reporters

\textsuperscript{107} Id.
\textsuperscript{109} Id., at 684.
\textsuperscript{110} Id.
\textsuperscript{111} Coggin v. Davey, 211 S.E.2d 708 (Ga. 1985).
\textsuperscript{112} Telephone interview with Brian Crowley, Tallahassee Bureau Chief of the Palm Beach Post (Aug. 1, 1985).
\textsuperscript{113} Haben, \textit{supra} note 7.
\textsuperscript{114} Id.
from a conference room where a handful of legislative leaders prepared to discuss legislation to control growth in Florida. Recognizing the potential for friction, the Senate President apologized and all participants avoided such confrontations for the remainder of the session. Whether that spirit of accommodation continues as the membership of the Legislature and of the press corps changes remains open to conjecture.

Past efforts at compromise created a "pool" system whereby one reporter attends a meeting and shares his notes with other reporters after the meeting. That system, in place for several sessions, appears workable. Not only does the news reach the public, but the press maintains a watchdog role in regard to the Legislature. Still, the system has shortcomings. Members of the public cannot attend those meetings. Reporters may eventually tire of a managed news system that curtails their ability to develop exclusive stories.

A large membership and a broad range of duties make a legislature a significantly more complex body of government than a local school board or town council. The formalities of the legislative process and fights between parties or power blocs add to the difficulty a legislature has in finishing its business. The whole process requires strategy, negotiation and notification of other legislators once the leaders reach tentative decisions.

The need for open government, then, may revolve around expediency. Applying open-meeting laws to each informal meeting may work against good government. There are too many meetings to cover, and mandating public attendance at every informal gathering might ensure that "the whole process would grind to a halt." That argument leads to the conclusion that making decisions privately eventually leads to a better-informed legislature, a legislature that serves the public better. The counter argument maintains that secret decisions by legislative leadership lead to a largely uninformed legislature, and that the public

115. Crowley, supra note 112.
117. Crowley, supra note 112.
118. Morris, supra note 8.
119. Lipman, supra note 1.
120. Crowley, supra note 112.
121. Van Gieson, supra note 2.
122. Haben, supra note 7.
123. Id.
Any analysis of legislative secrecy should ask: Is a legislature a fundamentally different enough creature to justify private discussion when other governmental bodies don’t enjoy that protection? One theory affirming that proposition points to the bicameral nature of nearly every state legislature. This theory finds an inherent need for privacy in the give-and-take between the two branches of the legislature. While the argument has surface appeal, the concept suffers from two weaknesses. First, the negotiating process between the two houses doesn’t have essentially different qualities that separate it from debate in either chamber. Second, the inter-house wrangling constitutes only a portion of a legislature’s work, typically concentrated at the end of the session. Relatively little of a legislature’s work could qualify for special privacy needs based on those grounds. In the end, the bicameral theory does not present an independent need for private legislative meetings.

An attempt to reconcile the ideals of open-meeting laws with the practicalities of legislative life should consider the following proposals: Legislatures should refrain from those devices that create one standard of openness for them and another for other governmental units and agencies. The separation-of-powers doctrine that shields lawmakers from unwarranted intrusions into the political process suffers from abuse when legislatures invoke the doctrine attempting to deflect public scrutiny of the process. Legislatures should eliminate exceptions that exempt them from sunshine laws. The same fate should await those exceptions that bless secrecy for legislative party caucuses, rule-making sessions, impeachment proceedings and the like. Such sessions are vital to organizing a government and thus engender a significant public interest.

Second, legislatures should gut overly broad exceptions that allow secrecy based on the interest of the individual, the public interest or the security of the state. That type of catch-all clause generates such latitude for secrecy as to leave the remainder of the statute hollow.

Third, legislatures should allow themselves exceptions for secret meetings in those areas where private discussions can save the public money and advance state policies. Examples are exceptions to discuss pending state purchases and personnel decisions. Other needs exist to allow private discussions of litigation affecting specific state policies, 124. Crowley, supra note 112.

125. All states except Nebraska have bicameral legislatures.

126. Haben, supra note 7.

https://nsuworks.nova.edu/nlr/vol10/iss1/1
strategy sessions for labor negotiations or meetings pursuing criminal investigations. Common features of this type of exception are: the state as participant in an adversarial process, a temporary and pending nature of the process, and jeopardy to a narrowly defined public interest through premature disclosure. Exceptions for this type of proceeding should contain provisions for disclosure of the substance of the meetings as well as the conclusions reached as soon as practical after the adversary role ends.

Even in a situation where a state open-meeting law contained a small number of narrowly crafted exceptions, the primary participants in the struggle for public access to government decision-making — the press and the legislature — should realize that legislators will maintain substantial opportunities for private talks and meetings on sensitive governmental issues. Even in populous states which have large capitol press corps, the sheer size of the legislature ensures that most legislators will have relatively free reign to go about their affairs with little public scrutiny. Those legislators adroit enough to command highly visible leadership positions commonly possess sufficient resourcefulness to hold secret talks when they need to do so. Therefore, legislators should realize that they can grant meaningful public access to the governing process while enjoying the opportunities to hold private conferences.

Media interests should focus attention on violations of sunshine laws and demand access to all non-exempt meetings. They should stress the need for robust debate of open-meeting issues and confrontations. They should realize their limitations in manpower suggest their most valuable weapon may be through their editorial pages, particularly in states where courts adopt a separation-of-powers philosophy regarding intervention in open-meeting disputes.

If legislatures and the press vie as champions of sometimes conflicting public interests, surely the public can provide leadership in determining how much the nation values open meetings.

During the Vietnam War and Watergate eras, public sentiment demanded greater scrutiny of the governing process. The mood of the population, then, may be the final arbiter in how legislators and the media interests view open-meeting laws.

VI. Conclusion

Open-meeting laws extend the ability of the public to watch the
decision-making process in state legislatures. Just how far that power extends remains open to debate.

Legislatures retain significant opportunities to meet privately, either as a whole, or in smaller groups. Most open-meeting statutes guarantee private meeting time, often by allowing for closed executive sessions. Additionally, chance social encounters between legislators seem beyond the reach of most every open-meeting law.

Court decisions establish further precedent for closed meetings. Courts may recognize state constitutional rights under the separation-of-powers doctrine that allow legislatures to create their own rules and procedures. Courts also may hold that meetings that are under attack may fall within exceptions written into the pertinent statute.

The volume of litigation regarding sunshine laws and their applicability to state legislatures remains relatively small. Appearances suggest that legislators and media interests find compromises such as pool reporting systems to abide by the spirit of sunshine laws without resorting to court action. While the compromises can be effective, the long-term answer to establishing effective sunshine laws include the elimination of statutory exceptions granting legislatures greater latitude for secret sessions than other governing bodies possess. Legislatures also should eliminate overly broad exceptions in favor of narrowly crafted private meetings designed to save the public money and advance specific state goals. Ultimately, the future of open-meeting laws may rest with the public rather than their elected representatives or their de facto media watchdogs.

John Peterson
Solar Access Rights in Florida: Is There a Right to Sunlight in the Sunshine State?

I. Introduction

The Florida legislature has declared, "[E]xisting domestic conventional energy resources will not provide sufficient energy to meet the nation's future needs..." Therefore, they enacted numerous statutes "to encourage the development of an alternative energy capability in the form of incident solar energy." Solar energy offers an attractive alternative to traditional energy resources such as oil, natural gas and coal because it is environmentally safe and virtually unlimited in supply.

This article will focus on Florida Statutes Section 704.071, one of

1. FLA. STAT. § 377.705(2)(a) (1983). This realistic appraisal of our nation's future energy needs is as valid today as it was ten years ago when the Florida legislature announced its findings. Traditional energy resources will not last forever, despite their present availability.

2. Id. Some of the statutes enacted by the Florida legislature to encourage solar energy use are: FLA. STAT. § 163.04 (1983) (prohibits anti-renewable resources ordinances); FLA. STAT. § 196.012(13)(a) (1983) (tax exemption status for solar energy collectors); FLA. STAT. § 212.08(7)(p) (1983) (sales tax exemption for solar energy systems and components); FLA. STAT. § 255.254 (1983) (state-financed and leased buildings to incorporate the use of solar energy systems); FLA. STAT. § 366.80-366.85 (1983) and FLA. STAT. § 403.519 (1983) (The "Florida Energy Efficiency and Conservation Act" enacted to encourage the development of solar energy plans by public utilities).

3. FLA. STAT. § 704.07 (1983). This statute only applies to easements which are obtained to maintain exposure of a solar energy device to sunlight. A solar collection system is virtually useless without unobstructed access to sunlight. There are approximately eighty-seven thousand active solar units in use in Florida. This data is provided by the Governor's Energy Office, State of Florida, 301 Bryant Building, Tallahassee, Florida 32301; as reported in 1973-1983: Florida Energy Data.

The Governor's Energy Office data explains that an active system circulates a fluid for heating and cooling purposes. The typical active system is comprised of a collector, a heat transfer fluid, thermal storage, and a distribution and control system. Active systems in Florida produced 1.9 trillion BTU of energy in 1983. Estimates for passive solar applications in which a building's structural design is used to heat, cool or light its interior are impossible to measure but they are a significant factor in Florida's renewable energy scheme. The author offers special thanks to Harold M. Draper, govern-
the measures taken by the legislature to promote solar energy use in the Sunshine State. This statute provides landowners with guidelines by which they can garner solar access easements for solar energy purposes. Clearly, a solar collection system is virtually useless without access to sunlight and the legislature's acknowledgment of this fact is laudable. However, the legislature assumes that potential solar energy users and adjoining landowners will always be able to negotiate solar access agreements voluntarily. There are no provisions within the statute to assist a solar energy user if his or her neighbor refuses to negotiate a solar access easement.

Currently in Florida, absent a contractual or statutory obligation to the contrary, a landowner does not have a legally enforceable right to the free flow of light and air across the adjoining land of his neighbor. Thus, if an adjoining landowner refuses to negotiate a solar access easement, a potential solar energy user is without legal recourse.

The Wisconsin Supreme Court has taken a unique approach towards resolving this solar access issue. In the landmark decision of Prah v. Maretti, it held that private nuisance law could adequately balance these opposing interests. Several state legislatures have also addressed the solar access issue. This article will discuss the various approaches taken by other jurisdictions, and then suggest how Florida can best balance the equities in its solar access disputes.

II. The Judicial Approach

A. Early Judicial Approaches

Courts have balanced the rights of solar energy users with the mental analyst at the Governor's Energy Office, for his assistance in obtaining this information.

For further data on solar energy systems the reader should contact either: 1) The Conservation and Renewable Energy Inquiry and Referral Service, toll-free at: 1-800-523-2929; or 2) The Florida Solar Energy Center, 300 State Road 401, Cape Canaveral, Florida 32920.

4. For a discussion of alternative approaches to this issue see supra notes 85-143 and related text.


6. 108 Wis. 2d 223, 321 N.W.2d 182 (1982).
rights of adjoining landowners for centuries.\textsuperscript{7} Legally enforceable solar rights were common in Rome during the second and third centuries A.D.\textsuperscript{8} Many landowners used solar energy as an alternative source of heat, as well as a source of illumination.\textsuperscript{9} A severe shortage of timber spawned this development in land-use.\textsuperscript{10}

Given the Roman community's desire to promote solar energy use, courts often concluded that a landowner's need for solar access outweighed a neighbor's right to build on adjoining property.\textsuperscript{11} Some courts went so far as to make adjoining landowners tear down a new structure if the structure left his neighbor without a reasonable amount of sunlight.\textsuperscript{12}

Roman solar access litigation continued until the fall of the empire.\textsuperscript{13} Centuries later, English courts adopted a similar attitude toward protecting solar access rights.\textsuperscript{14} The most interesting development in English solar access law was the emergence of the doctrine of "ancient lights."\textsuperscript{15} Under this doctrine, a landowner could acquire a legally enforceable right to solar access even though an express agreement had not been made with an adjoining landowner.\textsuperscript{16} The party seeking to establish the solar access right merely had to show that he enjoyed the benefit of light upon his windows for a required period of time.\textsuperscript{17} Originally, the party seeking to establish the solar access right was required to show that he enjoyed his use "from time whereof the memory of man runneth not to the contrary."\textsuperscript{18} Eventually, the prescriptive period

\textsuperscript{8} Id. at 594.
\textsuperscript{9} Id. at 590.
\textsuperscript{10} Id. at 588.
\textsuperscript{11} Id. at 593.
\textsuperscript{12} Id.
\textsuperscript{13} Id. at 594.
\textsuperscript{15} \textit{Ancient lights} refers to the English doctrine under which a landowner could acquire, via uninterrupted use, an easement or right by prescription over adjoining land for the unobstructed passage of light and air. See Clawson v. Primrose, 4 Del. Ch. 643 (1873) for an interesting and thorough discussion of this doctrine.
\textsuperscript{16} Id.
\textsuperscript{17} See generally Seeley, supra note 14 for a discussion of the amount of time that was required in various periods of English history.
\textsuperscript{18} See generally Clawson v. Primrose, 4 Del. Ch. 643, 655 (1873); Seeley, supra note 14 at 690-91.
was reduced to twenty years.\textsuperscript{19}

The doctrine of ancient lights is still viable in England, although its applicability appears limited to disputes regarding protection of solar access for illumination only.\textsuperscript{20} One commentator notes that even if the prescriptive period in England were shortened to benefit solar collection systems, it is unlikely that this doctrine would produce the desired results.\textsuperscript{21} Under current English law, the owner of a servient parcel\textsuperscript{22} can prevent the running of the statute by simply filing notice under the required registration procedures.\textsuperscript{23} Therefore, a potential solar energy user in England is well-advised to acquire an express easement\textsuperscript{24} before installing a solar collection system.\textsuperscript{25}

B. The American Judicial Approach

1 Ancient Lights Doctrine

Several American courts in early decisions adopted the ancient lights doctrine when first confronted with right to light cases.\textsuperscript{26} These courts held that the doctrine was part of the English common law incorporated by their individual state constitutions.\textsuperscript{27} However in 1838, when the New York Supreme Court rejected the ancient lights doctrine in Parker v. Foote,\textsuperscript{28} the majority of U.S. courts soon followed.\textsuperscript{29} Even-

\textsuperscript{19} See generally Seeley, supra note 14 at 694-97.

\textsuperscript{20} Id. at 698.

\textsuperscript{21} Id.

\textsuperscript{22} Servient parcel refers to an estate which is burdened with a servitude for the benefit or advantage of another estate. The estate which receives the benefit of the servitude is called the dominant estate. See generally BLACK'S LAW DICTIONARY 1228 (5th ed. 1979).

\textsuperscript{23} See generally Seeley, supra note 14, at 698.

\textsuperscript{24} An easement is the right of one or more persons to have use over the property of another. Solar access easements are generally described as negative easements because the owner of the servient estate is prohibited from doing something that would otherwise be lawful upon his estate. In the solar access context, a servient estate owner is prohibited from interrupting the light and air to his neighbor's dominant estate. See generally BLACK'S LAW DICTIONARY 458 (5th ed. 1979).

\textsuperscript{25} See supra note 3 for a brief explanation of the primary components required for a solar energy collection system.

\textsuperscript{26} See, e.g., Clawson v. Primrose, 4 Del. Ch. 643 (1873); Gerber v. Gerbel, 16 Ill. 217 (1854); Story v. Odin, 12 Mass. 157 (1815); Robeson v. Pittenger, 1 N.J. Eq. 57 (1838).

\textsuperscript{27} See generally Clawson v. Primrose, 4 Del. Ch. 643, 669 (1873).

\textsuperscript{28} 19 Wend. 309 (N.Y. Sup. Ct. 1838).
tually even those states which had originally accepted the doctrine, repudiated it.30 Delaware, the last state to enforce the doctrine, finally repudiated it in 1939.31

In Parker v. Foote, the owner of two village lots sold one and kept the other.32 The purchaser constructed a home on the adjoining property line, with windows overlooking the seller's lot. The seller, in the same year, built an addition within sixteen feet of the purchaser's new home. Twenty-four years later, the seller erected a store between the two original structures. New owners of the property originally conveyed by the seller, brought an action for "stopping the lights."33

In reviewing the dispute, the trial court judge instructed the jury that the plaintiffs were entitled to their verdict.34 The judge held that whether there was or was not a grant in writing as to the windows,35 the law presumed it from the user, and it could not be rebutted by proving that no grant had in fact been executed.36 The defendant appealed to the New York Supreme Court, alleging that the jury should have had an opportunity to determine whether a prescriptive right to light had been created.37

The appellate court agreed with the defendant. The decision was reversed on the ground that the question of whether a prescriptive easement had been created should have gone to the jury.38 In dicta, the Parker court criticized the doctrine's applicability to the American vision of unbridled growth.39 Speaking for the majority of the court, Jus-
Practice Bronson declared,

There is, I think, no principle upon which the modern English doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in England . . . but it cannot be applied in the growing cities and villages of this country, without working the most mischievous consequences. It has never, I think been deemed a part of our law. 40

Numerous courts throughout the United States cited this dicta from Parker v. Foote, even though the New York court rested its holding expressly upon its finding that the lower court erred in withholding a question that should have gone to the jury. 41 America’s need to promote growth was superior to the relatively small benefits afforded society by the ancient lights doctrine. If the state legislatures were to remain silent on the issue, then the courts would deal the ancient lights doctrine its fatal blow. 42

Since courts throughout the United States have repudiated the ancient lights doctrine, it is unlikely that this doctrine will ever assist a contemporary solar energy user. 43 Therefore, a more viable judicial remedy is in order. The following section will analyze the private nuisance doctrine as it applies to the solar access issue.

2. Private Nuisance Doctrine

Twenty-six years ago the Third District Court of Appeal of Florida decided Fountainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 44 in which a plaintiff sought judicial relief under the private nuisance maxim sic utere tuo ut alienum non laedas. 45 In Fountainebleau,

40. Id.
44. 114 So. 2d 357 (Fla. 3d Dist. Ct. App. 1959), cert. denied, 117 So. 2d 842 (Fla. 1960).
45. Id. at 359. Sic utere tuo ut alienum non laedas means use your own property in such a manner as not to injure that of another. See generally Black's Law Dictionary 1238 (5th ed. 1979). Note that an analogous property doctrine, cujus est solum, ejus est usque ad coelum et ad inferos (to whomsoever the soil belongs, he
the owner of the Eden Roc, a beachfront hotel, sought to enjoin its neighbor the Fountainebleau Hotel from building a fourteen story addition. If constructed, the addition would cast a shadow upon the Eden Roc's cabana, swimming pool and sunbathing areas each winter afternoon at about two o'clock.

The Florida court refused to recognize the Eden Roc's right to unobstructed sunlight. The court reasoned that the maxim sic utere tuo ut alienum non laedas does not mean that a landowner must never use his property in such a way as to injure his neighbor. Instead, the maxim only requires that a landowner must use his property so as not to injure the lawful rights of another. Because there was no lawful right to the free flow of light and air from adjoining land, and because the Fountainebleau addition would itself be beneficial, the court refused to enjoin construction under private nuisance doctrine.

The Wisconsin Supreme Court severely criticized the Fountainebleau decision in Prah v. Marett. The court declared, We do not find the reasoning of Fountainebleau persuasive. The court leaped from rejecting an easement by prescription (the doctrine of ancient lights) and an easement by implication to the conclusion that there is no right to protection from obstruction of access to sunlight. The court's statement that a landowner has no right to light should be the conclusion, not its initial premise. The court did not explain why an owner's interest in unobstructed light

owns also the sky and to the depths), has been narrowed by U.S. courts. See, e.g., United States v. Causby, 328 U.S. 256 (1946). In Causby, the Supreme Court declared that this doctrine has no place in our modern world.

47. Id. The Miami Beach city council had failed in an earlier attempt to prevent the construction of the Fountainebleau addition. The Third District Court of Appeal held that the council's "emergency" amendment to the city's building code was improper because the council failed to provide notice and a public hearing on the amendment, as required by the Miami Beach Zoning Enabling Act. See City of Miami Beach v. State ex rel. Fountainebleau Hotel Corp., 108 So. 2d 614 (Fla. 3d Dist. Ct. App.), cert. denied, 111 So. 2d 437 (Fla. 1959).
48. Fountainebleau, 114 So. 2d at 361.
49. Id. at 360.
50. Id.
51. Id.
52. Id. at 361.
53. 108 Wis. 2d 223, 321 N.W.2d 182 (1982).
should not be protected or in what manner an owner's interest in unobstructed sunlight differs from an owner's interest in being free from obtrusive noises or smells or differs from an owner's interest in unobstructed use of water. The recognition of a per se exception to private nuisance law may invite unreasonable behavior.  

In *Prah v. Maretti*, the owner of a solar-heated residence sought to enjoin his neighbor from constructing a home which would obstruct the solar energy user’s access to sunlight. The solar energy user alleged that the chimney from the proposed structure would cast a shadow upon the solar collection system, rendering it less efficient and possibly causing the system to become inoperable. The circuit court granted summary judgment in favor of the defendant, and the solar energy user appealed to the Wisconsin Supreme Court.

The Wisconsin Supreme Court noted that earlier American judicial decisions regarding solar access rights were based on three policy considerations. First, society vigorously protected the right of landowners to use their property as they wished, as long as they did not cause physical damage to a neighbor. Second, earlier solar access disputes generally involved only illumination or aesthetic enjoyment matters, on which society placed little value. Third, society's interest in encouraging land development was significant. In reviewing these considerations, a majority of the *Prah* court found them to be obsolete.

Citing *Euclid v. Ambler Realty Co.*, the court noted that modern society has increasingly regulated the use of land for the general welfare. The *Prah* court also acknowledged that the development of solar energy as an alternative energy source has given the solar access issue

54. *Id.* at 239, 321 N.W.2d at 191 n. 13 (emphasis in original).
55. *Id.* at 223, 321 N.W.2d at 182.
57. *Prah*, 108 Wis.2d 223, 321 N.W.2d 182.
58. *Id.* at 235, 321 N.W.2d at 189.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. 272 U.S. 365 (1926). The Euclid decision held that a zoning ordinance which restricted the location of apartment houses, trades, industries, single-family houses and other land uses was a valid exercise of the police power.
64. *Prah*, 108 Wis. 2d 223, 236, 321 N.W.2d 182, 189.
new significance. Furthermore, the policy favoring unhindered private development is no longer in harmony with the realities of our society. The Wisconsin Supreme Court concluded that private nuisance law could equitably balance the needs of a landowner seeking solar access with an adjoining landowner’s right to develop his land.

The court applied the definition of private nuisance found in Section 821D of the Second Restatement of Torts which declares that a private nuisance is “a nontresspassory invasion of another’s use and enjoyment of land.” The Prah court held that this doctrine could protect a landowner’s private use and enjoyment of a solar energy system. Therefore, the court concluded that the dispute required further factual development to determine if the Prah solar energy user should be entitled to judicial relief. The Wisconsin Supreme Court reversed and remanded, instructing the trial court to determine: 1) the extent of harm to the solar energy user; 2) whether the use of solar heat in that neighborhood is appropriate; 3) the availability of other remedies to the solar energy user; and 4) the costs to the adjoining landowner of avoiding the harm to the solar energy user.

It is worth noting, however, that the trial court never had an opportunity to decide whether this particular solar energy user would have prevailed under the Wisconsin Supreme Court’s guidelines. The Prah lawsuit was dismissed without further costs to either party. The lower court took judicial notice that the dispute had continued for over three years, and that it had become a “substantial burden on each of these parties.” Thus, in an effort to promote harmony between the litigants and their respective families and neighbors, the court dismissed the case and ordered that neither party comment further on the matter.

The plaintiff in Prah may himself have failed to secure solar access rights from his neighbor under the guidelines established by the

65. Id.
66. Id. at 237, 321 N.W.2d at 190.
67. Id. at 240, 321 N.W.2d at 191.
68. Id. at 231, 321 N.W.2d at 187 (quoting RESTATEMENT (SECOND) OF TORTS § 821D (1977)).
69. Id. at 242, 321 N.W.2d at 192.
70. Id.
72. Id.
73. Id.
74. Id.
Wisconsin Supreme Court. If the lower court had determined that the extent of the harm to the plaintiff was minimal, it could have denied the plaintiff relief.\[75\] The lower court also could have concluded that the use of solar heat was not appropriate for that neighborhood.\[76\] Lastly, the lower court could have determined that other remedies were available to the solar energy user and denied judicial relief on that basis.\[77\] Thus, despite its widespread acclaim in the solar access field, \[78\] the \textit{Prah} decision fails to offer a potential solar energy user much of a guarantee that he or she will successfully garner solar access rights via private nuisance law. No other jurisdiction has chosen to follow the \textit{Prah} court’s lead, so its remedies are available only within Wisconsin. Furthermore, even those Wisconsin decisions which have cited to \textit{Prah} have not done so to reaffirm its importance as a solar access landmark decision. Instead, they merely cite to \textit{Prah} to reaffirm that under Wisconsin law, summary judgment requires a court to decide whether a complaint states a claim upon which relief can be granted.\[79\]

Justice Callow’s dissenting opinion in \textit{Prah} points to further problems in using the private nuisance doctrine in solar access disputes.\[80\] He notes that under Section 821F of the Second Restatement of Torts, “[t]here is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose.”\[81\] Justice Callow concludes that the solar energy user in \textit{Prah} maintained “an unusually sensitive use”\[82\] and therefore the defendant’s construction of his new residence did not create a cause

\[75\] \textit{Prah}, 108 Wis. 2d 223, 240, 321 N.W.2d 182, 191. The Wisconsin Supreme Court states, “Nonetheless we do not determine whether the plaintiff in this case is entitled to relief.”

\[76\] \textit{Id}.

\[77\] \textit{Id}.


\[79\] Collins v. Eli Lilly Co., 116 Wis. 2d 166, 342 N.W.2d 37 (1984). In this action plaintiff sought recovery for injuries allegedly stemming from her mother’s ingestion of diethylstilbestrol (DES).

\[80\] 108 Wis. 2d at 243-57, 321 N.W.2d at 193-99 (Callow, J., dissenting).

\[81\] \textit{Id}. at 252, 321 N.W.2d at 197 (Callow, J., dissenting) (referring to \textit{RESTATEMENT (SECOND) OF TORTS} § 821F (1977)).

\[82\] \textit{Id}.
of action for nuisance. Thus, even if jurisdictions outside of Wisconsin were willing to apply private nuisance law to solar access disputes, courts could easily conclude that the use of a solar collection system was "an unusually sensitive use" and thereby deny a solar energy user the right to garner solar access for the collection system.

Justice Callow also raises the issue that perhaps the solar energy users, themselves, are really the nuisance in many circumstances.

This makes me wonder if we are examining the proper nuisance in the case before us. In other words, could it be said that the solar energy user is creating the nuisance when others must conform their homes to accomodate his use? I note that solar panel glare may temporarily blind automobile drivers, reflect into adjacent buildings causing excessive heat, and otherwise irritate neighbors. Certainly in these instances the solar heating system constitutes the nuisance.83

Justice Callow’s remarks suggest that absent a clear mandate from the legislature, many courts may find the use of solar collection systems to be more harmful than beneficial. Furthermore, when examining the overwhelming rejection of the ancient lights doctrine84 by United States courts, it becomes clear that legislative action is necessary if states wish to promote the use of solar energy as a viable alternative energy source. Therefore, the remaining sections of this article will focus on how states which have sought to promote solar energy use have done so through their legislatures.

III. The Legislative Approach

A. Solar Access as a Property Right: New Mexico and Wyoming

Perhaps the most controversial approach taken by lawmakers to protect solar access rights for solar energy purposes is that taken by New Mexico in 1978 and later adopted by Wyoming in 1981.85 The legislatures of both states have declared that the beneficial use of solar energy is a "property right."86 The statutes define "beneficial use"87 in

83. Id. at 248, 321 N.W.2d at 195, n. 3 (Callow, J., dissenting).
84. See Fountainebleau, 114 So. 2d at 359.
almost identical language.

Beneficial use shall be the basis, the measure and the limit of the solar right, except as otherwise provided by written contract. If the amount of solar energy which a solar collector user can beneficially use varies with the season of the year, then the extent of the solar right shall vary likewise. 88

Each statute also declares that "priority in time shall have the better right" subject only to the other provisions within the statute. 89 Thus, if a solar energy user establishes a solar collection system on his property, he is immediately vested with a legally enforceable "solar right." 90 Since "priority in time shall have the better right," a solar user can prevent an adjoining landowner from obstructing his solar access once the "solar right" has vested.

Critics have suggested this approach may be unconstitutional. 91 Since the fifth amendment to the United States Constitution declares that: "No person shall be . . . deprived of . . . property, without due process of the law; nor shall private property be taken for public use without just compensation," it has been suggested that the "taking" of an adjoining landowner's "private property" requires "just compensation." 92 Proponents of the New Mexico and Wyoming statutes argue, however, that they do not create an unreasonable regulation or a "taking" of private property which requires "just compensation." 93 Citing the United States Supreme Court case of Penn Central Transp. Co. v.

87. N.M. STAT. ANN §§ 47-3-4 (1978); WYO. STAT. §§ 34-22-103 (Supp. 1983). The New Mexico version of this definition includes the phrase "solar collector user" rather than Wyoming's "solar user" terminology.
89. N.M. STAT. ANN §§ 47-3-4 (1978); WYO. STAT. §§ 34-22-103 (Supp. 1983).
New York City, one commentator suggests that in certain circumstances the impact upon some adjoining landowners will be more severe than upon others, but this in and of itself does not mean the statute effects a “taking.”

It has also been suggested that since a private individual can acquire the immediate benefit of his neighbor’s land, the “taking” which results is for a “private use” rather than a “public use.” The merit of this position has been subject to criticism because the reduction of each solar energy user’s energy needs arguably benefits the public as a whole. The more energy the private solar energy users garner from non-traditional energy sources, the more the public will be able to use traditional energy sources, such as oil and gas, for other purposes.

In response to criticisms of the New Mexico approach, which fails to restrict the location of the solar collection systems or place limitations on their duration, the Wyoming legislature has modified its “solar right” statute by declaring that: 1) The solar access right is only effective from 9:00 a.m. until 3:00 p.m. each day; 2) If the “solar right” is not applied to a “beneficial use” for a period of five or more years, it shall be deemed “abandoned and without priority;” and 3) Solar collection systems must not unreasonably or unnecessarily restrict the uses of adjoining property; thus no solar right attaches to a solar collector which would be shaded by a hypothetical ten foot wall on the property line between the two parcels.

The New Mexico and Wyoming statutes have clearly acknowled-
edged the value of protecting solar access rights for solar energy purposes. However, most commentators agree that some type of legal challenge is inevitable.\textsuperscript{102} It is arguable whether or not a legal challenge to the New Mexico-Wyoming approach will be successful. It is the author's opinion that this enthusiastic approach is unconstitutional. Specifically, the failure of either statute to provide "just compensation" for the taking of an adjoining landowner's property seems to defy constitutional requirements. Therefore, it may be prudent for Florida and other state legislatures to refrain from adopting statutes which go to the extremes that these laws do to promote solar access protection. In the following sections the focus will be upon statutes which promote solar access protection in a less controversial manner.

B. California's Solar Shade Control Act

California has taken a unique approach toward promoting solar access rights for solar energy users. A California statute known as the California Solar Shade Control Act\textsuperscript{103} declares that in certain instances the blockage of solar access by a landowner constitutes a public nuisance.\textsuperscript{104} The statute applies only to solar obstruction caused by vegetation.\textsuperscript{105} Furthermore, the statute only applies if the solar energy user's collector has at least ten percent of its absorption area obstructed.\textsuperscript{106}

The California Solar Shade Control Act has been criticized because it requires the district attorney or city attorney to prosecute all persons guilty of violating the statute's provision.\textsuperscript{107} Critics claim that this system may lead to frivolous complaints and harassment of neighboring landowners since solar energy users must merely submit a complaint to the prosecutor.\textsuperscript{108} An adjoining landowner on the other hand must pay all the costs involved in refuting the complaint.\textsuperscript{109}

Perhaps a more obvious criticism of the statute is its failure to provide a solar energy user relief if the blockage is caused by some-

\begin{itemize}
  \item \textsuperscript{102} See supra note 91.
  \item \textsuperscript{103} CAL. PUB. RES. CODE § 25980 (Deering Supp. 1985).
  \item \textsuperscript{104} Id. at § 25983.
  \item \textsuperscript{105} Id. at § 25980.
  \item \textsuperscript{106} Id. at § 25982.
  \item \textsuperscript{107} See Gergacz, Legal Aspects of Solar Energy: Statutory Approaches for Access to Sunlight, 10 ENVTL. AFF. 1, 25 (1982).
  \item \textsuperscript{108} Id. at 27-28.
  \item \textsuperscript{109} Id. at 26-27.
\end{itemize}
thing other than vegetation. If an adjoining landowner constructed an addition to his residence, a solar energy user could not use this statute to protect the solar access for his system. The solar energy user would be forced to negotiate a solar access easement or relocate his collection system, assuming that this were even feasible. On the one hand, the adjoining landowner may refuse to negotiate a solar access easement. Should this happen the California solar energy user is without recourse. On the other hand, even if the size of the solar energy user’s property is large enough to make relocation of the system feasible, it is probable that the new location will be less favorable for solar energy collection since it is likely the user would have placed it in the most advantageous location when he first set up the unit.

The California Solar Shade Control Act declares that the state intends to encourage “the planting and maintenance of trees and shrubs to create shading, moderate outdoor temperature, and provide various economic and aesthetic benefits.” Since Florida is located in a tropic region where shading can substantially reduce the need for energy usage for cooling purposes, the Florida legislature should also seek to promote “shading” rather than solar access in certain circumstances. At least one federal government study has suggested that

110. *Id.* at 22.

111. *Id.*

112. *See* Cal. Civ. Code § 801.5 (Deering Supp. 1985). California has enacted a statute similar to Florida’s solar easement statute. The statute merely sets the guidelines by which a landowner may obtain a solar access easement which is recordable with other servitudes upon a particular piece of land. It may not be feasible to negotiate a solar access easement because an adjoining landowner is asking an unreasonable amount of money for the easement or the adjoining landowner may refuse to negotiate an easement voluntarily.

113. *Id.*

114. There are no provisions in the California statutes for alternative methods of garnering a solar access easement when a neighbor refuses to negotiate an easement voluntarily.

115. If the solar energy user used reasonable care when selecting the location for his solar collection system, it is arguable that he first placed the collector in the most favorable location rather than a less favorable one. Therefore, the overall efficiency of the system will likely be affected if the collection system must be moved to a less favorable location. If no other feasible location is available, a solar energy user may have to abandon the idea altogether.


117. *See* D. Erley & M. Jaffe, *Site Planning for Solar Access: A Guidebook for Residential Developers and Site Planners* (American Planning Ass’n 1980). This guide and other solar related information is available from The Conserva-
the promotion of "mature shade trees [in Florida is] . . . more important than solar access."\textsuperscript{118}

Therefore, if an adjoining landowner is using large mature trees to shade his residence or business, his use of this foliage should be encouraged by any new legislation enacted regarding the solar access issue. If, however, an adjoining landowner can not demonstrate a significant use of the foliage on his property for shading and cooling purposes, then the legislature should promote his neighbor's access to sunlight for solar energy purposes. In the following section the focus will be upon current statutes which allow a solar energy user to seek relief when an adjoining landowner refuses to negotiate a solar access easement.

C. Solar Access Permits: Iowa and Wisconsin

Iowa and Wisconsin have each enacted statutes allowing solar energy users to seek recourse with administrative review boards when adjoining landowners refuse to negotiate solar access easements.\textsuperscript{119} The two statutes are distinguishable. Iowa's law provides that the local district court will receive and act upon applications for solar access rights if the local governing body has failed to designate a solar access regulatory board.\textsuperscript{120} The Wisconsin statute leaves the establishment of a review board to the discretion of the local municipalities.\textsuperscript{121} If the local governing body does not provide for a solar access review board, then the potential solar energy user is without recourse.

Each statute defines the various terms associated with the permit procedure.\textsuperscript{122} Thus, the guidelines are easy to understand and apply.\textsuperscript{123}

\textsuperscript{118} Id. at 29.


\textsuperscript{120} IOWA CODE ANN. § 564A.3 (West Supp. 1985).

\textsuperscript{121} WIS. STAT. ANN. § 66.032(2) (West Supp. 1985).


\textsuperscript{123} By contrast FLA. STAT. § 704.07 (Florida's solar easement statute) does not define any of the solar-related terms within the statute. Arguably, if the solar-related terms were defined in the statute, the statute would be less ambiguous and more functional.
Both statutes try to promote voluntary agreements between adjoining landowners and solar energy users. The Iowa approach requires the applicant to declare that he "has done everything reasonable . . . to minimize the impact on the development of . . . [adjoining property]."\footnote{124} Furthermore, the applicant must state that he has attempted to negotiate a solar access easement with his neighbor.\footnote{125} The Wisconsin and Iowa legislatures have each enacted solar easement statutes which promote the use of voluntary agreements exclusive of the permit system.\footnote{126} Under these "solar easement" statutes, neighbors are free to negotiate the terms of a solar access right without administrative intervention.\footnote{127}

Perhaps the most unique part of the Iowa and Wisconsin statutes is that each authorizes the solar energy review boards to require an applicant to pay compensation to the owner of the property over which the solar access easement will run.\footnote{128} Arguably, this is an attempt by the Iowa and Wisconsin legislatures to provide just compensation for the taking of an adjoining landowner's property as required by the fifth amendment to the United States Constitution.\footnote{129} Although the applicant may incur an additional financial burden because of this provision, at least the solar energy user has some opportunity to garner solar access rights for his solar energy system. If the cost of the easement is prohibitive, then the potential solar energy user must accept the fact that a solar energy device is not feasible for his property. If, on the other hand, the compensation owed to the adjoining landowner is not prohibitive, then the potential solar energy user has garnered the right to solar access despite his neighbor's refusal to negotiate.

Compared to the relief available to a Florida landowner who is unable to negotiate a solar access easement, this approach arguably

125. Id. § 564A.4(1)(h).  
126. Id. § 564A.7; Wis. STAT. ANN. § 700.41 (West Supp. 1985).  
129. See Gergacz, Legal Aspects of Solar Energy: Statutory Approaches for Access to Sunlight, 10 ENVTL. AFF. 1, 31 (1982); discussing the constitutional issues involved with Iowa's approach toward protecting solar access rights. The terms just compensation and taking are used in the context of the United States Constitution's meaning of them as declared in the fifth amendment: No person shall be . . . deprived of . . . property without due process of law; nor shall private property be taken for public use without just compensation.}
represents a vast improvement. Although it may appear that the cost of securing a solar easement may cause some solar energy users to abandon the idea, the real advantage of adopting an approach like Iowa’s or Wisconsin’s is that an equitable remedy is available where previously none existed.\textsuperscript{130}

The Wisconsin statute has gone further than the Iowa approach to minimize the “taking” of the adjoining landowner’s property by limiting the “collector use period”\textsuperscript{131} from 9 a.m. to 3 p.m. daily.\textsuperscript{132} The Iowa statute merely authorizes the solar regulatory board or district court to modify the solar access easement as they see fit to minimize the impact upon the adjoining landowner.\textsuperscript{133}

Both Iowa and Wisconsin allow for the removal of the solar easement if the solar collection system is not operational within two years of the recording of the solar access easement.\textsuperscript{134} A solar access easement can also be removed if it ceases to be used for more than one year in Iowa\textsuperscript{135} or two consecutive years in Wisconsin.\textsuperscript{136} The major distinction between the removal of a solar easement in Iowa and a solar permit in Wisconsin is that in Iowa the adjoining landowner must apply to the board to have the easement removed.\textsuperscript{137} In Wisconsin the permit terminates if the reviewing agency determines that the solar access has not been in use for two or more years.\textsuperscript{138} Thus, in Iowa the burden is upon the adjoining landowner to come forward and submit a removal application,\textsuperscript{139} where an adjoining landowner in Wisconsin is not under

\textsuperscript{130} Attorney Virginia Poffenberger was co-sponsor of the Iowa solar access legislation. In a telephone interview with Ms. Poffenberger on Aug. 13, 1985, she indicated that one of the primary effects of Iowa’s solar access statute was that it encouraged voluntary agreements between solar energy users and their neighbors. The Iowa approach requires solar energy users to make a good faith effort to obtain a voluntary agreement with neighbors. Most neighbors prefer to resolve their differences with solar energy users instead of going through the solar access regulatory board’s review procedure. However, the ability of solar energy users to seek review of the dispute, in and of itself, greatly enhances the ability of solar energy users to obtain solar access easements from their neighbors.


\textsuperscript{132} Id.


\textsuperscript{134} Id. § 564A.6 (1); Wis. Stat. Ann. § 66.032(9)(a)(2) (West Supp. 1985).

\textsuperscript{135} Iowa Code Ann. § 564A.6(2) (West Supp. 1985).


\textsuperscript{137} Iowa Code Ann. § 564A.6 (West Supp. 1985).


\textsuperscript{139} Iowa Code Ann. § 564A.6 (West Supp. 1985).
such a duty.140

One shortcoming with Iowa's approach is that the statute requires a solar access application "to be filed before installation or construction of the solar collector."141 Thus, an Iowa landowner who has installed a solar energy system before securing a solar easement from an adjoining landowner or the regulatory board, technically would not be eligible to use the remedies declared in the statute.142 The Wisconsin statute expressly allows owners of currently operating solar collectors, as well as potential solar energy users to apply for permits.143

The Iowa and Wisconsin legislatures should both be commended for establishing mechanisms which promote solar energy use, while still balancing the equities between neighboring landowners. The concluding section of this article will describe Florida's present solar access statute and then suggest how Florida legislators might adopt the best features from the various approaches discussed within this article.

D. Florida's Approach: Improving Florida's Solar Access Law.144

In 1976, the Florida legislature enacted the "Solar Energy Standards Act,"145 declaring:

The Legislature recognizes that if present trends continue, Florida will increase present energy consumption six-fold by the year 2000. Because of this dramatic increase and because existing domestic conventional energy resources will not provide sufficient energy to meet the nation's future needs, new sources of energy must be developed and applied. One such source, solar energy, has been in limited use in Florida for 30 years. Applications of incident solar energy, the use of solar radiation to provide energy for water heating, space heating, space cooling, and other uses, through suitable absorbing equipment on or near a residence or commercial structure, must be extensively expanded. . . . It is the intent of the Legislature in formulating a sound and balanced energy policy for

142. Since Florida has approximately eighty-seven thousand active solar collection systems, a provision which allows current solar energy users to use the statute guidelines is therefore recommended. See supra note 3.
143. WIS. STAT. ANN. § 66.032(3) (West Supp. 1985).
144. FLA. STAT. § 704.07 (1983).
the state to encourage the development of an alternative energy capability in the form of incident solar energy.\textsuperscript{146}

In keeping with this finding, the legislature enacted Section 704.07\textsuperscript{147} of the Florida Statutes. This statute sets forth the process by which solar energy users and adjoining landowners can create legally enforceable solar easements. Specifically, the statute requires the easement to be in writing and include an adequate description of the easement's dimensions.\textsuperscript{148} Furthermore, the easement must be properly recorded.\textsuperscript{149}

Unlike the Iowa or Wisconsin statutes, the Florida approach fails to set-out definitions of the various terms used within the statute. For instance, the Iowa statute describes the term "solar collector" as "a device or structural feature of a building that collects solar energy and that is part of a system for the collection, storage, and distribution of solar energy. . . . [A] greenhouse is a solar collector."\textsuperscript{150} Florida, by its failure to define a "solar collector" leaves solar energy users unsure if a greenhouse is viewed as a collector under the statute. Thus potential solar energy users may fail to secure a solar easement for their greenhouses because they think that the statute is inapplicable.

More importantly, the Florida approach toward protecting solar access rights for solar energy users fails to offer an alternative when an adjoining landowner refuses to negotiate a solar access easement. Compared to the Iowa and Wisconsin solar access statutes, Florida's solar access statute is inadequate. If Florida desires to promote the use of solar energy in a fair and equitable manner, it should adopt an approach similar to that used in Iowa and Wisconsin.

If local zoning boards, city councils, county courts or circuit courts are empowered with a solar regulatory review board status, the adoption of the Iowa-Wisconsin system should not prove too burdensome in Florida. Furthermore, by delegating the ultimate decisions to the local officials, this system promotes the use of local expertise in the decision-making process. This is an important feature of this approach because northern Florida communities could conceivably have different solar access needs than southern Florida communities. Specifically, in Flor-
ida's southern communities, the need to promote energy efficiency through the shading of residences may be superior to the need to promote solar access rights.\textsuperscript{151}

Florida should adopt the best features of the Iowa and Wisconsin statutes. The legislature should: 1) set up an administrative agency which is competent to hear solar access disputes; 2) authorize this agency to grant a solar energy user a solar access easement or permit, if the situation warrants doing so; 3) authorize the agency to require an applicant to pay compensation to an adjoining landowner if the taking of the easement is such that equity demands that it be paid; 4) establish guidelines by which a solar easement can be removed for non-use over two or more years; 5) set out clear definitions of the terms used within the solar access statute; 6) require the applicant to declare that he had done everything reasonable to minimize the harm upon an adjoining landowner and furthermore that he has tried in good faith to secure a voluntary agreement with his neighbor; and 7) to minimize the harm to an adjoining landowner, limit the solar collection period to those hours when the availability of sunlight is greatest, and the likelihood of shadowing is at a minimum, from nine a.m. to three p.m. daily.

IV. Conclusion

Courts and legislatures have tried for generations to balance the competitive needs of landowners regarding solar access rights.\textsuperscript{152} Contemporary needs have brought the solar access issue full cycle. Where ancient Roman courts once enforced solar access rights for solar energy purposes,\textsuperscript{153} today we must again enforce solar access rights for our society's growing solar energy needs.\textsuperscript{154}

The courts are a weak ally to the contemporary solar energy user. Florida's \textit{Fountainbleau} decision is perhaps the most glaring example.\textsuperscript{155} Although this decision involved the right to sunlight for illumination purposes rather than solar energy purposes, there is nothing to indicate that absent an express contractual or statutory obligation to the contrary that solar energy users will receive more favorable treat-

\textsuperscript{151. See supra} note 118.
\textsuperscript{152. See supra} note 7 and text for notes 7-13.
\textsuperscript{153. Id.}
\textsuperscript{154. See supra} notes 144-49 and related text.
\textsuperscript{155. See supra} notes 44-52 and related text.
ment by Florida courts.156

The ability of the Wisconsin Supreme Court’s Prah v. Maretti decision to assist the contemporary solar energy user is also questionable. At present, the private nuisance approach adopted by the Prah court has failed to garner support in courts outside of Wisconsin.157 Therefore, non-Wisconsin courts are not obligated to adopt the Prah approach to solar energy disputes. Furthermore, even if non-Wisconsin courts chose to apply the private nuisance approach, a solar energy user does not have the comfort of knowing that another solar energy user has ever succeeded via this doctrine. In Prah, the Wisconsin Supreme Court remanded the case to the trial court but the trial court never had the opportunity to apply the private nuisance approach to the facts of that dispute.158 The case was dismissed by the trial court.159 Therefore, it is merely speculative as to whether the Prah solar energy user would have succeeded even if the guidelines set by the Wisconsin Supreme Court had been used.160

In light of the general reluctance by the courts to assist solar energy users in their efforts to protect their solar access rights, it is necessary for those legislatures which seek to encourage solar energy use in their states to enact new laws which allow solar energy users legal recourse when neighbors refuse to negotiate solar access easements.161 The Iowa, Wisconsin and California legislatures have taken commendable approaches toward balancing the rights of solar energy users with adjoining landowners.162 The Florida legislature should enact a new solar access statute which adopts the best features of these approaches.163

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156. See supra note 5 and related text.
157. See supra notes 53-83 and related text.
158. See supra notes 68-79 and related text.
159. See supra notes 72-74 and related text.
160. See supra notes 68-79 and related text.
161. The reluctance of the federal government to continue the use of residential renewable energy source tax credits, also suggests that state legislatures will have to take a more active role in the solar energy field, if it is to remain viable. In a Nov. 22, 1985 telephone interview with Stacy Lupton (a legislative aide to Florida’s U.S. Senator, Paula Hawkins), she indicated that federal bills regarding renewable energy tax credits are unlikely to pass in the near future. See S. 1201, 99th Cong., 1st Sess. (1985); H.R. 1272, 99th Cong., 1st Sess. (1985).
162. See supra notes 103-143 and related text.
163. The author wishes to thank the Nova Law Library staff and the Nova Law School faculty for their ready support of this project. I would especially like to ac-
Florida Statutes Section 704.07 Solar easements; creation; remedies.

(1) Easements obtained for the purpose of maintaining exposure of a solar energy device shall be created in writing and shall be subject to being recorded and indexed in the same manner as any other instrument affecting the title to real property. Solar easements may be preserved and protected from extinguishment by the filing of a notice in the form and in accordance with the provisions set forth in §§ 712.05 and 712.06.

(2) In addition to fulfilling the requirements of law relating to conveyance of interests in land, the instrument creating the solar easement shall include:

(a) A description of the properties, servient and dominant.
(b) The vertical and horizontal angles, expressed in degrees, at which the solar easement extends over the real property subject to the solar easement.
(c) A description of where the easement falls across the servient property in relation to existing boundaries and various setbacks established by the local zoning authority.
(d) The point on the dominant property from where the angles describing the solar easement are to be measured.
(e) Terms or conditions under which the solar easement is granted or will terminate.
(f) Any provisions for compensation of the owner of the property benefiting from the solar easement in the event of interference with the enjoyment of the solar easement or compensation of the owner of the property subject to the solar easement for maintaining the solar easement.

(3) No structure under construction on October 1, 1978, shall be subject to any solar easement recorded pursuant to this section.
Iowa Code Annotated Chapter 564A.

Access to solar energy 564A.1. Purpose

It is the purpose of this chapter to facilitate the orderly development and use of solar energy by establishing and providing certain procedures for obtaining access to solar energy.

564A.2. Definitions

As used in this chapter, unless the context otherwise requires:

1. "Solar access easement" means an easement recorded under section 564A.7, the purpose of which is to provide continued access to incident sunlight necessary to operate a solar collector.

2. "Solar energy" means energy emitted from the sun and collected in the form of heat or light by a solar collector.

3. "Solar collector" means a device or structural feature of a building that collects solar energy and that is part of a system for the collection, storage, and distribution of solar energy. For purposes of this chapter, a greenhouse is a solar collector.

4. "Development of property" means construction, landscaping, growth of vegetation, and other alteration of property that interferes with the operation of a solar collector.

5. "Dominant estate" means that parcel of land to which the benefits of a solar access easement attach.

6. "Servient estate" means land burdened by a solar access easement, other than the dominant estate.

7. "Solar access regulatory board" means the board designated by a city council or county board of supervisors under section 564A.3 to receive and act on applications for a solar access easement or in the absence of a specific designation, the district court having jurisdiction in the area where the dominant estate is located. Notwithstanding chapter 602 the jurisdiction of the district court established in this subsection may be exercised by district associate judges.

564A.3 Designation

The city council or the county board of supervisors may designate a solar access regulatory board to receive and act on appli-
cations for a solar access easement. The board designated by the city council may be a board of adjustment having jurisdiction in the city, the city council itself, or any board with at least three members. The board designated by the county board of supervisors may be a board of adjustment having jurisdiction in the county, the board of supervisors itself, or any other board with at least three members. The jurisdiction of a board designated by the city council extends to applications when the dominant estate is located in the city. The jurisdiction of a board designated by the county board of supervisors extends to applications when the dominant estate is located in the county but outside the city limits of a city. In the absence of the designation of a specific board under this section; the district court having jurisdiction in the area where the dominant estate is located shall receive and act on applications submitted under section 564A.4 and to that extent shall serve as the solar access regulatory board for purposes of this chapter. Notwithstanding chapter 602 the jurisdiction of the district court established in this section may be exercised by district associate judges.

564A.4 Application for solar access easement

1. An owner of property may apply to the solar access regulatory board designated under section 564A.3 for an order granting a solar access easement. The application must be filed before installation or construction of the solar collector. The application shall state the following:

   a. A statement of the need for the solar access easement by the owner of the dominant estate.
   b. A legal description of the dominant and servient estates.
   c. The name and address of the dominant and servient estate owners of record.
   d. A description of the solar collector to be used.
   e. The size and location of the collector, including heights, its orientation with respect to south, and its slope from the horizontal shown either by drawings or in words.
   f. An explanation of how the applicant has done everything reasonable, taking cost and efficiency into account, to design and locate the collector in a manner to minimize the impact on devel-
development of servient estates.

g. A legal description of the solar access easement which is sought and a drawing that is a spatial representation of the area of the servient estate burdened by the easement illustrating the degrees of the vertical and horizontal angles through which the easement extends over the burdened property and the points from which those angles are measured.

h. A statement that the applicant has attempted to voluntarily negotiate a solar access easement with the owner of the servient estate and has been unsuccessful in obtaining the easement voluntarily.

i. A statement that the space to be burdened by the solar access easement is not obstructed at the time of filing of the application by anything other than vegetation that would shade the solar collector.

2. Upon receipt of the application the solar access regulatory board shall determine whether the application is complete and contains the information required under subsection 1. The board may return an application for correction of any deficiencies. Upon acceptance of an application the board shall schedule a hearing. The board shall cause a copy of the application and a notice of the hearing to be served upon the owners of the servient estates in the manner provided for service of original notice and at least twenty days prior to the date of the hearing. The notice shall state that the solar access regulatory board will determine whether and to what extent a solar access easement will be granted, that the board will determine the compensation that may be awarded to the servient estate owner if the solar access easement is granted and that the servient estate owner has the right to contest the application before the board.

3. The applicant shall pay all costs incurred by the solar access regulatory board in copying and mailing the application and notice.

4. An application for a solar access easement submitted to the district court acting as the solar access regulatory board under this chapter is not subject to the small claims procedures under chapter 631.
564A.5 Decision

1. After the hearing on the application, the solar access regulatory board shall determine whether to issue an order granting a solar access easement. The board shall grant a solar access easement if the board finds that there is a need for the solar collector, that the space burdened by the easement was not obstructed by anything except vegetation that would shade the solar collector at the time of filing of the application, that the proposed location of the collector minimizes the impact of the easement on the development of the servient estate and that the applicant tried and failed to negotiate a voluntary easement. However, the board may refuse to grant a solar access easement upon a finding that the easement would require the removal of trees that provide shade or a windbreak to a residence on the servient estate. The board shall not grant a solar access easement upon a servient estate if the board finds that the owner, at least six months prior to the filing of the application, has made a substantial financial commitment to build a structure that will shade the solar collector. In issuing its order granting the solar access easement, the board may modify the solar access easement applied for and impose conditions on the location of the solar collector that will minimize the impact upon the servient estate.

2. The solar access regulatory board shall grant a solar access easement only within the area that is within three hundred feet of the center of the northernmost boundary of the collector and is south of a line drawn east and west tangent to the northernmost boundary of the collector.

3. The solar access regulatory board shall determine the amount of compensation that is to be paid to the owners of the servient estate for the impairment of the right to develop the property. Compensation shall be based on the difference between the fair market value of the property prior to and after granting the solar access easement. The parties shall be notified of the board's decision within thirty days from the date of the hearing. The owner of the dominant estate shall have thirty days from the date of notification of the board's decision to deposit the compensation with the board. Upon receipt of the compensation, the board shall issue an order granting the solar access easement to
the owner of the dominant estate and remit the compensation awarded to the owners of the servient estate. The owner of the dominant estate may decline to deposit the compensation with the board, and no order granting the solar access easement shall then be issued.

4. When the order granting the solar access easement is issued, the owner of the dominant estate shall have it recorded in the office of the county recorder who shall record the solar access easement and list the owner of the dominant estate as grantee and the owner of the servient estate as grantor in the deed index. The solar access easement after being recorded shall be considered an easement appurtenant in or on the servient estate.

564A.6. Removal of easement

The owner of a servient estate may apply to the solar access regulatory board or may petition the district court for an order removing a solar access easement granted by a solar access regulatory board under this chapter under any of the following conditions:

1. If the solar collector is not installed and made operational within two years of recording the easement under section 564A.5.
2. If the dominant estate owner ceases to use the solar collector for more than one year.
3. If the solar collector is destroyed or removed and not replaced within one year.

The procedure for filing an application with the solar access regulatory board under this section and for notice and hearings on the application shall be the same as that prescribed for an application for granting a solar access easement. An order issued by the district court or a solar access regulatory board removing a solar access easement may provide for the return by the servient estate owner of compensation paid by the dominant estate owner for the solar access easement after the deduction of reasonable expenses incurred by the servient estate owner in proceedings for the granting and removal of the easement.

564A.7. Solar access easements

1. Persons, including public bodies, may voluntarily agree to create a solar access easement. A solar access easement whether
obtained voluntarily or pursuant to the order of a solar access regulatory board is subject to the same recording and conveyance requirement as other easements.

2. A solar access easement shall be created in writing and shall include the following:
   a. The legal description of the dominant and servient estates.
   b. A legal description of the space which must remain unobstructed expressed in terms of the degrees of the vertical and horizontal angles through which the solar access easement extends over the burdened property and the points from which these angles are measured.

3. In addition to the items required in subsection 2 the solar access easement may include, but the contents are not limited to, the following:
   a. Any limitations on the growth of existing and future vegetation or the height of buildings or other potential obstructions of the solar collector.
   b. Terms or conditions under which the solar access easement may be abandoned or terminated.
   c. Provisions for compensating the owner of the property benefiting from the solar access easement in the event of interference with the enjoyment of the solar access easement, or for compensating the owner of the property subject to the solar access easement for maintaining that easement.

564A.8. Restrictive covenants
   City councils and county boards of supervisors may include in ordinances relating to subdivisions a provision prohibiting deeds for property located in new subdivisions from containing restrictive covenants that include unreasonable restrictions on the use of solar collectors.

564A.9. Assistance to local government bodies and the public
   The energy policy council shall make available information and guidelines to assist local government bodies and the public to understand and use the provisions of this chapter. The information and guidelines shall include an application form for a solar access easement, instructions and aids for preparing and record-
ing solar access easements and model ordinances that promote reasonable access to solar energy.
Attorney's Fees Under Florida Statute 57.105:
Caselaw Development

I. Introduction

In 1978, the Florida Legislature enacted section 57.105 of the Florida Statutes, providing, "The court shall award a reasonable attorney's fee to the prevailing party in any civil action in which the court finds that there was a complete lack of justiciable issue of either law or fact raised by the losing party." In so doing, it encroached on the "American rule" that, absent a statute or contractual provision to the contrary, each party bears the expense of his own legal representation. Although there already existed statutes allowing for an award of attorney's fees in several specific areas of law, this was the first time that a Florida law stretched across the range of civil litigation, so as to potentially allow a recovery of fees in any lawsuit, if a party assumes a position determined by the judge to be groundless.

Even as the proposal was being debated in the legislature, it was recognized that such a law must apply narrowly, lest it have a "chilling effect" on potential litigants and, in effect, deny access to the courts to those without the means to gamble whether a trial judge might disagree with their assessment of the worthiness of their claims and allow a potentially devastating award of fees to the other party. As originally proposed, the language "no genuine issues of law or material fact in dispute" lent itself to an interpretation justifying an award of fees in any case subject to a motion for summary judgment. After substantial debate, the legislature tightened up the language to allay those concerns expressed. What remains, then, is a statute which was designed to be of limited application, restricted to cases where litigants abuse their opponents and the courts by pressing palpably baseless claims, or interposing groundless or dilatory defenses.

It is not the purpose of this article to trace the background of the

1. FLA. STAT. § 57.105 (1979).
3. Id.
4. Id. at 90-95.
enactment of section 57.105 or to provide a comparison of Florida’s statute with those in other states; rather, the intent here is to trace the development of the caselaw which has emanated from section 57.105, showing how the courts have limited its applicability, and providing a practical analysis of how it is applied in specific situations, including apparent conflicts in existing precedent among the various district courts of appeal. In short, although the original purpose of the statute may have been to eliminate needless litigation, almost two hundred references to section 57.105 have found their way into recorded decisions, and these go far to flesh out the bare bones of its text: This article will provide a more-complete portrait of its present effect.

II. Preliminary Matters

"The court shall award . . . to the prevailing party . . . in any civil action . . . ."

Before delving into the specific circumstances which call for an award of attorney’s fees under section 57.105, brief consideration should be given to the following basic questions: (1) Which courts are authorized to make such an award?; (2) Is the authority to make such an award merely an extension of the courts’ discretionary power?; (3) To whom is such an award authorized?; and (4) To what actions does it apply?

The answer to the first inquiry, “Which courts are authorized to make such an award?,” is fairly straightforward: Any court operating under the laws of Florida may, under appropriate circumstances, grant attorney’s fees to the prevailing party.

As the trial court of general jurisdiction, the circuit court has this authority, as was to have been expected, and this was recognized in the very first appellate decision concerning the statute. Further, precedent allows a grant of fees by the county court. Similarly, several decisions recognize the authority of the district courts of appeal to award — again, under the appropriate circumstances — fees to parties

5. This was already admirably accomplished in these pages in the 1980 article cited in note 2, supra.
who have been subjected to unjustified appeals. Although this power has not yet been exercised, not only it is logical that the Supreme Court of Florida should also have this prerogative, but, indeed, this court has at least twice considered grants of fees, but refused them, as circumstances were not proper.

Somewhat less obvious is that federal courts sitting in Florida also have authority under section 57.105 to award fees to prevailing parties. It should be noted that this authority is in addition to the federal courts' general authority to award attorney's fees in cases of "bad faith," a basis not recognized by the courts of Florida. Consequently, awards of fees have been held proper in diversity actions and cases of bankruptcy, although the propriety of such awards in admiralty cases has been questioned. Even though the issue has not presented itself in a "federal question" action, application of the statute in such circumstances would not appear appropriate, since the Florida venue would be basically adventitious, so that federal courts hearing cases under federal law should confine themselves to remedies available under their own law.

It might be asked whether courts of other states are empowered to apply section 57.105 in actions arising in Florida, but momentary reflection reveals that the gist of the statute is misconduct in the course of litigation; since, as postulated, the litigation would be taking place


9. See, e.g., Williams v. 51 Island Way Condominium Ass'n, 476 So. 2d 676 (Fla. 1985); Continental Cigar Corp. v. Edelman & Co., 411 So. 2d 381 (Fla. 1981) (each declining discretionary jurisdiction and refusing to grant fees—as reported in LEXIS, States, Fla file).


11. Interstate Pipe Maintenance, Inc. v. FMC Corp., 775 F.2d 1495 (11th Cir. 1985); Burger King Corp. v. Mason, 710 F.2d 1480 (11th Cir. 1983); see Perkins State Bank, 632 F.2d at 1314 (diversity actions); In re North American Mktg. Corp., 24 Bankr. 16 (S.D. Fla. 1982).


13. See Avey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486 (11th Cir. 1985) (while affirming complete denial of attorney's fees, considering grounds for fees under Sherman Antitrust Act separately from § 57.105 as related to state antitrust portion).
elsewhere, recourse to the statute would, a priori, be improper.

As to the second inquiry, it is clear that the statute does not merely add to the court's discretionary authority, such as that allowed under the Rules of Civil Procedure in disputes over discovery.\(^{14}\) Rather, once appropriate grounds have been found, a grant of attorney's fees is not merely discretionary, but mandatory,\(^{15}\) although it appears still in conflict whether this may be sua sponte or whether the prevailing party must affirmatively move for an award of fees.\(^{16}\)

Next arises the question of who, indeed, is a "prevailing party," one entitled to seek fees from the opposition. There are few cases directly on point decided under the statute. Generally, courts have held that there must have been an actual judicial determination of the case on the merits, either by judgment or by order:\(^{17}\) A favorable settlement does not qualify.\(^{18}\) Aside from these fundamentals, one must look for guidance to principles applied in similar areas.

First, the victory must be total: A mere denial of a foreclosure of a


\(^{15}\) Debra, Inc., v. Orange County, 445 So. 2d 404 (Fla. 5th Dist. Ct. App. 1984) ("Once the determination has been made by the trial court that there is a complete absence of a justiciable issue of law or fact, the award of attorney's fees to the prevailing party who properly moves for such fees is required." Id. at 405.); Wright v. Acierno, 437 So. 2d 242 (Fla. 5th Dist. Ct. App. 1983) (even when award constitutes a windfall, as public officials were provided defense by city).

\(^{16}\) Compare Debra, 445 So. 2d at 405 ("prevailing party who properly moves for such fees"), with Smyth v. Smyth, 417 So. 2d 821 (Fla. 4th Dist. Ct. App. 1982) (appeals court granting fees sua sponte). Also, compare Autorico, Inc., v. Government Employees Ins. Co., 398 So. 2d 485, 486 (Fla. 3d Dist. Ct. App. 1981) (may grant fees "so long as a motion requesting such fees is filed at the conclusion of the litigation and is thereafter heard by the trial court upon proper notice"), with O'Brien v. Brickell Townhouse, Inc., 457 So. 2d 1123 (Fla. 3d Dist. Ct. App. 1984) ("There is no requirement that a trial court must take evidence to determine whether a matter is frivolous, it may do it on the record alone." Id. at 1123.).

\(^{17}\) Outdoor Concerts, Inc., v. Friedman, 438 So. 2d 988 (Fla. 3d Dist. Ct. App. 1983); Steinhardt v. Seals, 412 So. 2d 384 (Fla. 5th Dist. Ct. App. 1982). In Simmons v. Schimmel, 476 So. 2d 1342 (Fla. 3d Dist. Ct. App. 1985), the court indicated that a voluntary dismissal without prejudice, taken just before trial, was not sufficient to provide such an adjudication; there, the suit could have been refiled, whereas a second voluntary dismissal would have operated as an adjudication on the merits.

\(^{18}\) See Steinhardt v. Eastern Shores White House Assn., 413 So. 2d 785 (Fla. 3d Dist. Ct. App. 1982) ("In order that there be a prevailing party, there must necessarily be a disposition of the case or controversy as by judgment or order." Id. at 786.).
mechanic's lien is not enough when a judgment at law is still obtained. On the other hand, an award of fees is proper, even though a defendant, successful in the original action, still has an unrelated counterclaim outstanding.

Since the courts have frequently taken note of the fact that section 57.105 was enacted as an adjunct to code provisions relating to the awarding of costs, general principles defining a "prevailing party" for the purpose of receiving costs should also apply. So, looking beyond precedent specifically relating to section 57.105, victory in what was merely a preliminary skirmish, with the ultimate decision having the opposite effect, should not, for instance, entitle one to a grant of fees.

Finally, in this preliminary consideration, is the question of what manner of actions are subject to section 57.105. That the statute, in its very words, is confined to "civil actions" should have been simple enough, but the Fourth District Court of Appeal first stumbled, allowing fees under section 57.105 in a case involving a criminal appeal, then recovered, noting that this was clearly improper. Otherwise, its application has run the gamut of civil litigation, including cases based on specific performance, declaratory judgment, probate, domestic relations, civil contempt, replevin, ejectment, paternity, and un-


20. See McKelvey v. Kismet, Inc., 430 So. 2d 919 (Fla. 3d Dist. Ct. App. 1983) (actually decided under contract, but, as noted by dissent, "For purpose of this analysis it would make no difference whether the attorney's fee entitlement emanates from statute or contract." Id. at 923 n.4.).


28. E.g., Columbo v. Legendre, 397 So. 2d 1043 (Fla. 5th Dist. Ct. App. 1981); City of Miami v. Town of Bay Harbor Islands, 380 So. 2d 1112 (Fla. 3d Dist. Ct. App. 1980).
fair competition, as well as garden-variety tort and contract claims.

Although it is to be hoped that this additional observation is of only academic interest at this late date, it should also be noted that the statute has been held to have created a substantive right, so its effect is prospective only, not retroactive.

III. The Standard to be Applied

"... a complete absence of a justiciable issue of either fact or law. ..."

It must first be emphatically stated that merely losing is not enough to subject a party to the peril of being assessed attorney's fees under section 57.105. This is true, although he defaulted, although

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32. E.g., Castaway Lounge of Bay County, Inc., v. Reid, 411 So. 2d 282 (Fla. 1st Dist. Ct. App. 1982).
his case may have been dismissed, either voluntarily or involuntarily,\(^{37}\) although he lost on a motion for summary judgment,\(^ {38}\) although the other party was granted a directed verdict (even if the judge had previously warned of the possibility),\(^ {39}\) or, for that matter, although he failed to bear his burden of proof at trial.\(^ {40}\) Again, simply stated, mere losing is not enough.

Some early cases suggested a broad application of the statute,\(^ {41}\) but the Fifth District Court of Appeal, in its seminal decision in *Allen v. Estate of Dutton*,\(^ {42}\) articulated a restricted range for the applicability of the statute, and the Florida Supreme Court accepted its reason-


\(^{38}\) E.g., St. Regis Paper Co. v. Williams, 475 So. 2d 258 (Fla. 2d Dist. Ct. App. 1985); Cohen v. General Motors Corp., 444 So. 2d 1170 (Fla. 4th Dist. Ct. App. 1984); Russell v. State, 417 So. 2d 1119 (Fla. 5th Dist. Ct. App. 1982).


\(^{40}\) E.g., Sims Creek Homeowners' Assn. v. Van Kirk, 464 So. 2d 655 (Fla. 4th Dist. Ct. App. 1985); Snow v. Rosse, 455 So. 2d 615 (Fla. 4th Dist. Ct. App. 1984) (even when the trial judge thinks party was lying); see Byam v. Klopchic, No. 82-376, slip op. (Fla. 4th Dist. Ct. App., decided Feb. 8, 1984) (not frivolous when lack of issue only because plaintiff failed to plead and prove foreign law); Suwanee County v. Garrison, 417 So. 2d 1070 (Fla. 1st Dist. Ct. App. 1982) (reluctant to assume that trial judge would submit frivolous claim to a jury; found not so anyway); *cf.* Southeast Growers, Inc., v. Designed Facilities, 49 Fla. Supp. 160 (Broward County Ct. 1979) (fees not allowed if claim defeated by affirmative defense). *But see* Kisling v. Woolridge, 397 So. 2d 747 (Fla. 5th Dist. Ct. App. 1981) (grant of fees affirmed when plaintiff failed to prove any of elements of tortious interference with business relationship).

\(^{41}\) E.g., *Castaway Lounge*, 411 So. 2d at 285; MacBain v. Bowling, 374 So. 2d 75 (Fla. 3d Dist. Ct. App. 1979).

\(^{42}\) 384 So. 2d 171 (Fla. 5th Dist. Ct. App. 1980).
ing unreservedly in *Whitten v. Progressive Casualty Insurance Co.*,\(^{43}\) the only decision in which the high court has directly addressed the effect of the statute. The *Dutton* court first noted that attorney’s fees are not ordinarily recoverable as costs, unless so provided by statute, then held that the statute’s being placed in Chapter 57 empowered the trial court to make the award while appeal was pending.\(^{44}\) Then, rejecting the estate’s contention that the non-existence of justiciable issues of law or fact should entitle it to a recovery of attorney’s fees, the *Dutton* court focused on the statute’s term “complete absence” to import a requirement of “a total or absolute lack” of any justiciable issue, and found this tantamount to a finding that the action was “frivolous.”\(^{45}\) Proceeding from this, the Fifth District analogized the standard for an adequate finding under section 57.105 to an earlier Florida Supreme Court definition of a “frivolous appeal”:

A frivolous appeal is not merely one that is likely to be unsuccessful. It is one that is so readily recognizable as devoid of merit on the face of the record that there is little, if any, prospect whatsoever that it can ever succeed. It must be so clearly untenable, or the insufficiency of which is so manifest on a bare inspection of the record and assignments of error, that its character may be determined without argument or research. An appeal is not frivolous where a substantial justiciable question can be spelled out of it, or from any part of it, even though such question is unlikely to be decided other than as the lower court decided it, i.e., against appellant or plaintiff in error.\(^{46}\)

The *Dutton* court concluded that an award required a finding that an action be “so devoid of merit both on the facts and the law as to be completely untenable,” and, on this basis, reversed the circuit court’s award of fees, despite its affirmance of the judgment on the merits.\(^{47}\) It

\(^{43}\) 410 So. 2d 501 (Fla. 1982).

\(^{44}\) 384 So. 2d at 175.

\(^{45}\) *Id.* (emphasis in original). Cf. United Cos. Fin. Corp. v. Hughes, 460 So. 2d 585 (Fla. 2d Dist. Ct. App. 1984) (trial court’s determination that it was “75% convinced” that there was no issue was not sufficient to sustain a grant of fees).

\(^{46}\) *Treat v. State* ex rel. *Minton*, 121 Fla. 509, 510, 163 So. 883, 883 (1935) (citations omitted). This quotation is related at length, not only because it served to establish the tenor of subsequent decisions, but also because its use changed the very terminology used in most of them: No longer did the courts look for a “complete absence” of an issue, but, rather, for “frivolousness,” as defined here.

\(^{47}\) *Dutton*, 384 So. 2d at 175 (emphasis in the original).
is clear, therefore, that to be burdened with an award of fees, merely losing is not enough.

As noted above, the Florida Supreme Court adopted the Fifth District’s reasoning without reservation, noting that it, and other decisions which followed, “comport with the intent of the legislature in adopting the statute.” In the Whitten decision, the Supreme Court stated, “The purpose of section 57.105 is to discourage baseless claims, stonewall defenses and sham appeals in civil litigation by placing a price tag through attorney’s fees awards on losing parties who engage in these activities.” The Supreme Court continued, “Such frivolous litigation constitutes a reckless waste of judicial resources as well as the time and money of prevailing litigants.” After specifying that a mere loss under several of the circumstances enumerated in the first paragraph of this section is not sufficient to justify an award of fees, the Supreme Court went further to impose a technical requirement that there be a specific written finding of “a complete absence of a justiciable issue” before a grant of fees under section 57.105 could be sustained.

A few subsequent decisions have articulated the standard in somewhat different terms—an action must be “spurious,” an award is unjustified if “a plausible argument can be made . . . . [that there was] an honestly debatable question of law” — but the preponderance conforms with the above: “Complete absence of a justiciable issue” has been transformed into a test of “frivolousness,” and this even when the

48. Whitten, 410 So. 2d at 505.
49. Id.; see Ferrara v. Caves, 475 So. 2d 1295 (Fla 4th Dist. Ct. App. 1985) (“[P]unishment is what the subject statutory section is about.” Id. at 1299.).
50. Whitten, 410 So.2d at 505.
51. Id.
52. Id. at 506. There is precedent to the effect that an award is always improper if summary judgment was avoided in the court below, City of Deerfield Beach v. Oliver-Hoffman Corp., 396 So. 2d 1187 (Fla. 4th Dist. Ct. App. 1981); Denes and Denes & Assocs. v. Walter E. Heller & Co. of Fla., Inc., 396 So. 2d 760 (Fla. 3d Dist. Ct. App. 1981); contra Puder v. Raymond Int'l Builders, Inc., 424 So. 2d 78 (Fla. 3d Dist. Ct. App. 1982), or if the party against whom fees are claimed won below, Enoch Assocs., v. Moul Invs., Ltd., 404 So. 2d 798 (Fla. 3d Dist. Ct. App. 1981) cf. Schultz v. Williams, 472 So. 2d 1347 (Fla. 2d DCA 1985) (award of fees against property appraiser reversed when assessments had been upheld by property appraisal board); but fees were held to be properly awarded if the court below was mislead, Department of Revenue v. Gurtler, 381 So. 2d 242 (Fla. 4th Dist. Ct. App. 1979).
substituted terminology is more clumsy than the original would have been.  

IV. Specific Applications of Section 57.105

Possibly somewhat hyperbolically, it used to be said, "Sue everybody in sight; let them figure their way out!" The clearest sequence of cases decided under section 57.105 shows this dictum not to have whatever validity that it once may have had.

The most obvious example was an instance in which the plaintiff joined a city attorney in a squabble over the placement of a road when, if anyone, the city engineer would have been the proper party defendant. Accomodatingly, the plaintiff's lawyer, at deposition, admitted, "I have no idea who is responsible for this," that he had no idea who built the project, but would like to get the name of the proper party. The Fourth District Court of Appeal found that the suit against the city attorney was "begun recklessly, without investigation, and without a good faith belief that [the city attorney] had any involvement with the construction," then cited other authority to the effect that the purpose of the statute was "to place a pricetag upon such unwarranted litigation," and affirmed the lower court's grant of attorney's fees.

Similar are cases in which the plaintiffs assumed that documents which they were seeking were in the offices of the defendants' attorneys. Suits to replevy these files, joining the lawyers, resulted in grants of fees to them when it turned out that the attorneys did not, indeed, have the desired material.

Grants of attorney's fees under section 57.105 have also been affirmed when discovery clearly showed that the wrong party had been sued, but the plaintiff persisted in his error, and where it appeared

57. Id. at 575 (emphasis in reported decision).
58. Id.
59. Id.
62. Keen v. Bernardo, 452 So. 2d 1133 (Fla. 2d Dist. Ct. App. 1984) (holding discussed in n. 79, infra); see Parrino v. Ayers, 469 So. 2d 837 (Fla. 5th Dist. Ct. App. 1985) (suing former neighbor for ejectment of fence justified grant of fees when no
that the joinder of a party in his individual capacity was pursued only to gain a tactical advantage. 63

This does not, however, suggest that misjoinder is, ipso facto, an adequate ground for an award of attorney's fees. The failure of an attempt to "pierce the corporate veil" has been found inadequate to justify an award of fees, 64 as has been a suit against a life tenant in an action for the foreclosure of a mortgage. 65 Also, as will be discussed further below, a misjoinder, the existence of which did not become apparent until the completion of discovery, does not constitute grounds for a grant of fees under section 57.105. 66

On the other hand, there is a consistent string of precedent to the effect that it is not the intent of the statute to deter exploration of new, unsettled areas of the law, and that attorney's fees are not to be awarded if the position asserted is novel, yet sufficiently plausible as to represent a reasonable effort to expand, move, modify, or clarify the common law as it exists. 67 Consequently, a suit for group defamation 68 and another seeking to make manufacturers of prescription drugs responsible for failure to provide warnings directly to consumers 69 resulted in reversals of grants of fees. Similarly, denial of fees has been affirmed when the subrogability of PIP benefits was unclear, 70 when the law of shoreline accretion was unclear, 71 when the plaintiff sued the state for wrongful death for failure to detain a husband who subsequently killed his wife, 72 and when punitive damages were sought for attempt to ascertain present ownership).

64. Bacon v. August, 407 So. 2d 1089 (Fla. 3d Dist. Ct. App. 1982).
65. Brady v. Myers, 413 So. 2d 466 (Fla. 4th Dist. Ct. App. 1982).
72. Russell v. State, 417 So. 2d 1119 (Fla. 5th Dist. Ct. App. 1982); see Cate v.
violation of federal housing regulations. It was, nevertheless, held that a recent Supreme Court mandate denying a plaintiff's position — when plaintiff was aware of it — was sufficient to justify an award of fees. This all affirms the formulation that a position is "frivolous" — lacking of a justiciable issue — if it flies in the face of established and current precedent, but that it is not the purpose of the statute to stultify the natural development of the common law, or to penalize ventures into genuinely gray areas.

As noted above when discussing the effect of misjoinder, one is not liable for an assessment of fees when the lack of substance of the action only becomes apparent during the course of the suit. This is the situation when it turns out that the wrong person was sued, or that the defendant no longer intends to pursue the course of conduct complained of. However, timely action to terminate a course of litigation may be necessary to avoid an assessment based on one's persisting in his error, even after it has become apparent.

Interestingly, the fact that a defendant had a privilege against liability does not automatically expose the plaintiff to an assessment of fees, although the indications are that this would be a consideration

Oldham, 450 So. 2d 224 (Fla. 1984).
78. Friedman, 453 So. 2d 938 (continued in suit to replevy file from lawyer, even after it became apparent that he did not have it); Keen v. Bernardo, 452 So. 2d 1133 (Fla. 2d Dist. Ct. App. 1984) (persisted in suit against Bernardo, Jr., after it became apparent that borrower was Bernardo, Sr.); Adcast v. Nour, 3 Fla. Supp. 2d 180 (Volusia County Ct. 1982) (defendant not principal of corporation sued). But see Stevenson v. Rutherford, 440 So. 2d 28 (Fla. 4th Dist. Ct. App. 1983) (holding that party is not at own peril to determine when suit becomes "frivolous"; was no great imposition after fact came out).
79. Bull v. City of Atlantic Beach, 450 So. 2d 570 (Fla. 1st Dist. Ct. App. 1984) (declaratory judgment filed also against city officials as individuals); Freeman v. Valdez, 393 So. 2d 1173 (Fla. 3d Dist. Ct. App. 1981) (suit against sheriff in individ-
in determining whether the case was wholly frivolous. It has also been specifically held that recourse to needlessly dilatory tactics will justify an assessment of fees under section 57.105, and, also, that raising only a sham issue will not suffice to avoid an award.

V. Procedural Aspects

In addition to the numerous decisions relating to the substantive question of what circumstances justify a grant of fees under the statute, the courts have frequently been called upon to delineate the procedural requirements for granting an award of fees. Specifically, questions have arisen as to when the court has jurisdiction to grant fees, whether and in what manner the pleadings must request fees, when a request for fees is timely, what are adequate findings to support an award of fees, whether fees may be granted when only a portion of an action is found to be frivolous, and how what are “reasonable” fees is to be determined. This section will consider these technical aspects.

Jurisdiction to grant fees and costs remains in the trial court even after the filing of an appeal of a final judgment, since it “would not affect or interfere with the subject matter of the appeal and thus impinge on the appellate court’s power and authority to decide the issues presented to it by the appeal.” The logic of such power is questiona-
ble in light of the fact that the conclusion of the appeal would weigh heavily on the question of whether an action was "frivolous." Also, as discussed above, the appeals court may itself award fees or remand with instructions that this be done. 84

It was early recognized that it is not necessary for the prevailing party to have previously included a demand for attorney's fees for the trial court to have jurisdiction to grant them. 85 This is clearly logical, as "[t]here is certainly no way for a litigant to know in advance whether the adverse party will raise nothing but frivolous issues in a civil case and, therefore, to plead in good faith [for an assessment of fees under the statute]." 86

As regards the question of timeliness, one should note that fees may not be awarded until there has been an adverse final judgment. 87 Further, the trial court's reserving jurisdiction to consider an award of fees is not ripe for review in the appeal of the final judgment on the merits. 88 Beyond these limitations, it appears that the trial court's jurisdiction continues until the time for rehearing has passed, at which time the judgment becomes final. 89

Before the Supreme Court spoke in the Whitten decision, 90 the district courts of appeal were divided as to whether an award of fees under section 57.105 required a written finding of the fact that there was a complete lack of any justiciable issue, 91 or, on the other hand, that such a finding could be inferred from the trial court's granting of

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84. E.g., Pollock v. Morton, 455 So. 2d 574 (Fla. 3d Dist. Ct. App. 1984) (Other authorities in this area are cited supra, n. 8.).


90. 410 So. 2d 501 (Fla. 1982).

91. City of Miami Beach v. Town of Bay Harbor Islands, 380 So. 2d 1112 (Fla. 3d Dist. Ct. App. 1980).
fees and did not have to be explicitly stated.92 The Supreme Court’s decision specifically noted, “Without such a finding, an order assessing attorney’s fees is technically deficient and must be reversed.”93 This should have finally resolved the question, and largely has, but there are nevertheless recent decisions in which a district court has itself granted fees without stating requisite findings94 or suggested that a grant of fees implies appropriate findings.95

With few exceptions, courts have ruled that fees may not be granted when only part of the action was frivolous. In an early case involving the seller’s “frivolous” refusal to perform a real estate sales contract, the Third District Court of Appeal approved of the trial court’s bifurcating the trial, then awarded fees only for the portion determining liability, as there were always substantial questions as to damages.96 Also, the First District Court of Appeal reversed a denial of fees to the plaintiff on two of four counts of a suit filed by a teacher against her school board, but it was unclear whether the case was decided under section 57.105 or one of two other statutes authorizing a grant of fees.97 Other than these two decisions, Florida courts have been consistent in holding that the entire action must be “frivolous” for fees to be recoverable.98 However, one federal court decision suggests that a minor percentage of a complicated case was unfounded, so fees relating to that portion should be calculated and an award be made in the resulting amount.99

99. Burger King Corp. v. Mason, 710 F.2d 1480 (11th Cir. 1983).
Finally, in this consideration of technical factors posed by the statute is the basic question, "What is the 'reasonable attorney's fee' which can be recovered?" The answer is most easily given by stating what it is not: A "reasonable attorney's fee" is not necessarily what was actually contracted for or paid. In a subrogation case in which the attorney was on a contingency, what was determined to be "reasonable" (and was granted) turned out to be more than twice what was contracted for and over eighty percent of the amount recovered. When a city was defended by the city attorney, it was allowed the going rate for his time, rather than a pro rata portion of his salary and expenses. In another case, city officials who had been sued as individuals were granted "reasonable" fees, even though they had been defended for free by a salaried attorney provided by the city. Also, attorneys representing themselves have been granted fees for their own time, over and above expenses actually incurred. This judicial largesse is justified on a collateral source theory and a determination that the policy of section 57.105 is to punish frivolous litigants.

Courts in a less-generous mood have referred to the Florida Code of Professional Responsibility as the source of those factors to be considered in determining what is "reasonable." Generally, one court observed

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101. City of Boca Raton v. Faith Baptist Church, 423 So. 2d 1021 (Fla. 4th Dist. Ct. App. 1982).
102. Wright, 437 So. 2d 242 ("[W]e find it highly improbable that any honorable or forthright public officer would personally seek a profit from any such award when the cost of his or her defense had been borne by the taxpayers..." Id. at 244.). But see Salfi v. Ising, 464 So. 2d 687 (Fla. 5th Dist. Ct. App. 1985) (decision discussed in n. 80, supra).
103. Friedman v. Backman, 453 So. 2d 938 (Fla. 4th Dist. Ct. App. 1984); Hatcher v. Miller, 427 So. 2d 1039 (Fla. 1st Dist. Ct. App. 1983). But see Burger King Corp. v. Mason, 710 F.2d 1480 (11th Cir. 1983) (fees not allowed for house counsel who served only liaison function).
104. Wright, 437 So. 2d at 244. See also Autorico, Inc., v. Travelers Indem. Co., 400 So. 2d 164 (Fla. 3d Dist. Ct. App. 1981) (left open the question of whether insurer wrongfully refusing to provide defense is responsible for fees awarded against insured).
105. Travieso v. Travieso, 447 So. 2d 940, 943 n.2 (Fla. 3d Dist. Ct. App. 1984) (quoting DR 2-106); see also Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985) (discussing "reasonable fees" in medical malpractice appeal); Cisneros v. Tarafa, 418 So. 2d 338 (Fla. 3d Dist. Ct. App. 1982) (mere stipulation of what was "reasonable" does not prevent appeal of propriety of award).
Lawyers are officers of the court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently, and expeditiously. The attorney's fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public in the bench and bar. It does more than that; it brings the court into disrepute and destroys its power to perform adequately the function of its creation.  

How the specific cases referred to above correlate with this expression of purpose is less than clear.

VI. Section 57.105 Considered in a Broader Context

In addition to cases relating specifically to the application of section 57.105, numerous references to this statute are found in decisions in which it is compared to, or contrasted with, other principles of law. These are of interest, not only as they tend to further define the extent of its applicability, but also as they suggest the courts' attitudes as to how it may be applied in the future.

Most frequent are comparisons with the law of malicious prosecution. The cases hold that conduct must be more egregious to sustain a malicious prosecution suit than to justify an award of fees under the statute. 107 On the other hand, section 57.105 is suggested as an alternative to malicious prosecution when the latter is inappropriate, 108 especially when a public official is constitutionally barred from maintaining such an action. 109

The standard for recovery under section 57.105 has been held to be similar to that required for assessment of fees for filing a "frivolous" complaint before the Ethics Commission, 110 and, like a similar provision for hearings before the Career Service Commission, does not require that the matter be heard on its merits, but will allow a grant of

106. Travieso, 447 So. 2d at 944 (quoting Baruch v. Giblin, 122 Fla. 59, 63, 164 So. 831, 833 (1935)).
fees, even if the action is dismissed.\textsuperscript{111} Also, its operation has frequently been seen as analogous to the attorney's fees provision of Florida's consumer protection statute.\textsuperscript{112}

Perhaps most significant are judicial suggestions of future uses of the statute, and of problems for which it might serve as the preferred remedy. The Fifth District Court of Appeal has served notice that future failure by appellants to provide a proper record on appeal will result in summary dismissal of the appeal, and that motions for attorney's fees under the statute "will be favorably entertained."\textsuperscript{113} In a special concurrence recommending a broadening of landlords' liability for accidents on leased premises, Judge Glickstein of the Fourth District Court of Appeal recognizes that such change might lead to abuse, but points to section 57.105 as the remedy.\textsuperscript{114} It has also been suggested that the statute, not petitions for prohibition or certiorari to appeals courts, is the remedy for a party's attempt to relitigate matters decided by an administrative board,\textsuperscript{115} and that it would be the proper remedy if, in a contribution action, a joint tortfeasor pleads settlement and release in bad faith.\textsuperscript{116} Similarly, while the court's majority disposed of the matter by finding that the plaintiff had no standing to sue, Judge Lehman of the Second District Court of Appeal, dissenting, argued for a broader ability to sue public officials, with the statute standing as a defense against frivolous actions.\textsuperscript{117}

As can be seen from the above, the statute has influence beyond


\textsuperscript{112} \textit{See}, e.g., Nolan v. Altman, 449 So. 2d 898 (Fla. 1st Dist. Ct. App. 1984) (decided on FLA. STAT. § 501.2105 (1983)).

\textsuperscript{113} Beasley v. Beasley, 463 So. 2d 1248 (Fla. 5th Dist. Ct. App. 1985); \textit{see} Nicholason v. Bryant, 468 So. 2d 311 (Fla. 5th Dist. Ct. App. 1985) (fees granted by appeals court when husband failed to provide proper record in appeal over increase of support payments).

\textsuperscript{114} Klatman v. Barnett, 458 So. 2d 806, 807 (Fla. 4th Dist. Ct. App. 1984) (Glickstein, J., concurring specially).


\textsuperscript{116} Concrete Sciences, Inc., v. Bassett, 449 So. 2d 300 (Fla. 4th Dist. Ct. App. 1984).

\textsuperscript{117} Godheim v. City of Tampa, 426 So. 2d 1084, 1096 (Fla. 2d Dist. Ct. App. 1983) (Lehman, J., dissenting).
the scope of its own applicability, and may in the future find itself used creatively to resolve problems which are now without convenient solutions.

VII. Conclusion

The primary purpose for the enactment of section 57.105 was to deter unfounded litigation. Especially since it has itself presented such fertile ground for litigation, it has not yet achieved this end. As, however, its proper scope becomes more clearly delineated by the courts, the volume of cases — the preponderance of which result in denial of fees — should subside. Already in the books is a case adumbrating the possibility that one who frivolously seeks fees from the opposition may himself be assessed fees. One earnestly hopes that this statute, intended to eliminate needless litigation, is not fated to itself become a basis for intramural squabbling over who has better grounds for assessing fees against the other.

Section 57.105 was intended to have a narrow scope, and this is how it has been interpreted. With only few disparate exceptions, precedent consistently requires that an actual finding of “frivolousness” be made before the court awards fees. When, however, that “frivolousness” is found — and found to apply to the entire action — an award is mandatory. The statute authorizes only a “reasonable” award of fees, but existing precedent does not always hew closely to this principle. The restrictive requirements of the statute are not intended as a shield to protect delay or abuse, but do seek to preserve the citizen’s right of access to the courts, even when his action is only barely tenable. This statute, as construed, is a good piece of legislation which should in the future lend itself to a more-creative, yet narrow, application.

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Bowers v. Hardwick: The Extension of the Right to Privacy to Private Consensual Homosexual Conduct*

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I. Introduction

On August 3, 1982, a Fulton County, Georgia, police officer went to the apartment of Michael Hardwick on a routine matter. Hardwick’s roommate let the officer into the apartment. The officer, through the partially opened door to Hardwick’s bedroom, saw Hardwick and another man engaged in a homosexual act. The officer’s subsequent arrest of Hardwick for violating the Georgia sodomy statute was the origin of what may be the most important homosexual rights lawsuit in

* In the district and circuit courts the case was styled Hardwick v. Bowers. This Note shall follow the styling of the lower courts. In the Supreme Court, however, the case is Bowers v. Hardwick.
2. GA. CODE ANN. § 16-6-2 (1982). “A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years.” Note that the statute is not limited to homosexual acts.

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American history. The perfect test case was born: A man was arrested for engaging in consensual sexual acts with another adult in the privacy of his own bedroom. While the Fulton County District Attorney later dropped the charges unless further evidence developed, Hardwick's travail was sufficient to gain him standing to sue for a declaratory judgment that the statute was a violation of a fundamental constitutional right. The Eleventh Circuit Court of Appeals agreed with Hardwick, and the stage was set for a decision by the United States Supreme Court on an issue which the Court has steadfastly avoided for the last decade.

Twenty-three states and the District of Columbia have statutes making certain homosexual acts a crime. While prosecutions under sodomy statutes are rare, the laws remain on the books and therefore enforceable. This is important for two reasons.

First, sodomy laws stigmatize homosexuals. The sodomy statutes make homosexuals, as well as heterosexuals, aware that the law brands

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3. Hardwick, 760 F.2d at 1204.
4. Id. at 1212.
5. Arguing the case for the State of Georgia will be Georgia Senior Assistant Attorney General Michael Hobbs. Kathleen L. Wilde was Hardwick's attorney in the lower courts; joining her and handling the argument in the Supreme Court will be Prof. Laurence H. Tribe. The Court is expected to hand down a decision in June or early-July of 1986.

gay people as criminals. The psychological results of this and other forms of oppression can be devastating. 7

Second, sodomy laws are often used as justification for more common yet equally severe forms of discrimination against homosexuals. For example, an Oklahoma statute limiting the right of teachers to speak out in favor of homosexual rights was justified by the illegal status of homosexual acts. 8 A justice of the Florida Supreme Court, commenting on homosexual applicants to the Florida Bar, wrote that “[e]ven without evidence of actual conduct, I am opposed to the admission of any person whose admitted ‘orientation’ indicates a lifestyle likely to involve routine violation of a criminal statute.” 9 Justice Rehnquist, dissenting from a denial of certiorari in a case concerning a university’s recognition of a gay student group, wrote that “the issue posed in this case is the extent to which a self-governing democracy, having made certain acts criminal, may prevent or discourage individuals from engaging in speech or conduct which encourages others to violate those laws.” 10 Anti-gay measures which are defended by reference to the illegality of homosexual acts may, however, face serious constitutional challenges. 11


See also Dressler, Survey of School Principals Regarding Alleged Homosexual Teachers in the Classroom: How Likely (Really) is Discharge, 10 U. Dayton L. Rev. 599, 607-09 (1985) (12% of principals in sample favor revocation of license of teacher who commits noncriminal, consensual private homosexual act with an adult; figure rises to 30% if act was criminal, even if the teacher is not actually convicted of the crime).

11. See infra note 62 and Section V passim.
Hardwick v. Bowers is significant because a determination that sodomy laws are unconstitutional would change the content of the debate over homosexual rights; no longer could such discussions begin and end with a reference to the criminal status of homosexual acts.

In the following section of this Note, the constitutional issues involved in challenges to sodomy statutes are discussed. Then, in section III, there is an examination of the Supreme Court's decisions on privacy over the last two decades. Section IV will provide a discussion of Supreme Court cases dealing with homosexual rights. Section V is an examination of recent lower court rulings involving statutory prohibitions against homosexual acts and will provide the framework for discussion of Hardwick v. Bowers in Section VI. Subsections of Section VI examine the plaintiff's standing to sue, the precedential weight of a 1976 Supreme Court decision, and the constitutional basis for the extension of the right of privacy to private, consensual, noncommercial homosexual conduct.

II. The Constitutional Issues

Arguments that sodomy statutes are unconstitutional have been based on several sections of the United States Constitution. In essence, though, all arguments originate from the fundamental right of privacy.


13. A recent law review comment suggests that the best strategy for gay rights litigators is to treat homosexuality as a suspect classification and argue that laws discriminating on the basis of sexual orientation should be subject to heightened scrutiny (either strict or intermediate). The author argues that the right of privacy argument fails "to provide an adequate remedy for unequal treatment of gays . . . The social world, where most discrimination against gays occurs, is left untouched by the seemingly neutral abstention of the state." Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, 98 HARV. L. REV. 1285, 1291 (1985). "Even if homosexuality were accorded the full protection of privacy doctrine, majoritarian norms would still govern the expression of gay personhood outside the bedroom." Id. at 1292. For a similar argument see Note, An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality, 57 S. CAL. L. REV. 797 (1984). See also Rowland v. Mad River Local School District, 105 S. Ct. 1373, 1377 (1985) (Brennen, J., dissenting from denial of certiorari: "[D]iscrimination against homosexuals or bisexuals based solely on their sexual preference raises significant constitutional questions under . . . equal protection analysis").

While the argument is provocative, it ignores the reality of American society to-
The right to privacy was first recognized by Judge Cooley and was adopted by Samuel Warren and Louis Brandeis in an 1890 law review article.\textsuperscript{14} Seventy-five years later the Supreme Court in \textit{Griswold v. Connecticut}\textsuperscript{15} formally declared that there is a constitutional right to privacy. Though this has been frequently reaffirmed,\textsuperscript{16} it remains unclear from which section of the Constitution the right derives. Various answers have been suggested: 1) the privileges and immunities clauses of article IV and the fourteenth amendment; 2) the "penumbras" or "shadows" of the first, third, fourth, and fifteenth amendments; 3) the preamble to the Constitution; and 4) the prohibition against cruel and unusual punishment in the eighth amendment.\textsuperscript{17}

Perhaps the most convincing explanation of the newfound right to privacy is that it is actually the rebirth of substantive due process. Substantive due process was in great disrepute after the period in the early part of this century when the Supreme Court used it, most notably in \textit{Lochner v. New York},\textsuperscript{18} to strike down laws regulating the economy. \textit{Lochner} was later repudiated by the Court, but substantive due process continues to be tarred with the stigma of excessive judicial interference with the will of the people as expressed through the legislature. Some modern scholars now see the privacy decisions of the Court as being substantive due process, yet the Court itself has been hesitant to place its decisions under that mantle.\textsuperscript{19}

day. A society that is just now coming to a consensus that private acts should be protected from government interference is unlikely to protect the public persona of gay people. While the determination that homosexuality is a suspect classification may be an admirable goal, the right to privacy is a first, necessary step.

\textsuperscript{14} Warren & Brandeis, \textit{The Right to Privacy}, 4 HARV. L. REV. 193 (1890).

\textsuperscript{15} 381 U.S. 479 (1965).

\textsuperscript{16} See infra Section III.

\textsuperscript{17} L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10 (1978).

\textsuperscript{18} 198 U.S. 45 (1905) (law regulating maximum hours of bakers held to be an unconstitutional violation of the right to contract and an excessive use of the state's police powers).

\textsuperscript{19} Kenneth Karst writes that \textit{"Griswold was part of a larger doctrinal movement: the revival of substantive due process as a guarantee of individual freedoms."} Karst, \textit{The Freedom of Intimate Association}, 89 YALE L. REV. 624, 626 (1980). \textit{"After so many years of heaping scorn on Lochner v. New York, the Court has not found it easy to admit that substantive due process has returned."} \textit{Id.} at 644. Professor Tribe calls \textit{Griswold} \textit{"the most important substantive due process decision of the modern period."} L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-3 (1978).

Justice Stewart on several occasions expressed his agreement. \textit{See Roe v. Wade}, 410 U.S. 113, 167-68 n.2 (1973) (concurring) (this decision is based on the due process
The constitutional right to privacy, whatever its origins, is well-entrenched. The Supreme Court has frequently based decisions on it, and the doctrine has several times been raised in cases involving homosexual rights.

III. The Supreme Court on Privacy

In *Griswold v. Connecticut* the Supreme Court found that a law making the use of contraceptives illegal violated the right to privacy inherent in the Constitution. Justice Douglas, in the plurality opinion, eschewed reliance on due process and found the right to privacy emanating from the Bill of Rights. Justice Goldberg concurred but found the right to privacy based on the fourteenth amendment’s concept of liberty. Justice Douglas’ comment that the law in question “concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees” is important in the context of challenges to sodomy statutes. It is noteworthy that the issues and opinions in *Griswold* were limited to married persons.

In *Stanley v. Georgia* the Court found that a law making criminal the private possession of obscene material violated the first and fourteenth amendments. The facts were similar to those in *Hardwick v. Bowers* in that a search of Stanley’s apartment for bookmaking equipment inadvertently uncovered a number of obscene films. The Court said that the sale of obscene material could be punished, but not the clause, as “[t]here is no constitutional right of privacy as such”) and Zablocki v. Redhail, 434 U.S. 374, 395 (1978) (concurring in the decision that a Wisconsin law was unconstitutional, but arguing that the majority’s decision is “no more than substantive due process by another name”). Justice Stevens, in his majority opinion in *Whalen v. Roe*, 429 U.S. 589 (1977), wrote that in *Roe v. Wade* the right of privacy was said to be “founded in the Fourteenth Amendment’s concept of personal liberty.” *Id.* at 598 n.23. See also *Moore v. East Cleveland*, 431 U.S. 494, 499-503 (1977) (plurality).

20. 381 U.S. 479 (1965).
21. *Id.* at 481-84.
22. *Id.* at 486-87. “Because the opinion of the Court and the three separate concurrences are complex and often contradictory, *Griswold* does not afford any clear or simple answers. Focusing on one thought in one opinion or trying to explain *Griswold* in a sentence is almost necessarily manipulative or misleading.” Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670, 674 (1973).
23. 381 U.S. at 485.
24. *See infra* text accompanying note 189.
private use in one’s own home. Writing for six members of the Court, Justice Marshall stated that “fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy. . . . Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one’s own home.”26 The decision was ostensibly based upon the first amendment’s right to receive information and ideas, but the opinion seems to be based on the right to privacy: Some matters should not be regulated by the government, as they are private concerns.27 This interpretation was given support by the Court three years later in United States v. Orito,28 where a federal law making the transportation of obscene material across state lines a criminal offense was upheld. The Court limited the right to possess obscene material to one’s own home. Chief Justice Burger wrote for the Court that the “Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing, and education.”29

In Eisenstadt v. Baird30 the Court went significantly beyond its holding in Griswold and determined that a law banning the distribution of contraceptives to single persons was unconstitutional. “If the right of privacy means anything,” Justice Brennan wrote for the court, “it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”31

Roe v. Wade32 is of course the most controversial Supreme Court decision of our time. The Court declared that: 1) Women have an absolute right to obtain an abortion during the first trimester of pregnancy; 2) From the end of the first trimester until the time the fetus becomes viable, the state can regulate abortions only to protect the mother; and 3) When the fetus becomes viable, states can prohibit all abortions, except those necessary to preserve the life or health of the mother. The Court stated that only personal rights that are “fundamental” or “im-

26. Id. at 564-65.
29. Id. at 142.
31. Id. at 453 (emphasis in original).
plicit in the concept of ordered liberty" are protected by the "guarantee of personal privacy." Where fundamental rights are involved, laws will be upheld only when a "compelling state interest" is shown and when the law is "narrowly drawn to express only the legitimate state interests at stake."

IV. The Supreme Court on Homosexual Rights

As homosexuals began to assert themselves in society, the battle for gay rights reached the courts, and the legal argument relied on was often the right to privacy. "In law," wrote one commentator, "the turning point on gay rights was Griswold v. Connecticut." In the era of gay liberation, the Supreme Court was first confronted with homosexual rights in 1976.

In the landmark case of Doe v. Commonwealth's Attorney for City of Richmond, male homosexuals sought to have Virginia's sodomy statute declared unconstitutional as a violation of their constitutional rights to due process, freedom of expression, and privacy. A three-judge District Court upheld the law. The Supreme Court was then confronted with the case on its appellate docket. This offered the

33. Id. at 152.
34. Id. at 155.
37. An earlier memorandum opinion, ONE, Inc. v. Olesen, 355 U.S. 371 (1958), concerned a local postmaster's refusal to mail a homosexual magazine.
In 1967 the Court upheld the deportation from the United States of a homosexual man. Boutilier v. Immigration and Naturalization Service, 387 U.S. 118 (1967). The Court found that Congress' intent was that the term "afflicted with psychopathic personality" be interpreted as including homosexuals. The Court further found that the statute was not void for vagueness.

The statute remains on the books and continues to be enforced. See Fowler & Graff, Gay Aliens and Immigration: Resolving the Conflict between Hill and Longstaff, 10 U. Dayton L. Rev. 621 (1985).

39. Va. Code § 18.1-212 (1950): "Crimes against nature.—If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be confined in the penitentiary not less than one year nor more than three years." The statute was repealed in 1975 and replaced by Va. Code § 18.2-361.
Court an opportunity to clearly state its views on the subject, but it declined to do so. The Court chose not to see briefs or hear oral arguments; instead, it simply said "Judgement Affirmed." By not issuing an opinion the Court set the stage for a decade of confusion about the meaning of the summary affirmance. Every court throughout the country deciding upon the validity of a sodomy law has had to grapple with the enigma of \textit{Doe}.^{41}

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41. As if the unexplained affirmance by the Supreme Court on an issue of great constitutional import was not mysterious enough, the dilemma is made even worse by the poor quality of the district court's opinion.

First, parts of the opinion were ridiculously circular: "[I]f the State has the burden of proving that it has a legitimate interest in the subject of the statute or that the statute is rationally supportable, Virginia has completely fulfilled this obligation. Fundamentally, the State action is simply directed to the suppression of crime, whether committed in public or private." 403 F. Supp. 1199, 1202 (E.D. Va. 1975). In short, the law is constitutional because violations of it are illegal.

A second weakness of the decision is its distortion of Justice Harlan's dissent in \textit{Poe} v. \textit{Ullman}, 367 U.S. 497 (1961), on which it relies heavily. In \textit{Poe} the Court declined to consider the merits of a challenge to the Connecticut law banning the use of contraceptives which was declared unconstitutional four years later in \textit{Griswold}. Harlan believed the law to be unconstitutional. While Harlan did state that there can be criminal sanctions against private homosexual activity, he stressed the degree to which decisions on the constitutionality of state action reflect both precedent and the times. Constitutional interpretation, Harlan wrote, cannot be approached "in a literalistic way, as if we had a tax statute before us, but as the basic charter of our society, setting out in spare but meaningful terms the principles of government." \textit{Id.} at 540. There is a balance struck between respect for the liberty of the individual and the demands of organized society. "The balance of which I speak is the balance struck by the country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing." \textit{Id.} at 542. The plaintiff argued that many people now approve of the use of contraceptives by married people. Harlan commented:

> What they do not emphasize is that not too long ago the current of opinion was very probably quite the opposite, and that even today the issue is not free of controversy. Certainly, Connecticut's judgment is no more demonstrably correct or incorrect than are the varieties of judgment, expressed in law, on marriage and divorce, on adult consensual homosexual conduct, abortion and sterilization, on euthanasia and suicide.

\textit{Id.} at 546-47. What the \textit{Doe} court ignored was the flexibility of Harlan's jurisprudence. He believed that constitutional interpretation should reflect the times. The \textit{Doe} court, on the other hand, approached the Constitution in a "literalistic way," as if it had a "tax statute" before it.

The third and greatest flaw of the \textit{Doe} opinion is its failure to deal with the pri-
The confusion sown by the summary affirmance in \textit{Doe} became even more pronounced after the decision in \textit{Carey v. Population Services International}.\footnote{42} In \textit{Carey}, the Court declared unconstitutional a law which: 1) banned the distribution of contraceptives to anyone under sixteen; 2) limited to licensed pharmacists distribution to those over sixteen; and 3) banned the advertising or display of contraceptives. Justice Brennan wrote the majority opinion, the various sections of which were joined by a varying number of Justices.

Early in the opinion Justice Brennan (writing for five Justices) said that zones of privacy exist in which the government should not interfere. Among them are a person’s “interest in independence in making certain kinds of important decisions.”\footnote{43} Justice Brennan added that “the outer limits of this aspect of privacy have not yet been determined.”\footnote{44} A few pages later, writing for only four members, Justice Brennan stated in an infamous footnote that “the Court has not defini-

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\footnote{42} 431 U.S. 678 (1977).
\footnote{43} \textit{Id.} at 684 (quoting \textit{Whalen v. Roe}, 429 U.S. 589 (1977)).
\footnote{44} \textit{Carey}, 431 U.S. at 684.
tively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults.\textsuperscript{45}

Justice Powell, concurring in part and dissenting in part, took strong exception with what he viewed as the majority's determination that all state laws regulating adult sexual relations must withstand the strict scrutiny test. "[T]he extraordinary protection the Court would give to all personal decisions in matters of sex is neither required by the Constitution nor supported by our prior decisions."\textsuperscript{46}

Justice Brennan's reply to Justice Powell, in a section supported by six Justices, was that Justice Powell was incorrect in his understanding of the majority opinion. Justice Brennan explained that, "[a]s we observe [in the section referred to above], 'the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults,' and we do not purport to answer that question now."\textsuperscript{47} Justice White joined this section of Justice Brennan's opinion, and added that he did not regard it as "declaring unconstitutional state laws forbidding extramarital sexual relations."\textsuperscript{48}

Finally, Justice Rehnquist wrote in dissent that he could not "let pass without comment" the statement by the majority that the Court has not definitively answered the question of constitutional protection for private consensual sexual acts. "While we have not ruled on every conceivable regulation affecting such conduct the facial constitutional validity of criminal statutes prohibiting certain consensual acts has been 'definitively' established."\textsuperscript{49} Justice Rehnquist cited \textit{Doe v. Commonwealth's Attorney} as authority for this statement.

When the Court granted certiorari in \textit{New York v. Uplinger}\textsuperscript{50} it seemed ready to settle some of the issues involving the rights of homosexuals. The defendant had been charged with violating a statute which prohibited loitering "in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or

\textsuperscript{45} Id. at 694 n.17.

\textsuperscript{46} Id. at 703. Justice Powell added that strict scrutiny should be applied "only when the state regulation entirely frustrates or heavily burdens the exercise of constitutional rights in this area." Id. at 705. This of course somewhat begs the question; what are the "constitutional rights in this area?"

\textsuperscript{47} Id. at 688 n.5.

\textsuperscript{48} Id. at 702.

\textsuperscript{49} Id. at 718 n.2.

other sexual behavior of a deviate nature." The statute had been declared unconstitutional by the New York Court of Appeals. The Supreme Court accepted briefs from counsel and amici curiae and heard oral argument, but in a 5-4 vote ruled that certiorari had been “improvidently granted." In a per curiam opinion the majority said that the statute was related to a sodomy statute that the New York Court of Appeals had struck down in an earlier case, and that a decision on the loitering law could not be made without a consideration of the earlier decision. “[W]e are persuaded that this case provides an inappropriate vehicle for resolving the important constitutional issues raised by the parties.” Justice White, in a dissent joined by three other Justices, wrote that “[a]s I see it, the New York statute was invalidated on federal constitutional grounds, and the merits of that decision are properly before us and should be addressed.”

The most recent Supreme Court case involving homosexuality was *Board of Education of Oklahoma City v. National Gay Task Force,* which concerned the first amendment rather than the right to privacy. The Tenth Circuit Court of Appeals had declared unconstitutional a law providing for the dismissal of teachers who advocated homosexuality. The Supreme Court heard the case during the period in early-1985 when Justice Powell was ill, and his absence left the Court deadlocked 4-4. While some of the cases which Justice Powell missed were

53. *Uplinger,* 104 S. Ct. at 2334.
55. *Uplinger,* 104 S. Ct. at 2334.
56. *Id.* at 2335.
59. It is interesting to speculate how Justice Powell might have voted. However, an examination of his previous decisions in the area is inconclusive. On the one hand, he voted to uphold the constitutionality of the Virginia sodomy statute in *Doe,* and in *Carey* wrote that neither “precedent nor sound principles of constitutional analysis” justified the application of the strict scrutiny test whenever sexual freedom is affected by a state law. *Carey,* 431 U.S. at 705. On the other hand, Justice Powell voted with Justices Brennan, Marshall, Stevens, and Blackmun that certiorari had been improvidently granted in New York v. Uplinger. It seems that on this issue as on many others, Justice Powell (and to a lesser extent Justice Blackmun) controls the direction of the Court. See *National Law Journal,* Sept. 2, 1985, at S-4, col. 3.
rescheduled, this one was not.

Considering the summary affirmance in *Doe*, the finding that certiorari was improvidently granted in *Uplinger*, and the decision in *Board of Education of Oklahoma City v. National Gay Task Force* not to reschedule arguments, one cannot but agree that "[t]he Court apparently is avoiding a written opinion involving homosexual rights."\(^{60}\) This lack of leadership on an important issue has understandably left the lower courts at a loss on how to rule on this difficult constitutional issue.

V. Since *Doe*: Confusion in the Lower Courts

Lower courts have, not surprisingly, had difficulty determining the Supreme Court's views on constitutional protection for private consensual homosexual conduct. The issue has arisen infrequently in the lower courts in challenges to sodomy statutes; more commonly it arises in challenges to discharges from the military because of homosexuality.\(^{61}\) Some of the major cases that have dealt with the larger constitutional issue will now be examined.\(^{62}\)

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62. Cases which deal with homosexual rights but which do not consider even tangentially the right of privacy will not be considered. For example, *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1976) (not unconstitutional for a newspaper at a state college to refuse to run an ad for a gay student group, if the editors alone make the decision and if they are not pressured by the college administration); *National Gay Task Force v. Board of Education of Oklahoma City*, 729 F.2d 1270 (10th Cir. 1984) (law requiring that teachers be dismissed for “advocating” homosexuality is unconstitutional); *Matlovich v. Secretary of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978) (constitutionality of discharge of airman by Air Force cannot be determined without learning what the military’s reasons were); *benShalom v. Secretary of the Army*, 489 F. Supp. 964 (E.D. Wis. 1980) (dismissal from military for homosexual orientation—as opposed to actual conduct—violates first amendment rights); *Krugler v. United States Army*, No. 83-C8265 (E.D. Ill. Sept. 27, 1984) (available August 29, 1985, on LEXIS, Genfed library, Newer file) (suit to contest dismissal from the military is dismissed for being “premature,” as plaintiff had not exhausted her administra-
Cases decided soon after Doe found the Supreme Court's summary affirmance to be binding. In Lovisi v. Slayton a husband and wife who allowed a third person into their bedroom were convicted of sodomy. The right to privacy was lost, the Fourth Circuit Court of Appeals declared, when that third person became involved. In an addendum written after Doe was decided, the Lovisi court found that Doe "necessarily confined the constitutionally protected right of privacy to heterosexual conduct, probably even that only within the marital relationship." 64

A state university's refusal to give full recognition to a gay student group was found to be unconstitutional in Gay Alliance of Students v. Matthews.65 The court said that it had "little doubt that the University could constitutionally regulate [homosexual] conduct," but there was no indication that the organization was engaged in such conduct.66

A few years after Doe some state courts, perhaps feeling more independent than the lower federal courts, struck down state sodomy laws. Often the decisions were based on federal constitutional grounds. In State v. Saunders67 the New Jersey Supreme Court found the state's fornication law to be unconstitutional. "[T]he conduct statutorily defined as fornication involves, by its very nature, a fundamental choice. Thus, the statute infringes upon the right to privacy."68 The court said that its decision was "consistent with the tenor and thrust" of the recent United States Supreme Court decisions. It dealt with Doe by stating that it was "not inclined to read this controversial decision too broadly. Though the lower court's decision is technically binding as a precedent, . . . it does not necessarily represent the reasoning of the Court. . . . Furthermore, the significance of Doe . . . is a matter of

tive remedies). Also not discussed are attacks on sodomy statutes as being unconstitutionally vague. See Franklin v. State, 257 So. 2d 21 (Fla. 1971) (law punishing "[w]hoever commits the abominable and detestable crime against nature, either with mankind or with beast" is unconstitutionally vague). The Florida Supreme Court later upheld the constitutionality of Fla. Stat. Ann. § 800.02 (West 1980), which prohibits "unnatural and lascivious acts with another person." Thomas v. State, 326 So. 2d 413 (Fla. 1976) and Johnsen v. State, 332 So. 2d 69 (Fla. 1976).

64. Id. at 352.
65. 544 F.2d 162 (4th Cir. 1976).
66. Id. at 166.
68. Id. at N.J. 213, A.2d 339.
some dispute within the Court [Carey is cited]."69 The decision may also have been based on rights under the New Jersey Constitution.70 The next year a New Jersey Superior Court stated its view that the Saunders opinion had impliedly declared the state’s sodomy law to be unconstitutional.71

Not long after the Saunders decision New York joined New Jersey in refusing to be bound by Doe. In People v. Onofre72 the New York Court of Appeals found that the state’s sodomy law violated the federal Constitution’s right to privacy and right to equal protection. The court said of Doe that “the affirmance by the Supreme Court of the District Court’s dismissal of the action may have been predicated on a lack of standing on the part of the plaintiffs.”73

The same year as Onofre, the Pennsylvania Supreme Court ruled unconstitutional the state’s “Voluntary Deviate Sexual Intercourse” statute.74 In Commonwealth v. Bonadio75 the court said that the law “has only one possible purpose: to regulate the private conduct of consenting adults. Such a purpose, we believe, exceeds the valid bounds of the police power while infringing the right to equal protection of the laws guaranteed by the Constitution of the United States and of this Commonwealth.”76 The law, “despite the fact that it provides punishment for what many believe to be abhorrent crimes against nature and perceived sins against God, is not properly in the realm of the temporal

69. Id. at N.J. 216, A.2d 340-41.
70. Id. After discounting the effect of Doe and discussing the U.S. Supreme Court’s decisions on privacy, the New Jersey Court added that its decision was also “impelled” by its own prior decisions on privacy. “It is now settled that the right of privacy guaranteed under the Fourteenth Amendment has an analogue in our State Constitution.” Id. at N.J. 216, A.2d 341.
73. Id., 51 N.Y.2d at 493, 415 N.E.2d at 943, 434 N.Y.S.2d at 954. The view that the Supreme Court’s decision may have been based on a lack of standing is not rare. See infra Section IV(C). A “companion” loitering statute was struck down by the Court of Appeals in People v. Uplinger, 58 N.Y.2d 936, 447 N.E.2d 62, 460 N.Y.S.2d 947 (1983), cert. dismissed sub nom. New York v. Uplinger, 104 S. Ct. 2332 (1984).
76. Id. at 95, 415 A.2d at 50.
police powers."77 Despite the fact that the decision was based in part on federal constitutional law, the court failed to mention Doe. More surprising are the facts of the case: Plaintiff Bonadio was the cashier at the Penthouse Theater, where "exotic dancer" Mildred Kannitz (a.k.a. "Dawn Delight") was arrested for engaging in sexual acts with members of the audience.78 The dancers, theater owner, and participating members of the audience were also arrested. The sexual acts involved were arguably both public and commercial, yet the court ruled that the statute was facially unconstitutional.79

Questioning of the precedential effect of the Doe summary affirmance became increasingly common, especially in light of the indication in Carey that the Supreme Court had not yet "definitively" settled the issue of constitutional protection for private sexual acts.80 For example, a federal district court in benShalom v. Army stated in dictum that "the law remains unsettled as to whether private sexual conduct between consenting adults is protected by the right to privacy. . . ."81

Whenever possible, federal courts avoided the issue. In Beller v. Middendorf82 two men and one woman were discharged from the Navy for separately engaging in homosexual acts. The Ninth Circuit Court of Appeals upheld the discharges, but stated that "this case does not require us to address whether consensual private homosexual conduct is a fundamental right. . . ."83 The nature of the employer—the Navy—was crucial to the court's decision.84

77. Id. at 96, 415 A.2d at 50.
78. Id. at 101, 415 A.2d at 52 (Nix, J., dissenting).
79. Id. at 102, 415 A.2d at 53 (Nix, J., dissenting) ("Here the sex acts were performed in public and in return for monetary compensation") (emphasis in the original).
81. benShalom v. Secretary of the Army, 489 F. Supp. 964, 976 (E.D. Wis. 1980).
82. 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 and 454 U.S. 855 (1981).
83. Id. at 807.
84. Id. at 810. The court explained the narrow scope of its decision:
[W]e can concede arguendo that the reasons which led the [Supreme] Court to protect certain private decisions intimately linked with one's personality . . . and family living arrangements beyond the core nuclear family . . . suggest that some kinds of government regulation of private consensual homosexual behavior may face substantial constitutional challenge. . . . The instant cases, however, are not ones in which the state seeks to use its criminal processes to coerce persons to comply with a moral

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A bold exception to the trend toward avoiding the issue was *Baker v. Wade*, in which a district court for the Northern District of Texas found that the Texas deviate sexual intercourse law was an unconstitutional violation of the right to privacy and the right to equal protection. "The right to privacy . . . extend[s] to private sexual conduct between consenting adults (whether heterosexual or homosexual). . . ."86

More common was the approach of the Eighth Circuit Court of Appeals in *United States v. Lemons*. The court upheld the conviction, under a state sodomy statute, of a man who engaged in sexual acts with another man in a public restroom. The Court declined to consider a facial challenge to the law, and thereby avoided having to determine the meaning of *Doe and Carey*. "We only decide whether the Arkansas sodomy statute as applied to sexual acts between members of the same sex in a public restroom—the circumstances of Lemons' conviction—is constitutional."88 The court emphasized that it "did not reach the question whether the statute is constitutional under all hypothetical circumstances."89 Judge Fagg, concurring, wrote that the "issue of Lemons' right to make private affectional choices is not involved in our holding."90

The Tenth Circuit acted similarly in *Rich v. Secretary of the Army*.91 The court upheld a serviceman's discharge from the Army for precept even if they are consenting adults acting in private without injury to each other. . . . The nature of the employer—the Navy—is crucial to our decision.

*Id.*

The court reaffirmed its rationale in Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir.), cert. denied, 454 U.S. 864 (1981), and in Watkins v. United States Army, 721 F.2d 687 (9th Cir. 1983) (Norris, J., concurring at 691: *Beller* is binding, but "[t]o me, the Army's current bias against homosexuals is no less repugnant to fundamental constitutional principles than was its long-standing prejudice against minority servicemen").

85. 553 F. Supp. 1121 (N.D. Texas 1982), rev'd en banc, 769 F.2d 289 (5th Cir. 1985). See infra text accompanying notes 101 to 106. The district court opinion is perhaps the best yet written on the subject of homosexuality. Scientific, psychological, sociological and religious perspectives on homosexuality are considered. In addition, the opinion is unique in that it discusses what it is like to be homosexual in America. *Id.* at 1126-28.


87. 697 F.2d 832 (8th Cir. 1983).

88. *Id.* at 834 n.4.

89. *Id.*

90. *Id.* at 839.

91. 735 F.2d 1220 (10th Cir. 1984).
fraudulently stating on his application that he was not homosexual. Once again the constitutional issue was avoided:

[I]t is unnecessary for us to decide whether there is any constitutional protection for private consensual homosexual conduct among adults. Even if we assume, arguendo, that the constitutional right to privacy protects some private consensual homosexual activity among adults, it does not follow that the Army could not exclude homosexuals.\textsuperscript{92}

The court noted that whether private consensual homosexual activity is constitutionally protected “appears to be an unsettled question” on which “the authorities have not been in agreement...”\textsuperscript{93}

In recent years, then, a consensus had emerged among the lower courts: Whenever possible avoid the question of constitutional protection for private consensual homosexual acts. There was general agreement that the issue was unsettled.\textsuperscript{94}

The D.C. Circuit Court of Appeals, in \textit{Dronenburg v. Zech},\textsuperscript{95} departed from the consensus and considered the constitutional issue head-on. The facts were like those in many other cases: A serviceman was discharged from the Navy for engaging in a homosexual act. Instead of narrowly upholding the discharge, the Circuit Court, in an opinion by Judge Robert Bork, reviewed the Supreme Court’s opinions on privacy. Judge Bork was very critical of the line of cases beginning with \textit{Griswold},\textsuperscript{96} finding that no clear legal standard had evolved over time. “Aside from prior listed holdings, the Court provided no explanatory principle that informs a lower court how to reason about what is and what is not encompassed by the right to privacy.”\textsuperscript{97}

Judge Bork wrote

\textsuperscript{92.} \textit{Id.} at 1228 (emphasis in original).
\textsuperscript{93.} \textit{Id.} at 1228 n.8.
\textsuperscript{94.} See, more generally, City of North Muskegon v. Briggs, 105 S. Ct. 3535, 3536 (1985) (certiorari denied—but leave to proceed \textit{in forma pauperis} granted—in a case in which a man was awarded damages after being fired from a police department for being a married man living with a married woman who was not his wife; White, J., dissenting from denial of cert, wrote that the lower courts are in disagreement on the issue of constitutional protection for extra-marital sexual activity).
\textsuperscript{95.} 741 F.2d 1388, \textit{reh’g en banc denied}, 746 F.2d 1579 (D.C. Cir. 1984).
\textsuperscript{96.} Griswold v. Connecticut, 381 U.S. 479 (1965).
\textsuperscript{97.} \textit{Dronenburg}, 741 F.2d at 1395. Judge Bork’s statement is not correct. See the discussion of “intimate associations” in Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984). \textit{See also infra} text accompanying notes 192 to 198. \textit{Roberts} was decided a month and a half before the \textit{Dronenburg} decision. Perhaps Judge Bork was not famil-
that the privacy cases protected activities related to marriage, procreation, contraception, family relationships, and child rearing and education. "It need hardly be said that none of those covers a right to engage in homosexual conduct." In conclusion, Judge Bork wrote that "we can find no constitutional right to engage in homosexual conduct, and . . . , as judges, we have no warrant to create one." The opinion was the subject of intense criticism from other judges in the D.C. Circuit and from academic critics.

A recent Fifth Circuit decision on constitutional protection for private homosexual conduct was a throw-back to the cases decided almost a decade earlier in that Doe was found to be fully binding. The Court of Appeals sitting en banc in Baker v. Wade found in a 9-7 decision that the Texas sodomy statute did not violate the Constitutional Right with the case.

98. Id. at 1395-96.
99. Id. at 1397.
100. See Dronenburg v. Zech, 746 F.2d 1579 (D.C. Cir. 1984). Dissenting from the denial of a rehearing en banc, Judges Spottswood W. Robinson, Wald, Mikva, and Harry T. Edwards wrote that the "panel's extravagant exegesis on the constitutional right to privacy was wholly unnecessary to decide the case before the court." Id. at 1580.

We find particularly inappropriate the panel's attempt to wipe away selected Supreme Court decisions in the name of judicial restraint. Regardless of whether it is the proper role of lower federal courts to 'create new constitutional rights,' . . . surely it is not their function to conduct a general spring cleaning of constitutional law. Judicial restraint begins at home.

Id. "Instead of conscientiously attempting to discern the principles underlying the Supreme Court's privacy decisions, the panel has in effect thrown up their hands and decided to confine those decisions to their facts." Id.

The case could have been decided on several narrow grounds. First, there is a judicial deference to military regulations, as in many of the military cases cited above. Second, the homosexual activity in Dronenburg took place on military premises. Third, the acts were between a petty officer and a lower-ranked enlisted man. Note, Dronenburg v. Zech: The Wrong Case for Asserting A Right of Privacy for Homosexuals, 53 N.C.L. REV. 749, 766 (1985). See also Note, Dronenburg v. Zech: Judicial Restraint or Judicial Prejudice?, 3 YALE L. & POLICY REV. 245 (1985); Saphire, Gay Rights and the Constitution: An Essay on Constitutional Theory, Practice, and Dronenburg v. Zech, 10 U. DAYTON L. REV. 767 (1985); and Note, Dronenburg v. Zech: Sexual Preference Discrimination Sanctioned in the Name of Judicial Restraint 5 PACE L. REV. 847 (1985).

101. See supra text accompanying notes 63 to 66.
102. Baker v. Wade, 769 F.2d 289, reh'g denied, 774 F.2d 1285 (5th Cir. 1985).
103. TEX. PENAL CODE ANN. § 21.06 (Vernon 1974). The law makes criminal
tion. In reversing a district court decision, the majority devoted most of its opinion to procedural matters. The discussion of the constitutional issue was limited to two paragraphs. The majority cited no Supreme Court privacy decisions other than Doe; instead it simply stated that it considered Doe "to be binding upon us for the reasons stated" by the Dronenburg court and in the dissent in Hardwick v. Bowers. The court said that it would follow Doe until the Supreme Court issues an "unequivocal statement that Doe no longer controls." It is interesting to recall, however, that the Dronenburg court did not base its decision fully on Doe. Judge Bork examined the Supreme Court's decisions on privacy. The Baker court decided the issue much more narrowly, and did not consider the merits at all; it declared that it was foreclosed from such consideration by Doe.

The lower courts are obviously deeply divided on the question of engaging "in deviate sexual intercourse with another individual of the same sex." "Deviate sexual intercourse" is defined as "any contact between any part of the genitals of one person and the mouth or anus of another." TEX. PENAL CODE ANN. § 21.01 (1) (Vernon 1974).

The case has an interesting history. The law was first declared unconstitutional in a far-reaching district court opinion. Baker v. Wade, 553 F. Supp. 1121 (N.D. Texas 1982). The Texas Attorney General decided not to appeal, after which the District Attorney of Potter County, Texas, petitioned the court for permission to appeal the decision. The Circuit Court ruled that the appeal was proper, but there was vigorous dissent. Judge Alvin B. Rubin, writing for the seven dissenters, said of the majority's allowing the District Attorney to appeal:

Determined to uphold the constitutionality of a Texas statute whatever obstacles bar the way, the majority opinion tramples every procedural rule it considers. . . . If this en banc decision is precedent, it assuredly rewrites the adjective law. If it is not intended to be precedential, but only a special life-support contrivance, undertaken for the one purpose of salvaging the statute, it denies equal justice both to the litigants before us and to those who, in the future, will be denied equally extreme judicial measure. Baker, 769 F.2d at 293. The seven dissenters, with one exception, expressed no opinion on the constitutional issues. They believed that the lower court decision should stand because the District Attorney did not have standing to bring the appeal.

The Fifth Circuit's denial of the petition for a rehearing en banc, 774 F.2d 1285, contains a longer discussion of the constitutional issue. Judge Reavley, writing for the Court, said that the issue of constitutional protection for private sexual acts should be decided by the legislature, not the courts. "Moral issues should be resolved by the people, and the laws pertaining thereto should be written or rescinded by the representatives of the people." Id. at 1287.

Baker, 769 F.2d at 292.

This is based on a misreading of the Supreme Court's decisions on the precedential weight of summary affirmances. See infra note 178.
constitutional protection for private homosexual conduct. Many courts have avoided the issue completely. The Fifth Circuit, in *Baker*, found *Doe* to be fully binding. The *Dronenburg* court seemed to find that *Doe* was not binding, and decided that the right to privacy did not extend to homosexual acts. The Eleventh Circuit, in *Hardwick v. Bowers*, staked out a new position in the controversy.

**VI. Hardwick v. Bowers**

After years of judicial evasions of the issues raised in *Doe*, the District of Columbia Circuit Court of Appeals decided in *Dronenburg* that it was time to consider the merits of the question of constitutional protection for private consensual homosexual conduct.107 The *Dronenburg* court found that no constitutional protection of homosexual conduct existed.108 A few months later a panel of the Eleventh Circuit Court of Appeals considered the same question but reached the opposite conclusion and found that the right to privacy was indeed implicated by laws regulating private consensual homosexual conduct. *Hardwick v. Bowers*108 thus became the first Court of Appeals decision in which such a constitutional right was declared to exist.110

107. The Supreme Court's failure to address the constitutional issue in New York v. Uplinger, 104 S. Ct. 2332 (1984), may have contributed to the willingness of the *Dronenburg* court (and later the *Hardwick* court) to find *Doe* to be of little precedential weight.

108. *Dronenburg*, 741 F.2d at 1397.

109. 760 F.2d 1202, *reh'g en banc denied*, 765 F.2d 1123 (11th Cir.), *cert. granted*, 106 S. Ct. 342 (1985). The district court, in an unpublished opinion by Judge Robert H. Hall, dismissed Hardwick's suit as failing to state a claim on which relief could be granted, in light of the Supreme Court's summary affirmance in *Doe*. On appeal the Circuit Court found that *Doe* is not binding precedent and that there is constitutional protection for private consensual homosexual conduct. The case was remanded with the instruction that the district court should uphold the sodomy law only if the state could demonstrate a compelling interest for the law and that the law was drawn as narrowly as possible in accomplishing that state interest. *Hardwick*, 760 F.2d at 1213. The determination that a compelling state interest must be shown—that is, that the law must meet the strict scrutiny test mentioned in *Roe v. Wade*, 410 U.S. 113, 155 (1973)—is important. "[T]he outcome of a case depends largely upon which standard of review the court uses . . . ." Note, *Constitutional Protection of Private Sexual Conduct Among Consenting Adults: Another Look at Sodomy Statutes*, 62 *Iowa L. Rev.* 568, 579 (1976). It is very difficult for a law to survive the strict scrutiny test.

110. Judge Frank Johnson wrote the opinion for a divided court. Senior Judge Elbert P. Tuttle concurred. Judge Phyllis A. Kravitch dissented on the ground the *Doe*
Before reaching the constitutional question the *Hardwick* court had to consider four questions: 1) whether Hardwick had standing to sue; 2) how much precedential weight is generally given to summary affirmances; 3) what the Supreme Court actually decided in *Doe*; and 4) whether decisions since *Doe* have released the lower courts from following the summary affirmation.

**A. Hardwick's Standing to Sue**

A threshold question in every lawsuit in the federal courts is whether there is a "case or controversy." If the plaintiff lacks standing the court does not have the authority to decide on the merits of the case. All the judges who considered *Hardwick v. Bowers* (the district court judge and both the majority and the dissenter in the court of appeals) found that Hardwick met the Constitutional requirement of standing. Nevertheless, the case raises some difficult questions which must be considered. While the State of Georgia is not contesting standing in the Supreme Court, the Court can raise the issue on its own. Considering the Court's reticence to decide gay rights cases, it would not be surprising if the Court vacated the judgement below on the ground that Hardwick lacked standing.

To gain standing a plaintiff must at a minimum show that: 1) he personally suffered some actual or threatened injury; 2) the injury was the result of the putatively illegal conduct of the defendant; and 3) the injury is likely to be redressed by a favorable decision. Past injury is was controlling. She stated, though, that were it not for *Doe* she too would have found a constitutional protection for private consensual homosexual acts. *Hardwick*, 760 F.2d at 1213 n.1.


112. *Hardwick*, 760 F.2d at 1204-07. Co-plaintiffs with Hardwick were John and Mary Doe, a heterosexual couple. They claimed that the sodomy law left them "uncertain" of their legal rights. *Id.* at 1206. Both the district and circuit courts found that the Does did not have standing.

113. Phone conversation with Michael Hobbs, Georgia Senior Assistant Attorney General, August 12, 1985. See also Petition for Writ of Certiorari.

114. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). In addition to the constitutional requirements there are prudential considerations in determining whether a plaintiff has standing: 1) The plaintiff should assert his own rights, rather than the rights of others, 2) Generalized grievances shared with the rest of society will be left to the representative branches of government, and 3) The complaint should concern interests protected by statute or Constitution. *Id.* at 474-75.
not sufficient to gain standing "if unaccompanied by any continuing, present, adverse effects."115 Past wrongs may, however, provide an indication of the likelihood of future harm.116 A person challenging the constitutionality of a statute need not expose himself to arrest, but there must be a threat of prosecution that is "credible" rather than "imaginary or speculative."117

In recent years the Supreme Court has restricted its view of standing. This approach, it has been argued, is "representative of the Court's general disapproval of public law litigation and reflects the Court's desire to limit the role of the federal courts."118

Perhaps the most important of these recent cases is Lyons v. City of Los Angeles.119 The facts in Lyons are similar to those in Hardwick in that the plaintiffs in both cases challenged governmental actions which they had previously been exposed to, but which there was no guarantee they would ever again have to face. In Lyons the plaintiff was stopped for a traffic violation. Lyons claimed not to have offered any resistance, but nevertheless was subjected to a choke hold which caused him to temporarily become unconscious. Lyons requested injunctive relief, but the Supreme Court ruled that he lacked standing. Justice White wrote in the 5-4 decision "[t]hat Lyons may have been illegally choked . . . does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part."120 The plaintiff's fear of repeated injury is irrelevant. "It is the reality of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions."121 "Absent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction that any other citizen of Los Angeles . . . ," and the federal courts cannot entertain a claim by a citizen who simply asserts that certain practices of law enforcement officers

116. Id. at 496.
120. Id. at 105.
121. Id. at 107 n.8 (emphasis in original).
are unconstitutional.  

In *Hardwick* the majority found that four factors combined to give Hardwick standing. First, the prior arrest showed that Hardwick’s fear of future prosecution is reasonable. Second, there was a “continuing resolve on the part of the State to enforce the sodomy statute against homosexuals. . . .” Third, Hardwick stated that “his arrest resulted from a situation in which he regularly places himself, one that will recur often in the future.” Fourth, Hardwick’s homosexual “status” suggests that his stated desire to violate the statute is sincere, rather than merely an attempt to gain standing.

The *Hardwick* majority considered the above factors and concluded that Michael Hardwick had standing to challenge Georgia’s sodomy statute. Another court, looking at the same facts, could easily come to the opposite conclusion. It does seem unlikely that the police will once again stumble upon Mr. Hardwick *in flagrante delicto*. A more convincing analysis of Hardwick’s standing can be gained by comparing his case with *Lyons*. As the Supreme Court recently stated, “[i]n many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in

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122. *Id.* at 111.

123. *Hardwick*, 760 F.2d at 1205. This might appear to contradict the Supreme Court’s statement that fear of repeated injury is irrelevant. *See supra* text accompanying note 121. However, the *Hardwick* majority was referring to a reasonable fear, which seems to be what the Supreme Court was concerned with.

124. *Hardwick*, 760 F.2d at 1206. The court bases this statement on Hardwick’s assertion that the Atlanta police enforce the statute “in a way that places all practicing homosexuals in imminent danger of arrest.” *Id.* at 1205. The court noted that “[b]ecause Hardwick appeals from a dismissal for failure to state a claim on which relief can be granted, the allegations of his complaint must be taken as true.” *Id.* at 1205 n.4.

Hardwick said in a brief to the court that the Georgia sodomy statute is routinely and consistently enforced. He claimed that had he been permitted to proceed with discovery he “could show that there are people now serving time in prison for sodomy.” Appellants’ Reply Brief at 3. The court does not mention this seemingly important assertion.

125. *Hardwick*, 760 F.2d at 1205.

126. *Id.* “While a plaintiff hoping only to challenge a statute might overestimate his or her willingness to risk actual prosecution, a plaintiff who genuinely desires to engage in conduct regardless of its legal status presents a court with a more plausible threat of future prosecution.” *Id.*

127. The Does (the heterosexual co-plaintiffs) were found to lack standing. *Id.* at 1206-07.
prior standing cases."\textsuperscript{128}

There is a clear similarity between the facts in \textit{Lyons} and those in \textit{Hardwick}. As mentioned above, each plaintiff sued the government on constitutional grounds, and each based his claim to standing in considerable measure on a prior incident which is not very likely to recur. There are, however, substantial differences between the two cases.\textsuperscript{129}

First, Hardwick continues to suffer from the stigma of his criminal status.\textsuperscript{130} His stigmatic injury stands separate from his arrest. Whether or not he had been arrested this would be the case. His arrest simply adds to the injury. In contrast, there was no allegation that Lyons had done anything seriously improper. Neither the Los Angeles police nor the laws of California suggest that Lyons had committed any offense more serious than a traffic violation.

Second, while Lyons is no more likely than any other Los Angeles resident to have the choke hold applied to him, Hardwick is much more likely than the average Georgian to be arrested for violating the State's sodomy statute. Hardwick is a regular violator of the law, and the police are aware of this. In addition, it seems reasonable to believe that the law, which facially applies to heterosexual as well as homosexual acts, is more likely to be enforced against homosexuals. In sum, there are few people in the state of Georgia who are known to violate the


\textsuperscript{129} One difference that will be only briefly mentioned is that Lyons asked for injunctive relief, while Hardwick requested only a declaratory judgment. Appellants' Reply Brief at 4. It is unclear whether \textit{Lyons} also applies to declaratory judgments. In \textit{Lyons} the Court relied upon cases dealing with declaratory judgments. "It bears noting that the \textit{Lyons} Court's reliance on declaratory judgment decisions has caused at least one district court to find that . . . '\textit{Lyons} fully applies to declaratory judgment actions.'" Note, \textit{City of Los Angeles v. Lyons}, 30 N.Y.L. SCH. L. REV. 165, 170 n.24 (1985). "Arguably the Court implicitly approved the application of \textit{Lyons} to declaratory judgments in \textit{Kolender v. Lawson}, 461 U.S. 352 (1983)." \textit{Id.}

For an argument that one cannot logically claim both that Hardwick lacks standing and that \textit{Doe} was decided on the merits, see infra note 160.

\textsuperscript{130} The Supreme Court has recognized that "stigma" alone can be the basis of standing. \textit{See} Heckler v. Matthews, 104 S. Ct. 1387 (1984), and \textit{Allen}, 104 S. Ct. at 3315. In \textit{Allen}, Justice O'Connor wrote for the Court that "[t]here can be no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing." \textit{Allen}, 104 S. Ct. at 3327. "The stigmatic injury thus requires identification of some concrete interest with respect to which respondents are personally subject to discriminatory treatment." \textit{Id.} at 3328 n.22.

For more on Hardwick's stigmatic injury, \textit{see supra} note 7 and accompanying text.
State's sodomy law; none are better known than Michael Hardwick.

Third, the theoretical basis for Lyons does not apply to the facts in Hardwick. The essence of Lyons (and of earlier similar decisions such as O'Shea v. Littleton and Rizzo v. Goode) is that the judiciary must allow the executive branch wide latitude in administering the laws. In O'Shea residents of Cairo, Illinois, claimed that city officials used racially discriminatory practices in bond setting, sentencing, and jury fee payments. In Rizzo, citizens filed suit against city officials to obtain injunctive relief against abuses by the Philadelphia police. In Lyons, choke holds applied by police to peaceful traffic offenders were challenged. In none of these cases was there a claim that any law was unconstitutional.

Justice White wrote in O'Shea that it was significant that the plaintiff did not allege that any criminal statute was unconstitutional facially or as applied, or “that respondents have been or will be improperly charged with violating criminal law.” A “reluctance to interfere with the normal operation of state administration of its criminal laws in the manner sought by respondents strengthens the conclusion” that the plaintiffs lacked standing. In Lyons, Justice White said that “recognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the state’s criminal laws in the absence of irreparable injury which is both great and immediate.”

What was strongly implied in O'Shea and Lyons was explicitly stated in Allen v. Wright. Justice O'Connor wrote that in O'Shea, Rizzo, and Lyons the plaintiffs “sought injunctive relief directed at certain systemwide law enforcement practices. . . . Animating this Court’s holdings was the principle that ‘[a] federal court . . . is not the proper forum to press’ general complaints about the way in which government goes about its business.” The opinion continued:

When transported into the Art. III context, that principle [that government has wide latitude to dispatch its own internal affairs], grounded as it is in the idea of separation of powers, counsels

133. O'Shea, 414 U.S. at 496.
134. Id. at 498-99.
135. Lyons, 461 U.S. at 112.
137. Id. at 3330 (quoting Lyons, 461 U.S. at 111-12).
against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. The Constitution, after all, assigns to the Executive Branch and not the Judicial Branch, the duty to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3.138

Justice Stevens, in dissent, argued that standing decisions should not be based upon whether the relief sought by the plaintiff "would intrude upon the prerogatives of other branches of government; the possibility that the relief might be inappropriate does not lessen the plaintiff's stake in obtaining that relief." 139 The majority responded that it disagreed with Justice Stevens' "suggestions that separation of powers merely underly standing requirements, have no role to play in giving meaning to those requirements, and should be considered only under a distinct justiciability analysis. . . . [We] rely on separation of powers principles to interpret the 'fairly traceable' component of the standing requirement." 140

*Lyons* is clearly inspired by a judicial reluctance to interfere with the way the executive branch enforces the laws. The Court is willing to grant the executive branch a great deal of leeway. In *Hardwick*, by contrast, executive and administrative actions are not at issue. Hardwick does not claim that the Georgia sodomy law is unconstitutionally administered; instead, he argues that the law itself is unconstitutional. The issue is not the way the law is enforced, but the validity of the law itself. In sum, the concern for federalism that underlies *O'Shea, Rizzo*, and *Lyons* is not at issue in *Hardwick*. Applying the law of *Lyons* to the facts in *Hardwick* would require the separation of the doctrine from its theoretical foundation.

*Hardwick*, then, can be distinguished from *Lyons*. The narrow test for standing stated in *Lyons* is not applicable to *Hardwick*. Michael Hardwick, more so than any other person in Georgia, is injured by the State's sodomy law. He has been arrested for violating it, the police are aware that he will continue to violate it, and he continues to suffer from the stigma of being branded a criminal. These factors combine to form a reasonable argument that Hardwick has suffered some injury,

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138. *Id.* at 3330.
139. *Id.* at 3346.
140. *Id.* at 3330 n.26.
"actual or threatened," and has standing to sue.

B. The Precedential Effect of Summary Affirmances

A tenet basic to the American judicial system is that lower courts must comply with and follow the decisions of the United States Supreme Court. This truism is, however, often easier to state than to put into practice. When the Court speaks less than clearly the precise obligation of lower courts becomes uncertain. The obligation of the lower courts is perhaps never more difficult to determine than when, as in Doe, the Court's decision was a mere summary affirmation.

In finding that Doe was not binding precedent, the Hardwick majority had to consider the precedential weight of summary affirmances. As the Supreme Court's workload has increased in recent years summary affirmances have become more common. Accompanying this increase has been a debate about whether summary affirmances carry the same precedential weight as cases which are decided after briefs and oral argument and which are explained by an opinion of the Court. The Court has yet to comprehensively discuss the issue, but several themes have become apparent:

1) Summary affirmances have precedential weight, but not as much as fully considered and explained opinions.142
2) Lower courts must use care in interpreting what issues the Supreme Court decided in declaring a summary affirmation.143
3) Summary affirmances affirm the judgment below, but not necessarily the reasoning of the lower court.144

141. Valley Forge Christian College, 454 U.S. at 472.
142. See Edelman v. Jordan, 415 U.S. 651, 671 (1974) (summary affirmances "obviously" have precedential value, but "[e]qually obviously they are not of the same precedential value as would be an opinion of this Court treating the question on the merits"); Hicks v. Miranda, 422 U.S. 332, 344 (1975) (summary affirmances are decisions on the merits, and must be followed by the lower courts until the Supreme Court says otherwise or until "doctrinal developments" indicate otherwise); Tully v. Griffin, Inc., 429 U.S. 68, 74 (1976) (a summary affirmation is not of the same precedential weight as a decision on the merits); Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 180-81 (1979) ("summary affirmances have considerably less precedential value than an opinion on the merits").
144. The District Court erred in believing that our affirmation in [a previ-
4) Summary affirmances “without doubt reject the specific challenges presented in the statement of jurisdiction” and “prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.”

5) Summary affirmances cease to become binding precedents for the lower courts “when doctrinal developments indicate otherwise.”

6) Summary affirmances do not have the same authority within the Supreme Court as do fully considered opinions. “Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established.”

ous case] adopted the reasoning as well as the judgment of the three-judge court in that case. . . . Because a summary affirmation is an affirmation of the judgment only, the rationale of the affirmation may not be gleaned solely from the opinion below.

Mandel v. Bradley, 432 U.S. 173, 176 (1977). See also Fusari v. Steinberg, 419 U.S. at 391-92 (Burger, C.J., concurring: “When we summarily affirm, without opinion, the judgment of a three-judge District Court we affirm the judgment but not necessarily the reasoning by which it was reached.”); Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 476-77 n.20 (1979) (“A summary dismissal of an appeal represents no more than a view that the judgment appealed from was correct as to those federal questions raised and necessary to the decision. It does not, as we have continued to stress . . . necessarily reflect our agreement with the opinion of the court whose judgment is appealed.”); Zobel v. Williams, 457 U.S. 55, 64 n.13 (1982) (“[S]ummary affirmation by this Court is not to be read as an adoption of the reasoning supporting the judgment under review.”).

145. Mandel, 432 U.S. at 176. See also Tully, 429 U.S. at 74 (“The correctness of that holding was placed squarely before us by the Jurisdictional Statement that the appellants filed in this Court in [an earlier case].”); Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. at 476-77 n.20 (summary dismissals are rulings on the merits in that they reject the challenges presented in the jurisdictional statement).

146. Hicks, 422 U.S. at 344, quoting Port Authority Bondholders Protective Committee v. Port of New York Authority, 387 F.2d 259, 263 n.3 (2d Cir. 1967).

147. Metromedia v. San Diego, 453 U.S. 490, 500 (1981) (summary affirmances “do not present the same justification for declining to reconsider a prior decision as do decisions rendered after argument and with full opinion.”)

148. Fusari, 419 U.S. at 392 (Burger, C.J., concurring). See also Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 476-77 n.20 (1979) (“It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of a previous summary action.”).
There are two arguments, then, available to those who wish to find that \textit{Doe} has no precedential effect: 1) The summary affirmance in \textit{Doe} did not decide the issue of constitutional protection for private consensual homosexual acts, and 2) Doctrinal developments have obviated \textit{Doe}. The majority in \textit{Hardwick} argued both.

C. \textit{The Issues Decided in Doe}

Judge Frank Johnson wrote in the \textit{Hardwick} majority opinion that the effect of a summary affirmance is determined by examining the jurisdictional statement and the issues necessarily decided.\textsuperscript{149} In \textit{Doe} the jurisdictional statement\textsuperscript{150} referred only to the constitutional issues, but Judge Johnson argued that the Supreme Court may not have reached any of those issues. "[T]he constitutional issues presented in \textit{Doe} were issues listed in the jurisdictional statement but not necessary to the disposition of that case."\textsuperscript{151} In determining the precedential effect of a summary affirmance, one considers "the most narrow plausible rationale for the summary decision."\textsuperscript{152} The summary affirmance, he argued, may have been the result of the Supreme Court having determined that the plaintiffs in \textit{Doe} lacked standing.\textsuperscript{153} This is a defensible argument as the plaintiffs in \textit{Doe} had neither been arrested nor threatened with arrest under the Virginia sodomy statute.

Though the majority's argument that the summary affirmance in \textit{Doe} was based on a lack of standing is plausible, it is not convincing. The district court's decision\textsuperscript{154} was clearly decided on constitutional

\textsuperscript{149} \textit{Hardwick}, 760 F.2d at 1207-8.
\textsuperscript{150} "Whether Virginia Code § 18.1-212, as applied to sexual activity between consenting adults in private, violates appellants' constitutional rights to privacy, to due process of law, and to the equal protection of the laws, under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution." Jurisdictional Statement for Appellants at 3, \textit{Doe} v. Commonwealth's Attorney for the City of Richmond, 425 U.S. 901 (1976).
\textsuperscript{151} \textit{Hardwick}, 760 F.2d at 1207-8.
\textsuperscript{152} \textit{Id.} at 1208.
\textsuperscript{153} \textit{Id.} at 1207-08.
\textsuperscript{154} \textit{Doe} v. Commonwealth's Attorney for City of Richmond, 403 F. Supp. 1199 (E.D. Va. 1975), \textit{aff'd mem.}, 425 U.S. 901 (1976). There was no court of appeals decision; under 28 U.S.C.A. § 1253, "an order granting or denying . . . an injunction in
grounds, and not on the question of standing. The papers submitted to the Supreme Court by both parties did not raise the issue of standing. The Jurisdictional Statement by Doe made no mention of his standing.\textsuperscript{155} There was only one argument in the State of Virginia's Motion to Dismiss: "Whether a state statute can constitutionally prohibit sodomitic acts by consenting homosexuals in private is not a substantial question."\textsuperscript{156} On this matter the \textit{Dronenburg} court was correct: "[W]e doubt that a court of appeals ought to distinguish a Supreme Court precedent on the speculation that the Court might possibly have had something else in mind."\textsuperscript{157}

The argument that \textit{Doe} was based on a lack of standing has a second weakness: If this were true then the Supreme Court would not have had jurisdiction to decide the merits of the case. Instead, it would have had to dismiss the appeal or remand with instructions to dismiss.\textsuperscript{158} For example, in a recent per curiam opinion the Court said that "[b]ecause the Court dismissed the appeals for lack of appellate jurisdiction, we had no occasion to adjudicate the merits of the constitutional questions presented in the jurisdictional statements."\textsuperscript{159} In sum, the \textit{Doe} summary affirmance could not have been for lack of standing; had that been the case, the Court would not have had the power to summarily affirm.\textsuperscript{160}

\textit{Any civil action . . . required by any Act of Congress to be heard and determined by a district court of three judges" is appealed directly to the Supreme Court.}

\textsuperscript{155.} This is not surprising; the appellants were unlikely to put forward the argument that they lacked standing.

\textsuperscript{156.} Appellee's Motion to Dismiss at 1, \textit{Doe}, 425 U.S. 901.


\textsuperscript{159.} Hopfmann v. Connolly, 105 S. Ct. 2106, 2107 (1985).

\textsuperscript{160.} Judge Johnson correctly pointed out that the Supreme Court has on occasion made exceptions to the rule that the Court cannot consider cases over which it does not have jurisdiction. \textit{Philbrook} v. \textit{Glodgett}, 421 U.S. 707, 721 (1975). There were, however, no exceptional circumstances in \textit{Doe} like there were in \textit{Philbrook}, where: 1) The question of jurisdiction was very complex, 2) The case could proceed without the party whose standing was questioned, and 3) The defendant whose standing was questioned—the Secretary of Health, Education, and Welfare—agreed to be bound by the decision of the Court, even if he were not a party to the case. \textit{Id.}

The view that \textit{Doe} was decided on the merits has interesting implications for the determination of whether Hardwick has standing. \textit{See supra} Section VI (A). Justice Rehnquist has been one of the leaders of the movement to restrict standing; he wrote the majority opinion in \textit{Valley Forge Christian College v. Americans United for Sepa-
D. Doctrinal Developments Since Doe

Perhaps realizing the weakness of its interpretation of the original holding in Doe, the Hardwick majority then argued that Doe is not binding because of "doctrinal developments" occurring after 1976. Judge Johnson argued that the issue of the constitutionality of sodomy statutes is still open.\textsuperscript{162}

The first doctrinal developments are the footnotes in Carey v. Population Services International\textsuperscript{163} in which a majority of the Justices stated that "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults."\textsuperscript{164} Judge Johnson commented:

The implications of footnote 5 could hardly be clearer. The plain meaning of the phrase "private consensual sexual behavior among adults" encompasses acts of sodomy carried out between consenting adults in private. . . . The ability of the state to regulate conduct as Georgia has attempted to do, according to the Court in Carey, is now an open question.\textsuperscript{165}

\textsuperscript{161} The "doctrinal developments" phrase is from Hicks, 422 U.S. at 344.
\textsuperscript{162} Hardwick, 760 F.2d at 1208-09.
\textsuperscript{164} Id. at 688 n.5, 694 n.17.
\textsuperscript{165} Hardwick, 760 F.2d at 1209. The court goes on to point out that in footnote 17, just after the quote in question, there is a citation to a law review note that is about (among other things) homosexual acts. Note, On Privacy: Constitutional Protection for
Judge Kravitch, dissenting in *Hardwick*, argued that the *Carey* footnote “simply acknowledges the fact that the Court has not yet passed on the validity of many kinds of state statutes regulating sexual conduct,” and cited fornication statutes as an example.\(^\text{166}\) The defendant in *Hardwick* argued that the footnote is in a decision discussing contraceptives, and therefore the phrase should be read as discussing heterosexual acts only, since “decisions as to child birth . . . necessarily are the result of heterosexual, not homosexual conduct.”\(^\text{167}\) These arguments are similar to the one made by Justice Rehnquist in dissent in *Carey*, where he said that while it is true that the constitutional validity of every possible law regulating private sexual acts had not been decided upon, it had been decided in *Doe* that there was no constitutional protection for homosexual conduct.\(^\text{168}\) However, if the footnote means what the defendant in *Hardwick* and Judge Kravitch say that it does, then one would have expected that the *Carey* majority would have taken issue with Justice Rehnquist. The majority did object to Justice Powell’s interpretation\(^\text{169}\) of the crucial footnote, but it did not dispute Justice Rehnquist’s comment.

The footnote in *Carey* is obviously ambiguous. Nevertheless, it can reasonably be interpreted to mean that the Court has not yet definitively decided the issue of constitutional limitations on laws regulating private consensual homosexual behavior. The Court did not limit the comment to heterosexual conduct, and there is no need for others to read the language as doing so.

The second “doctrinal development” upon which the *Hardwick* majority relied was *New York v. Uplinger*,\(^\text{170}\) in which the New York Court of Appeals declared unconstitutional a law which made a criminal offense of loitering in a public place for the purpose of engaging in deviate sexual intercourse.\(^\text{171}\) To reiterate, the Supreme Court granted certiorari but later, in a 5-4 vote, ruled that certiorari had been improv-

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\(^\text{166}\) *Hardwick*, 760 F.2d at 1215 & n.7 (Kravitch, J., dissenting).

\(^\text{167}\) Brief of Appellee in Reply to Appellants’ Supplemental Brief at 5, *Hardwick v. Bowers*.

\(^\text{168}\) *Carey*, 431 U.S. at 718 n.2 (Rehnquist, J., dissenting).

\(^\text{169}\) See the response to a comment by Justice Powell. *Id.* at 688 n.5. *See also* supra text accompanying notes 46 to 48.


\(^\text{171}\) N.Y. PENAL LAW § 240.35-3 (McKinney 1980).
idently granted. The two reasons stated by the Court were: 1) The statute may have been a companion to the New York sodomy statute earlier declared unconstitutional by the New York Court of Appeals, and 2) It was unclear which federal questions had been presented.

The *Hardwick* majority pointed to the fact that the State of New York said in its petition for certiorari that it was willing to argue the constitutionality of the sodomy law that had earlier been overturned. In his brief, however, the counsel for New York chose not to argue the earlier case. Judge Johnson suggested that this, and the fact that the sodomy law was only a subissue of the case, were the factors which caused the Court to declare certiorari improvidently granted. "It is fair to conclude from this order that the Supreme Court was prepared to address the constitutionality of state regulations like Georgia's sodomy statute but chose to address the issue when presented more directly in another case." This suggested to Judge Johnson that the questions presented in *Hardwick* were still open for consideration by the Supreme Court.

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173. *Uplinger*, 104 S. Ct. at 2333. The per curiam opinion concluded that "we are persuaded that this case provides an inappropriate vehicle for resolving the important constitutional issues raised by the parties." *Id.* at S. Ct. 2334.


175. *Hardwick*, 760 F.2d at 1210.

176. *Id.* Judge Johnson might also have noted that the amicus brief of the National Association of Business Councils, et al, may have influenced the Court's decision. Alone among all briefs in the case, it contained the argument that *Uplinger* was "not a proper vehicle for review of *Onofre*" and that the Court should declare that certiorari had been improvidently granted. Review of the issues in *Onofre* "should not be through the back door by way of a footnote in a petition. If the Court desires to review those issues, such review should be in a case in which the issues are clearly presented." Motion for Leave to File Brief and Amicus Curiae Brief of the National Association of Business Councils, et al at 5-7, *Uplinger*. Emphasis in original. The Petitioner filed an objection to the Amicus brief:

[T]he entire premise of the instant *amicus curiae* brief is that certiorari was improvidently granted by this Court which should not review at this time the legality of private, noncommercial consensual sodomy. Since the issue before this Court, as set forth in petitioner's brief, concerns the constitutionality of [the loitering statute] and not the correctness of the New York Court of Appeals ruling in *Onofre*, supra, the *amicus curiae* brief proffered by the above listed organizations and individuals is wholly irrelevant and uninformative.

Petitioner's Objection to Motion of National Association of Business Councils et al to
Interpreting *Uplinger* to mean that the Supreme Court wants to consider the constitutionality of sodomy statutes is a bit of a leap. The Court may want to do this, but it is by no means clear from *Uplinger*. *Uplinger* alone is not enough to constitute a "doctrinal development" sufficient to free a lower court from following *Doe*. However, *Uplinger* combined with the clearer statement in *Carey* is more than sufficient.\(^{177}\) The *Hardwick* majority was justified in disregarding *Doe v. Commonwealth's Attorney*; it appears that the Supreme Court has.\(^{178}\)

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\(^{177}\) Another doctrinal development may be *Roberts v. United States Jaycees*, 104 S. Ct. 3244 (1984), an important case that has been overlooked by many, including the *Hardwick* court. In *Roberts* a majority of the Court gave a general definition of which "intimate associations" are constitutionally protected. *Roberts*, 104 S. Ct. at 3249-51. The case is discussed further infra text accompanying notes 192 to 198.

One reason why the decision has been overlooked may be that the discussion of "intimate associations" is not in a case involving abortion, birth control, or rights existing in family relationships; rather, *Roberts* concerns the assertion that the Minnesota Jaycees have a constitutional right to discriminate against women, despite a state law banning such discrimination.

\(^{178}\) A recent Fifth Circuit en banc decision upholding the Texas sodomy statute presented a revisionist version of the "doctrinal developments" exception. In *Baker v. Wade*, 769 F.2d 289, *reh'g denied*, 774 F.2d 1285 (5th Cir. 1985), the court did not consider any Supreme Court decisions on privacy other than *Doe*; it simply stated that it considered *Doe* "to be binding for the reasons stated" in *Dronenburg v. Zech*, 741 F.2d 1388, 1391-92, *reh'g en banc denied*, 746 F.2d 1579 (D.C. Cir. 1984), and by Judge Kravitch's dissent in *Hardwick*, 760 F.2d at 1213-16. *Baker*, 769 F.2d at 292.

The *Baker* court explained: "We should follow that controlling authority [Doe] until the Supreme Court itself has issued an unequivocal statement that Doe no longer controls. We refuse to speculate, on the basis of the writings cited to us by the appellee, about what the Court might do today on this issue." *Baker*, 769 F.2d at 292 (emphasis added).

The court's decision is based on an erroneous interpretation of the Supreme Court's opinions on the precedential weight of summary affirmances—namely, that a decision is binding until an "unequivocal statement" that the precedent no longer controls. The *Baker* court treats *Doe* as if the case had been fully considered by the Supreme Court. In doing so, it ignores much case authority on the precedential weight of summary affirmances, and makes a challenge to the precedential weight of a summary affirmation impossible anywhere but in the Supreme Court.

What the *Baker* court is saying is that it will follow *Doe* until it is explicitly overturned. But this renders meaningless the "doctrinal developments" clause in *Hicks v. Miranda*, 422 U.S. 332 (1975). It is obvious that when the Supreme Court explicitly overturns a prior decision the lower courts must follow; after all, the Supreme Court is the highest court in the land. The "doctrinal developments" language is an exception to the rule that a decision by the Supreme Court is fully binding until explicitly over-
It is worth noting that any precedential effect of *Doe* is binding only on the lower courts. The Supreme Court has repeatedly stated that it will without hesitation overrule one of its prior summary affirmances. Though lower courts must consider the precedential effect of summary affirmances, the Supreme Court can proceed directly to the constitutional issues.

E. The Extension of the Right to Privacy to Private Consensual Homosexual Conduct

The Supreme Court's decisions on privacy, from *Griswold* to the present, have created two types of constitutionally protected privacy interests.

The first type of privacy interest is that of "intimate associations" or "associational interests." This is grounded in *Griswold* (right to contraceptives), *Eisenstadt v. Baird* (right to contraceptives not limited to married persons), *Moore v. East Cleveland* (right of turned. "Doctrinal developments" means that a summary decision—and a summary decision alone—can be disregarded without an explicit overruling of precedent, if doctrinal developments warrant.

In treating *Doe* as if it were a decision reached after plenary consideration and explained by a full opinion, the *Baker* court ignores the dictates of the Supreme Court, as expressed in *Edelman v. Jordan*, 415 U.S. 651, 671 (1974), *Hicks v. Miranda*, 422 U.S. 332, 344 (1975), *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976), and *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-81 (1979). Doctrinal developments after *Doe* may or may not warrant the finding that it can be disregarded; but the *Baker* court was mistaken in requiring an "unequivocal statement that *Doe* no longer controls."

179. See supra section VI(B), on the precedential weight of summary affirmances.


extended families to live in one house), 186 Carey v. Population Services International (right to access to contraceptives, even for minors), 187 and Zablocki v. Redhail (right to marry without state interference for the purpose of collecting child support payments). 188 In each of these cases the Court protected an intimate relationship. The government was prohibited from interfering with matters of sex and family.

The right to associate with whom one wishes is basic to democracy. As Justice Douglas wrote in Griswold:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. 189

This judicial deference to intimate associations has clearly been expanded beyond the institution of marriage. The Court in Eisenstadt wrote that the right to privacy required that all people, even those not married, “be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” 190 In Moore a plurality of the Court noted that “[o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family.” 191

In a recent case the Supreme Court explicitly adopted the “intimate associations” analysis of its prior privacy decisions. At issue in Roberts v. United States Jaycees 192 was the application to the Minnesota Jaycees of a state anti-sex discrimination law. The national

188. 434 U.S. 374 (1978).
189. Griswold, 381 U.S. at 486.
190. Eisenstadt, 405 U.S. at 453.
191. Moore, 431 U.S. at 504.

Justice Brennan wrote the decision for the Court. Justices Marshall, Powell, Stevens, and White concurred. Justice Rehnquist concurred in the judgment only. Justice O'Connor concurred in part and concurred in the judgment. She did not join the section of the opinion on intimate association, but her disagreement concerned the Court's adjacent discussion of the First Amendment. The Chief Justice and Justice Blackmun did not participate, perhaps because of their ties to Minnesota.
Jaycees claimed that the law violated their right to privacy and their first amendment rights. The Court unanimously found that the Jaycees’ discrimination against women was not constitutionally protected. In reaching that decision the Court discussed why some activities are protected by the right to privacy and why others are not. 193

The Court found that the “freedom of intimate associations” is fundamental to individual liberty. 194 “[C]hoices to enter into and maintain certain intimate human relationships must be secured against intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. . . . [F]reedom of association receives protection as a fundamental element of personal liberty.” 195 One of the reasons such relationships are protected is that “individuals draw much of their emotional enrichment from close ties with others.” 196 Intimate associations help people to “independently . . . define one’s identity,” and this is “central to any concept of liberty.” 197

The Court stated factors to be considered in determining whether an activity is constitutionally protected as an intimate association:

Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and belief but also distinctively personal aspects of one’s life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. 198

These factors would seem to describe private consensual homosexual conduct. Homosexual associations of the sort which Hardwick was found to have engaged in are: 1) small in their membership, 2) selective in membership, and 3) practiced in seclusion. These associations

193. Neither the Hardwick, Dronenburg, nor Baker v. Wade opinions mentioned Roberts. For a brief discussion of why the case has not received the attention it deserves and for a view that Roberts is a “doctrinal development”, see supra note 177.
194. Roberts, 104 S. Ct. at 3250.
195. Id. at 3249.
196. Id. at 3250.
197. Id.
198. Id. at 3250. “We only note that factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent.” Id. at 3251.
afford homosexual persons an opportunity to share with others their thoughts, experiences, and beliefs. Through private consensual sexual conduct, homosexuals share a distinctively personal aspect of their lives.

The *Hardwick* majority was well grounded in precedent when it said that “[t]he intimate association protected against state interference does not exist in the marriage relationship alone. . . . The benefit of marriage can inure to individuals outside the traditional marital relationship. For some, the sexual activity in question here [private consensual homosexual acts] serves the same purpose as the intimacy of marriage.”

The second aspect of the constitutional right to privacy “protects conduct that occurs in a specific place, the home.” In *Stanley v. Georgia* the Supreme Court stated that “fundamental is the right to be free, except in very limited circumstances, from unwarranted governmental intrusions into one’s privacy.” Chief Justice Burger wrote for the Court in *United States v. Orito* that the Constitution “extends special safeguards to the privacy of the home.” While conduct unpopular with the public would not be tolerated if engaged in openly, such conduct will be allowed if it is within the home. “[T]he constitutional protection of privacy,” noted Judge Johnson, “reaches its height when the state attempts to regulate an activity in the home.” Here is the heart of Hardwick’s claim, and the reason why the facts of his case are so compelling. It seems inappropriate, in late twentieth century America, that the government should intrude into the bedrooms of its citizens.

Both aspects of the right to privacy—the right to intimate associations and the special right of privacy in one’s home—support the deci-
sion in *Hardwick*. As Judge Johnson wrote, "[t]he activity [Hardwick] hopes to engage in is quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation." The *Hardwick* court was justified in finding that "the Georgia sodomy statute implicates a fundamental right of Michael Hardwick." "

VII. Conclusion

Despite the confusion apparent in the lower courts, the Supreme Court has yet to fully consider the question of a constitutional protection for private consensual homosexual conduct by adults. Outside of the courts, however, many people and institutions have in recent years accepted that there is diversity in society, and that the government should not invade the bedrooms of Americans in order to ensure conformity. For example, the American Bar Association more than a decade ago passed a resolution urging states to repeal all laws classifying as criminal any form of private noncommercial sexual conduct between consenting adults. The Model Penal Code includes no sanctions against private consensual noncommercial homosexual acts. The American Psychiatric Association has urged the repeal of all legislation making criminal offenses of sexual acts performed by consenting adults in private.

It is time for the Supreme Court to confront the issue of constitutional protection for private consensual homosexual conduct. The Court can once again avoid the issue by declaring that Hardwick lacks stand-

204. *Hardwick*, 760 F.2d at 1212.
205. *Id.*
206. 42 U.S.L.W. 2095 (1973). The resolution passed the Assembly by a vote of 183 to 20. By a nine vote margin (161-152) the A.B.A. House of Delegates recently defeated a resolution urging federal, state, and local governments "to adopt legislation prohibiting discrimination in employment, housing and public accommodations, on the basis of sexual orientation." The margin of defeat had been 24 votes in the previous attempt to get the resolution passed, and its sponsors expect that it will pass in the next few years. *See Gay Rights Loses*, A.B.A.J. 22 (September 1985) and N.Y. Times, July 10, 1985 at A12, col. 1.
207. *Model Penal Code and Commentaries* § 213.2 (Official Draft and Revised Comments 1980). The official comment states that "the Model Penal Code takes the view that private homosexual conduct between consenting adults should not be punished as a crime." *Id.* comment on section at 367. The comment includes a fine history of sodomy laws in the Anglo-American legal tradition.
ing; it should avoid the temptation to do so. In light of the changing mores of society, the Court should extend the right of privacy to homosexual acts. Such conduct is an intimate association in which the government should not meddle. "To individuality should belong the part of life in which it is chiefly the individual that is interested; to society, the part which chiefly interests society."\textsuperscript{209} As shown above, the Supreme Court's privacy decisions at the very least allow this extension of the right of privacy; they may even demand it.\textsuperscript{210} The law is there for the Court and now, with \textit{Hardwick v. Bowers}, so are the facts.

\textit{Robert Glazier}

\begin{footnotesize}
\textsuperscript{210} "[T]he Court's development of the constitutional right of privacy unavoidably requires the protection of sex acts between consenting adults, homosexual as well as heterosexual, in a secluded place." Adamany, \textit{The Supreme Court at the Frontier of Politics: The Issue of Gay Rights}, 1980 HAMLIN L. REV. 185, 189 (1980).
\end{footnotesize}
Praying For Direction: The Establishment Clause and the Supreme Court

I. Introduction

The United States Supreme Court decided three establishment clause cases last term and in so doing, reconsidered the application of criteria originally set forth in the 1971 decision of Lemon v. Kurtzman. Specifically the Court examined the applicability of the Lemon criteria to prayer in public schools and to state aid for nonpublic schools. Through these decisions, it appears that the Court may be redefining the Lemon criteria, reaffirming the use of the Lemon test in establishment clause cases and giving needed direction to lower courts and legislatures.

In Wallace v. Jaffree, the Court was asked to determine if an Alabama statute authorizing a one minute period of silence in all public schools for meditation or voluntary prayer was constitutional within the meaning of the establishment clause. The Court held it was not. In School Dist. of Grand Rapids v. Ball and in Aguilar v. Felton, both decided the same day, the Court dealt with two similar issues involving aid to nonpublic schools. In Grand Rapids, the Court was asked whether two programs, Shared Time and Community Education, were constitutional. A closely divided Court said they were not. In Aguilar the Court was asked to decide whether a New York Title I program which provided public school teachers to teach in parochial schools to meet the needs of educationally deprived children of low income fami-

1. Lemon v. Kurtzman, 403 U.S. 602 (1971). The three criteria of Lemon are 1) The law must have a secular purpose, 2) Its primary purpose or effect must not advance nor inhibit religion, and 3) There must not be excessive government entanglement with religion.
2. U.S. Const. amend. I. "Congress shall make no law respecting an establishment of religion . . . ."
7. These two programs provide classes to nonpublic school students at public expense in classrooms located in and leased from nonpublic schools.
lies was constitutional. Again, the majority held it was not.

These three cases provided the Court with an opportunity to re-examine the Lemon criteria. This article will demonstrate how the Lemon criteria are still firmly imbedded in the Supreme Court's thinking. The article begins by giving a brief overview of past establishment clause cases, highlighting the important cases of the 1960s, 70s and 80s. The Justices that now make up the Court and past changes in the Court's composition will be briefly discussed in an effort to explain the Court's division on establishment clause issues. Discussion of the Court's reasoning in reaching its three recent decisions will exemplify how the Lemon criteria have been reshaped. Finally, analysis of the three recent establishment clause cases will provide the probable path the Lemon criteria will lead the Court along in its future decision making.

A. The Sixties: A Time for Change

Interpretation of the establishment clause of the Constitution has left lower courts in disarray due to the often confusing and seemingly conflicting decisions by the United States Supreme Court. The Court's inability to come to a clear-cut and thorough decision in its establishment clause cases has led to very narrow decisions. An evenly divided Court has given unsure precedent for lower courts to follow.

In 1947, the Court expressed a separationist view of the establishment clause in Everson v. Board of Education. The Court gave its first definitive interpretation of the establishment clause in Everson:

Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . . No tax in any amount, large or small, can be levied to support any religious activities of institutions, whatever they may be called, or whatever form they may adopt to teach and practice religion . . . . In the words of


10. A separationist view is one that believes the church and the state should act independently of each other, without any influence by one over the other. There should be a wall of separation between church and state which marks the line which neither may transgress.

Jefferson, the clause against the establishment of religion by law was intended to erect a wall of separation between church and state.\textsuperscript{12}

The Court held that a New Jersey statute which provided money for bus transportation for public and nonpublic school children was constitutional. The Court recognized that the subsidy was a legitimate public safety measure for children and not aid to further educational purposes of nonpublic schools.

After \textit{Everson}, the Court, with few exceptions,\textsuperscript{13} adhered to a separat-  

ationist view of the establishment clause. In 1961, the Court held in \textit{McGowan v. Maryland}\textsuperscript{14} that a statute which closed businesses and other secular activities on Sundays, the blue laws, was constitutional. In reaching this conclusion, the Court said that even though Sunday closing was initially religious in purpose, through the years this non-  

secular activity had been transformed into a secular purpose by providing a community day of rest.\textsuperscript{15} Thus the fact that the chosen day was Sunday was not constitutionally significant. The first turn toward accommodating\textsuperscript{16} church and state was beginning.

In 1963, a major setback for the accommodationists came when the Court decided \textit{School Dist. of Abington Township v. Schempp}.\textsuperscript{17} The Court held that providing Bible readings in public schools was un-  

constitutional under the establishment clause. Justice Clark, delivering the opinion of the Court, attempted to construct a test to apply to religion cases.

The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular purpose and a primary effect that neither advances nor

\begin{itemize}
\item \textsuperscript{12} \textit{Id}. at 15, 16.
\item \textsuperscript{13} \textit{See} Zorach v. Clauson, 343 U.S. 306 (1952) (allowing religious instruction off school grounds).
\item \textsuperscript{14} 366 U.S. 420 (1961).
\item \textsuperscript{15} \textit{Id}. at 445.
\item \textsuperscript{16} Accommodation refers to the relationship between church and state which would allow some intertwining of the government with religion, for instance allowing moral teachings of religion or influence to dictate the actions of government.
\item \textsuperscript{17} 374 U.S. 203 (1963).
\end{itemize}
inhibits religion.\textsuperscript{18}

The criteria combined earlier Court rulings and were a first attempt at fashioning a workable test for lower courts. This test is remarkably similar to the first two prongs of \textit{Lemon} in use today.

After \textit{Schempp} the Court went back to its accommodationist trend in \textit{Board of Education v. Allen}\textsuperscript{19} in which the Court found constitutional a New York statute which allowed aid to nonpublic schools for textbooks in secular subjects from state approved lists. Justice White delivered the opinion of the Court and applied the purpose and effect test articulated by Justice Clark in \textit{Schempp}. For the purpose prong he merely insisted that some valid purpose be demonstrated. For the effect prong Justice White looked to what the first effect of the law would be. Since the first effect of the New York law was to give children books, and its second effect was to aid nonpublic schools, the law was held constitutional.

In 1969, the makeup of the Supreme Court began to change, and in a span of six years five new justices were appointed. In 1969, Justice Burger was named Chief Justice replacing Earl Warren. Chief Justice Burger would lead the Court with a moderate accommodationist view of establishment. In 1970, Justice Fortas was replaced by Justice Blackmun who held a moderate separationist view of the establishment clause. In 1972, Justice Black was replaced by Justice Powell who also held a moderate separationist view of the establishment clause. Also in 1972, Justice Rehnquist replaced Justice Harlan. Justice Rehnquist holds a strong accommodationist view and has been pivotal in the struggle for full accommodation between church and state on all issues involving the establishment clause. The final appointee of the seventies was Justice Stevens, who replaced Justice Douglas. Justice Stevens holds a very strong separationist view.

Thus, the make up of the Supreme Court of the '70s was again nearly evenly divided into separationists,\textsuperscript{20} accommodationists,\textsuperscript{21} and the moderates,\textsuperscript{22} who carried the swing votes on any particular issue.

The most recent appointment, Justice O'Connor in 1981, replaced Justice Stewart. This was important since Justice Stewart had leaned

\textsuperscript{18} Id. at 222.

\textsuperscript{19} 392 U.S. 236 (1968).

\textsuperscript{20} The separationists were Justices Brennan, Marshall, and Stevens.

\textsuperscript{21} The accommodationists were Justices White, Rehnquist, and Stewart.

\textsuperscript{22} The moderates were Justices Burger, Blackmun, and Powell.
toward an accommodationist stance. The close 5-4 decisions of the Court might now be changed depending on where Justice O'Connor stood on the establishment clause.

B. The Seventies: Accommodation, Separation, or Confusion?

In 1971 the landmark case of *Lemon v. Kurtzman* was handed down, setting forth the newly combined criteria which would provide the touchstone for future establishment clause cases. The three criteria announced for determining if a law violated the establishment clause were: 1) The law must have a secular purpose; 2) Its primary purpose or effect must not advance nor inhibit religion; and 3) There must not be excessive government entanglement with religion. The Court then went on to declare a Rhode Island statute and a Pennsylvania statute, which provided state aid to church related elementary and secondary schools and to teachers, unconstitutional for failing the *Lemon* test. Henceforth, failing any one of the three prongs of the *Lemon* test would result in the law being declared unconstitutional.

*Tilton v. Richardson,* decided the same day as *Lemon,* upheld several sections of the Federal Higher Education Facilities Act of 1963, which authorized grants to colleges and universities. Although no majority was formed, five justices determined that any government entanglement was minimal and that religion did not, on a college level, so permeate the secular education program as to make the two inseparable.

24. *Id.* at 612-13.
25. R.I. GEN. LAWS § 16-61-1 (1969)(this statute provided for payment of up to 15% annual salary supplements to teachers of secular subjects in nonpublic elementary schools).
26. PA. CONS. STAT. ANN., tit. 24 §§ 5601-5609 (Purdon & Supp. 1971)(this statute provided for state reimbursement of nonpublic elementary and secondary schools for costs of teachers' salaries, textbooks, and instructional material in specified secular subjects. It prohibited reimbursement for any course that contained any subject matter expressing religious teachings or the morals or forms of worship of any sect).
27. The statutes were found to have a secular purpose and would not advance religion, but since the statutes might lead to excessive government entanglement, because of the need for the state supervision, the statutes were void.
29. This included church related institutions.
30. Chief Justice Burger announced the judgment of the Court in which Justices Harlan, Stewart, and Blackmun joined, upholding the Federal Higher Educations Act...
After the *Lemon* criteria were in place, in 1973 the Court struck down aid for nonpublic schools in *Committee for Public Education and Religious Liberty v. Nyquist*. In *Nyquist* three kinds of subsidies to nonpublic school were at issue: Direct money grants for maintenance and repair, a partial tuition reimbursement for parents, and a tax relief plan for those not qualifying for the tuition reimbursement. The Court said this aid had the primary effect of advancing religion, violated the second prong of *Lemon*, and was therefore, unconstitutional.

In 1975, *Meek v. Pittenger* upheld a law allowing public funds to be used for acquisition of textbooks for nonpublic school children because the law's primary effect was to benefit the school children and not the school. The Court struck down the part of the statute providing funds for auxiliary services, because the constant government supervision of the services would result in excessive government entanglement.

In 1976, in *Roemer v. Board of Public Works of Maryland*, the Court upheld a Maryland statute which provided funds to private colleges that were religiously affiliated, if the funds were used for secular purposes. Because the statute provided subsidies only on an annual basis, the Court determined that the occasional audits used to verify the sectarian purposes of the expenditures would be quick and non-judgmental. The infrequent auditing would therefore not result in excessive entanglement.

In 1977, in *Wolman v. Walter*, the Court upheld those parts of a comprehensive Ohio Statute which authorized "the state to provide nonpublic school pupils with books, standardized testing and scoring, diagnostic services, and therapeutic and remedial services." It held unconstitutional "those portions relating to instructional materials, of 1963 because minimal government inspections of the program would not lead to excessive entanglement. Justice White concurred in the result on the ground that legislation having a secular purpose and extending governmental assistance to sectarian schools in the performance of their secular functions did not violate the First Amendment merely because the legislative program incidentally benefited a church in fulfilling its religious mission.

33. The auxiliary services were counseling, testing, psychological services and speech and hearing therapy.
34. 426 U.S. 736 (1976).
36. *Id.* at 255.
equipment and field trip services.”\textsuperscript{37}

In the ‘70s, the Court marked out its position on religion in the law. Despite the many changes of composition, the Court continued in the direction of accommodating state support of the church. The Court also endeavored to come up with a workable test that lower courts could apply in resolving establishment clause cases. Despite disagreement as to the \textit{Lemon} test’s usefulness, it endures to the present day. The ‘80s would see a plethora of wide ranging establishment clause cases that would test the inclination of the Court towards continuing accommodation.

C. The Eighties: From Symbols to Silence

In 1980, two establishment clause cases came before the Court. In the first, \textit{Committee for Public Education and Religious Liberty v. Regan},\textsuperscript{38} the Court upheld a New York law\textsuperscript{39} which offered reimbursements to nonpublic schools for performing various testing and reporting services mandated by the State.\textsuperscript{40} The Court determined that grading state tests by nonpublic school employees affords no substantial risk that the examinations can be used for religious educational purposes. Reporting services are not part of the teaching process and cannot foster a sectarian outlook. Therefore, reimbursement for the cost of complying with state law had primarily a secular, rather than religious, purpose and effect. No supervision was required to administer and grade the test, nor would the reporting need to be monitored. Therefore, no excessive government entanglement would occur.

In the second case, \textit{Stone v. Graham},\textsuperscript{41} the Court held unconstitu-

\textsuperscript{37} Id. The Court held that the statute authorizing instructional materials and equipment was unconstitutional because it had the primary effect of providing a direct and substantial advancement of the sectarian enterprise. Paying for field trip services was unconstitutional because the school rather than the children was the recipient of the service, and this advanced the sectarian enterprise. Therefore, secular field trips would be unlikely without close supervision of nonpublic school teachers, and this would create excessive entanglement.

\textsuperscript{38} 444 U.S. 646 (1980).

\textsuperscript{39} N.Y. Educ. Law § 3601 (McKinney & Supp. 1971-1979)(This statute appropriated public funds to reimburse both church-sponsored and secular nonpublic schools for performing various services mandated by the state).

\textsuperscript{40} This differed from \textit{Wolman v. Walter} in that funds went directly to the nonpublic schools and testing was handled by nonpublic school personnel, not strictly by the state or its agents.

\textsuperscript{41} 449 U.S. 39 (1980).
tional a Kentucky statute that required that a copy of the Ten Commandments be placed in every public school classroom in the state. The Court found the law violated the first prong of the Lemon test because it did not have a secular purpose.

In Larkin v. Grendel's Den, Inc. the Court held unconstitutional a Massachusetts law that gave churches and schools the power to veto liquor license applications from any businesses within a 500-foot radius of their premises. The Court stated that placing governmental power in religious institutions violated the establishment clause's core rationale of preventing "a fusion of government and religious functions." The secular objective of protecting schools and churches from the commotion associated with liquor stores could have been accomplished by other means. Allowing a church to decide public policy can be seen as having the effect of advancing religion and will enmesh churches in the processes of government, producing excessive entanglement. Justice Rehnquist was the only dissenter in this eight-to-one decision. This indicates the Court's strong predilection that laws which enable religious institutions to involve themselves in government operations clearly overstep the boundary of separation between church and state.

In 1983, the Court appeared to abandon the Lemon test on historical practice alone when it decided Marsh v. Chambers. In Marsh, the Court upheld the long-standing practice of the Nebraska Legislature's appointing a state-compensated chaplain to deliver opening prayers at its sessions. The Court stated that long standing traditions which have "become part of the fabric of our society," do not violate the establishment clause. In dissent, Justice Brennan stated that the Court was carving out an exception to the establishment clause, and that if the Lemon test were applied, Marsh would clearly violate it.

42. KY. REV. STAT. § 158.178 (1980)(This statute required the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each public school classroom in the state).
44. MASS. GEN. LAWS ANN. Ch. 138, § 16C (1974)(This statute vests in the governing bodies of schools and churches the power to prevent issuance of liquor licenses for premises within a 500-foot radius of the church or school by objecting to the license applications).
45. 459 U.S. at 126-27 (quoting Schempp, 374 U.S. at 222).
47. Id. at 792.
48. Id. at 796 (Brennan, J., dissenting).
In *Mueller v. Allen*, the Court upheld a Minnesota statute permitting taxpayers to deduct tuition, transportation, instructional material and textbook expenses incurred in sending their children to non-public schools. The Court stated that the tax deduction had the secular purpose of ensuring that the state's citizenry was well-educated, as well as assuring the continued financial health of private schools, both sectarian and nonsectarian. Because the tax deduction was only one of many deductions, the Court felt it did not have the primary effect of advancing the sectarian aims of nonpublic schools. The tax deduction would not require state supervision; therefore, there was no excessive entanglement.

Finally, in 1984, the Court decided *Lynch v. Donnelly*, the controversial Nativity scene case. The Court, in a five to four decision, upheld as constitutional the display of a Nativity scene which was included in the city of Pawtucket's annual Christmas decorations. The Court loosely applied the *Lemon* test, stating that it would not "be confined to any single test or criterion in this sensitive area." The Court stated that the secular purpose of the creche was apparent in that it "depicts the historical origins of this traditional event long recognized as a National Holiday." Therefore, celebrating a national holiday was a worthy secular activity. The Court also felt that the creche did not advance religion any more than lending textbooks or granting tax deductions did, and excessive entanglement would be minimal since this was a once-a-year activity. The Court stated that the question of political divisiveness had never allowed the Court to invalidate otherwise permissible conduct, and it would not do so now. Indications were that the *Lemon* test may have been overruled or that its three criteria might be reshaped in the near future. The Court's loose interpretation of *Lemon* seemed to point out the Court's dissatisfaction with the *Lemon* test and its willingness to abandon or restructure it.

These cases suggest some moderate accommodation of church and state extending into the early eighties; they also suggest that the *Lemon* test might be discarded or reformed in the near future. In *Wallace*,

50. MINN. STAT. § 290.09 (1982)(This Statute allowed taxpayers, in computing their state income tax, to deduct expenses incurred in providing tuition, textbooks, and transportation for their children attending elementary or secondary school).
52. Id. at 1362.
53. Id. at 1363.
54. Id. at 1364.
Grand Rapids, and Aguilar, the lower courts were looking for a clarification of the Lemon criteria and for an indication how the Supreme Court would decide future establishment clause cases.

Wallace v. Jaffree

a. The Lower Courts

In Wallace, the plaintiff had three minor children attending public schools in Mobile, Alabama. On May 28, 1982, Jaffree filed a complaint on behalf of his three children, seeking a declaratory judgment and injunctive relief restraining the defendants\(^5\) from maintaining or allowing the maintenance of regular religious prayer services or other forms of religious observances in Mobile County Public schools in violation of the first amendment. The complaint further alleged that two of Mr. Jaffree’s children had been subjected to religious indoctrination since the beginning of the school year, when two of the public school teachers led their classes in saying certain prayers in unison. Jaffree, prior to filing the complaint, had unsuccessfully requested that the leading of prayer in class be stopped. His original complaint made no mention of any challenge to the Alabama prayer statutes,\(^6\) but was

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\(^5\) The defendants were the Mobile County School Board, school officials and three teachers.

\(^6\) Ala. Code § 16-1-20 (Supp. 1985) At the commencement of the first class each day in the first through the sixth grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation, and during any such period silence shall be maintained and no activities shall be maintained and activities engaged in.

Ala. Code § 16-1-20.1 (Supp. 1985) At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.

Ala. Code § 16-1-20.2 (Supp. 1985) From henceforth, any teacher or professor in any public educational institution within the state of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may lead willing students in prayer, or may lead the willing students in the following prayer to God: Almighty God, you alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the
subsequently amended to do so.

The district court granted a preliminary injunction enjoining the school from further leading of prayers. An evidentiary hearing revealed that State Senator Holmes' purpose in sponsoring the Alabama law was to return voluntary prayer to the public schools.57

At trial,58 the district court examined three previous Supreme Court cases59 which had dealt with school prayer.60 In re-examining the establishment clause from a historical perspective, the district court concluded that the Supreme Court had erred in its analysis of the establishment clause, and that "[b]ecause the establishment clause of the First amendment to the United States Constitution does not prohibit the state from establishing a religion, the prayers offered by the teachers in this case are not unconstitutional."61 In a second opinion, the district court dismissed the plaintiffs' challenge to the three Alabama statutes for failure to state a claim upon which relief could be granted, congruent with its previous holding that the establishment clause did not bar the States from establishing a religion.62

The United States Court of Appeals for the Eleventh Circuit consolidated the two cases63 and reversed the district court's ruling.64 The Court of Appeals held that the county school-prayer activities and Alabama Statutes sections 16-1-20.1 and 16-1-20.2 were in violation of the establishment clause of the first amendment to the Constitution of the United States,65 because they did not have a clear secular purpose.

The appeals court reviewed the district court's historical findings which led to the dismissal of the Jaffree cases, and concluded that the court misapplied the doctrine of stare decisis66 and disregarded Su-
b. The Supreme Court Opinion

In Wallace v. Jaffree, the Court held that Alabama Statute section 16-1-20.1, which gave state approval for meditation or voluntary prayer, violated the establishment clause of the first amendment. This decision is significant both because it is an affirmation of the Lemon test, notwithstanding the language of Lynch, and because it is also a re-examination and reshaping of the secular purpose prong of the Lemon test.

The majority opinion written by Justice Stevens began by affirming the Court of Appeals judgment concerning Alabama Statutes section 16-1-20.2. Before considering the issue before it, the Court noted that the states have no greater power to restrain individual freedoms than does the Congress of the United States. This has been confirmed time and again by the Court. In Everson, the Court had stated “the establishment of religion clause of the First Amendment means at least this: Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”

After listing the criteria for the Lemon test the Court stated, “It is the first of these three criteria that is most plainly implicated in this case.” If a statute does not have a clearly secular legislative purpose, then consideration of the effect or entanglement prongs of the Lemon test is unnecessary. “[T]he First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.” The Court determined that in applying the purpose prong of Lemon it is appropriate to ask “whether government’s actual purpose is to endorse or disapprove of religion.”

literally, “let the decision stand.”

67. The Supreme Court examined the same historical data as the district court and reached a different conclusion. See Everson, 330 U.S. 1.
69. See supra note 55.
70. 105 S. Ct. at 2486.
72. Everson, 330 U.S. at 15.
73. Wallace, 105 S. Ct. at 2489.
74. Id. at 2490.
75. Id.
76. Id. (quoting Lynch, 104 S.Ct. at 1368).
this case it was the legislature’s intent to endorse religion by the enactment of Alabama Statute section 16-1-20.1.

In applying the purpose prong of Lemon, the Court analyzed the legislative history of Alabama Statute section 16-1-20.1. In doing so, it noted that the record revealed that Senator Donald Holmes, the sponsor of the bill, had said in the legislative record that the bill was an effort to return voluntary prayer to the public schools. Since prayer is pervasively sectarian, the Court concluded that there was no evidence of any secular purpose in the enactment of Alabama Statutes section 16-1-20.1.

Putting into the record the fact that the statute’s purpose was to return prayer to the public schools, in defiance of previous Supreme Court cases, the Alabama Legislature left the Court no choice but to declare the statute unconstitutional. To do otherwise would have struck a serious blow to the validity of the purpose prong of the Lemon test. The Court had stated earlier that even though a statute is motivated in part by religious purpose, it may still satisfy the purpose prong of Lemon. The Alabama Legislature left the Court no alternative to striking down the statute, since no secular purpose could be inferred from the statute or its history.

Justice Powell wrote a separate concurring opinion in response to criticism of the Lemon test. He feared that continued criticism of the Lemon test “could encourage other courts to feel free to decide establishment clause cases on an ad hoc basis.” His concern seems justified. The Court had already decided Marsh without using the Lemon test, and Lynch with what appears to be a very loose application of Lemon. Continued aversion to Lemon might cause lower courts to decide establishment clause cases without the help of any bright line rule. The confusion already communicated to lower courts was due to the Supreme Court’s statement in Lynch that it will not “be confined to any single test or criterion in this sensitive area.” The question that logically follows is, if the Supreme Court will not be confined to the

77. Id.
78. Id.
81. Wallace, 105 S. Ct. at 2493 (Powell, J., concurring).
82. Id. at 2494 (emphasis in original).
83. Lynch, 104 S. Ct. at 1362.
**Lemon** criteria, then what standard should the lower courts be held to in deciding establishment clause cases?

Powell went on to clarify the purpose prong of **Lemon** by stating, "We have not interpreted the first prong of **Lemon**, however, as requiring that a statute have 'exclusively secular' objectives. If such a requirement existed, much conduct and legislation approved by this Court in the past would have been invalidated." The purpose of the Alabama statute in question was religious in character. This indicated that Justice Powell found the **Lemon** criteria the proper guide for the lower courts to follow. The **Lemon** test is useful and in most cases easy to apply. Justice Powell supported this conclusion by stating that neither lower court found a clearly secular purpose when applying the **Lemon** purpose prong.

Justice O'Connor, concurring, wrote that she felt the **Lemon** test is problematic, but that she was not ready to abandon all aspects of it. Justice O'Connor suggested that the **Lemon** criteria should be re-examined in order to develop a test that was "capable of consistent application to the relevant problems." Her answer to the refinement of the **Lemon** purpose prong was the "endorsement test." This would require courts to "examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement." She said this does not preclude the government from taking religion into account when making the law, but does preclude the government from conveying a message that one religion or religious belief is preferred over another. Therefore, since the Alabama law was an effort to endorse religion — by endorsing the views of those who wish to pray over those who do not — the statute must be declared unconstitutional.

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85. The Court established the religious nature of Alabama Statute section 16-1-20.1 by examining the legislative record, intent, and the history of the statute.
86. *Wallace*, 105 S. Ct. at 2495 (Powell, J., concurring).
87. *Id.*, at 2496 (O'Connor, J., concurring).
88. *Id.*, at 2497.
89. *Id.*
90. *Id.*
91. *Id.*
Establishment Clause

Grand Rapids School District v. Ball

a. The Lower Courts

At issue in *Grand Rapids*, 92 was whether two programs, Shared Time and Community Education, 93 which provided classes to nonpublic school students at public expense in classrooms located in and leased from the nonpublic school violated the establishment clause. The Shared Time program offered classes during the regular school day in nonpublic schools to supplement the core curriculum courses required by the State. 94 The Shared Time teachers were full time employees of the public school system.

The Community Education program offered classes at the conclusion of the school day on a voluntary basis for children and adults. 95 The Community Education program teachers were part-time public school employees who were employed full time for the nonpublic school in which they taught the Community Education courses. 96 The students attending the remedial programs were the same students that attended the nonpublic schools where the programs were held. Administrators of nonpublic schools decided which courses would be offered and in which classrooms they would be held. The director of the program, a public school employee, then inspected the premises to insure that it was free of any religious artifacts, and a sign was posted stating that it was a "public school classroom." 97

Taxpayers filed suit in federal district court 98 against the school district and certain officials, alleging that both programs violated the establishment clause. The district court found that there was no evidence that any public school student had ever attended the Shared Time or Community Education class in a nonpublic school. 99 The district court also found that the makeup of the classes for the programs

93. See supra, note 7.
94. 105 S. Ct. at 3218.
95. Id. at 3219.
96. Id.
97. Id. at 3220 n. 7. The sign reads as follows: "Grand Rapids Public Schools' Room. This room has been leased by the Grand Rapids Public School District, for the purpose of conducting public school educational programs. The activity in this room is controlled solely by the Grand Rapids Public School District."
99. Id. at 1097.
was entirely religious without consideration of school district boundaries.\textsuperscript{100}

The district court applied the three-part \textit{Lemon} test and held that, although the purpose of each program was secular, the effects were distinctly impermissible.\textsuperscript{101} The district court also found the programs entailed an unacceptable level of entanglement between the public and sectarian schools.\textsuperscript{102} Therefore, the court entered judgment for plaintiffs and enjoined further operation of the programs.\textsuperscript{103} The Court of Appeals for the Sixth Circuit, in a divided decision, affirmed the district court’s findings.\textsuperscript{104}

\textbf{b. The Supreme Court Opinion}

In \textit{Grand Rapids v. Ball},\textsuperscript{105} the Court held that the Shared Time and Community Education programs had the primary or principal effect of advancing religion, and, therefore, both violated the establishment clause. This decision evinces the Court’s decision to continue using the \textit{Lemon} test, and it signals a more separationist position being taken by the Court.

The Court, in reaffirming its continued use of the \textit{Lemon} criteria,\textsuperscript{106} stated that “the \textit{Lemon} test concentrates attention on the issues — purposes, effect, entanglement — that determine whether a particular state action is an improper law respecting an establishment of religion.”\textsuperscript{107} The Court went on to state that the two programs in question did not violate the first prong of \textit{Lemon}. “Both the district court and the Court of Appeals found that the purpose of the Community Education and Share Time programs was ‘manifestly secular.’ We find no reason to disagree with this holding.”\textsuperscript{108}

The Court then examined the effect prong of \textit{Lemon} in relation to the two programs. The Court held that the two programs impermissibly

\begin{itemize}
\item 100. \textit{Id.} at 1093.
\item 101. \textit{Id.}
\item 102. \textit{Id.} at 1098.
\item 103. \textit{Id.} at 1100.
\item 104. Americans United for Separation of Church and State v. School Dist. of City of Grand Rapids, 718 F.2d 1389 (6th Cir. 1983).
\item 105. \textit{Grand Rapids}, 105 S. Ct. at 3216.
\item 106. \textit{Id.} at 3223.
\item 107. \textit{Id.}
\item 108. \textit{Id.}
\end{itemize}
advanced religion in three ways. First, the teachers participating in the programs may influence their classes with religious indoctrination; second, the programs may provide a symbolic link between religion and government; and finally, the programs may promote religion by providing a subsidy for religious institutions in their primary religious missions. The second criterion of Lemon, that the effect of the statute was to neither advance nor to inhibit religion, had not been satisfied, and therefore, the statute was struck down as violative of the establishment clause.

The Court focused on the fact that in the Community Education program, practically every course taught on leased private school property was taught by a teacher employed by that private school. The majority reasoned that the teacher could not put aside religious instruction and engage in completely secular education in the Community Education program.

The main problem in the Shared Time program was that even though the teachers were full time public school employees, since they were teaching in a sectarian school, they may "subtly (or overtly) conform their instruction to the environment in which they teach." The students might then perceive that the government was giving its approval to a religious message.

Justice O'Connor, dissenting from the Shared Time opinion, noted that nothing would indicate that Share Time instructors had attempted to indoctrinate students.

The majority stated that another important concern of the effects test of Lemon is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as disapproval, of their individual religious choices. The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years.
The Court felt that indoctrination of young children was detrimental due to their ages, but that this was not a major problem for adults since they are not as impressionable. The Court had articulated this view in its holding in *Marsh*. 115 To lessen symbolic impact, the Court opined that similar programs held off the premises of nonpublic schools may pass constitutional muster. In this instance, the students could then perceive the difference between religious classes and public school classes if the classes were held off religious school premises. Since the classes in the present case were held on nonpublic school premises, "this effect - the symbolic union of government and religion in one sectarian enterprise - is an impermissible effect under the Establishment Clause." 116

The Court then examined whether the aid was direct and substantial or indirect and incidental. The Court expressed the view that aid which is indirect and incidental is not, for that reason alone, constitutionally invalid. 117 But in direct aid cases "the government, although acting for a secular purpose, has done so by directly supporting a religious institution." 118 The programs at issue, providing teachers, in addition to the instructional equipment and materials, was the type of direct aid which is forbidden as advancing religion.

The majority concluded that the effect prong of *Lemon* was violated by the promotion of religion in three ways: subtle indoctrination of students by state paid teachers, symbolic union of church and state because of instruction delivered in religious schools, and subsidization of religious functions of nonpublic schools. The Court felt that some involvement between church and state is inevitable, but that lines must be drawn. Therefore, the guidelines of *Lemon v. Kurtzman* will be what the Supreme Court will apply when deciding if state aid to nonpublic schools violates the establishment clause.

**Aguilar v. Felton**

a. The Lower Courts

The issue in *Aguilar v. Felton* 119 was whether the city of New York could use federal funds to pay the salaries of public employees.

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117. *Id.* at 3228.
118. *Id.*
119. 105 S. Ct. 3232.
who taught in parochial schools. The City of New York received federal funds under the Title I program of the Elementary and Secondary Education Act of 1965.\textsuperscript{120} The program gave federal assistance to local educational institutions to meet the needs of educationally deprived children from low income families.\textsuperscript{121} To qualify for government funding, the program must have met the following requirements: First, the children involved in the program must be educationally deprived; second, the children must reside in areas comprising a high concentration of low income families; and finally, the program must supplement programs that would exist absent funding under Title I.\textsuperscript{122}

In 1978, six taxpayers commenced this action in the District Court for the Eastern District of New York, alleging that the program violated the establishment clause. Summary judgment was given for defendants based on the evidentiary record of an earlier case.\textsuperscript{123} The Court of Appeals for the Second Circuit reversed and held that the federal funds used to send instructors into nonpublic schools violated the establishment clause as interpreted by the United States Supreme Court.\textsuperscript{124}

b. The Supreme Court Opinion

In \textit{Aguilar}, the Supreme Court held that the Title I program, as administered by New York City, violated the establishment clause. This program was similar to the one considered in \textit{School District of Grand Rapids v. Ball},\textsuperscript{125} decided the same day. The case was of similar importance in showing the Court’s further use and affirmance of the \textit{Lemon} criteria and the Court’s re-examination and reshaping of the third prong of \textit{Lemon}.

\begin{itemize}
  \item \textsuperscript{120} 20 U.S.C. § 3801 (1982)(This statute is known as the Elementary and Secondary Education Act. This statute authorized federal financial assistance to local educational institutions to meet the needs of educationally deprived children from low income families).
  \item \textsuperscript{121} 105 S. Ct. at 3234 (quoting 20 U.S.C. § 2701).
  \item \textsuperscript{122} \textit{Id.} at 3235.
  \item \textsuperscript{123} National Coalition for Public Educ. and Religious Liberty v. Harris, 489 F. Supp. 1248 (S.D.N.Y. 1980)(The evidentiary record in the other case involved an identical challenge to the city’s Title I program, in which the constitutionality of the program was upheld).
  \item \textsuperscript{124} Felton v. Secretary, United States Dep’t of Educ., 739 F.2d 48 (2d Cir. 1984).
  \item \textsuperscript{125} \textit{Grand Rapids}, 105 S. Ct. at 3216.
\end{itemize}
The Supreme Court opinion given by Justice Brennan discussed the defendant's attempts to distinguish Aguilar from Grand Rapids; but the distinction fails, because the supervisory system established by the City of New York inevitably results in the excessive entanglement of church and state, an Establishment Clause concern distinct from that addressed by the effects doctrine. Even where state aid to parochial institutions does not have the primary effect of advancing religion, the provision of such aid may nonetheless violate the Establishment Clause owing to the nature of the interaction of church and state in the administration of that aid.128

The Court, in analyzing Aguilar, applied the Lemon test and found that the third criterion, excessive entanglement, had been violated. Justice Brennan pointed out that the inspections needed to ensure that religious indoctrination was not occurring in the Title I classes would create excessive entanglement. Brennan then identified the elements that were important to non-entanglement in school aid programs and stated that what was crucial to avoid excessive entanglement was "the ability of the State to identify and subsidize separate secular functions carried out at the school, without the on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes."127

In dissent, Justice Rehnquist pointed out the interesting Catch-22 paradox which the Court created, "whereby aid must be supervised to ensure no entanglement, but the supervision itself is held to cause an entanglement."128 This was important because any aid could create entanglement and, therefore, even some previous cases would not have passed constitutional muster.129

The Court referred to the critical elements of entanglement set out in Lemon and Meek that were present in this case: aid provided in a purely sectarian environment and assistance needed to provide inspection to keep the aid purely secular would lead to excessive entanglement.130 The Court stated that a religious school whose function was to indoctrinate students in a certain religion would be hard pressed if the

126. Aguilar, 105 S. Ct. at 3237.
127. Id. at 3238 (quoting Roemer v. Maryland Pub. Works Bd., 426 U.S. 736 (1976)).
128. Id. at 3243 (Rehnquist, J., dissenting).
130. Aguilar, 105 S. Ct. at 3238.

https://nsuworks.nova.edu/nlr/vol10/iss1/1
state must come in and decide what was and what was not religiously affiliated in the Title I classroom. 131 This would cause excessive entanglement because the public and private school instructors would have to work together closely to monitor Title I classroom assignments, scheduling and other related matters. 132 The Court went on to point out that separation of church and state does not mean absence of all contact, but that "the detailed monitoring and close administrative contact required to maintain New York's Title I program can only produce a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." 133

Justice Powell, in a concurring opinion, stated that political divisiveness over the issue among voters is also an important consideration, since taxpayers who support the public schools would be disconcerted to find aid flowing to sectarian schools, and those who support sectarian schools would now feel that funds are being diverted from them. 134 Even though the Court had stated it would not invalidate a law if the only result of the law was the creation of political divisiveness, 135 the majority now indicates that political divisiveness may one day be dispositive in certain circumstances. Justice Powell went on to say that Aguilar may fail the second prong of Lemon by advancing religion, though the majority opinion makes no specific mention of this.

Justices Burger and White dissented because the majority's application of the Lemon criteria of state aid to private schools was "contrary to the long-range interests of the country." 136 White declared that aid to nonpublic schools is not forbidden by the establishment clause, and Chief Justice Burger rejected the idea that tidy formulas such as Lemon could be used to decide, in school aid cases, whether a law will take a step toward establishing a religion.

Justice O'Connor, dissenting, pointed out that time has already proven that religious indoctrination has not occurred in all the years the Title I programs have been in effect. Therefore, excessive entanglement will not become a problem because supervision was never needed in the first place.

131. Id. at 3239.
132. Id.
133. Id. (quoting Walz v. Tax Comm'n, 397 U.S. 664, 676 (1970)).
134. Id. at 3240 (Powell, J., concurring).
135. Lynch, 104 S. Ct. at 1364.
Given that not a single incident of religious indoctrination has been identified as occurring in the thousands of classes offered in Grand Rapids and New York over the past two decades, it is time to acknowledge that the risk identified in *Meek* was greatly exaggerated. Just as the risk that public school-teachers in parochial classrooms will inculcate religion has been exaggerated, so has the degree of supervision required to manage the risk.\(^{137}\)

Justice O'Connor expressed her doubts as to the usefulness of the entanglement test. She thought laws which had a valid purpose and effect should not be invalidated due to excessive entanglement in cases of aid to parochial schools. She stated that the unusual results obtained in previous establishment clause cases were due in part to problems with the entanglement prong of *Lemon*.\(^{138}\)

**II. Analysis**

The three cases\(^{139}\) just examined represent two important points. First, the Court has reaffirmed its use of the three part *Lemon* test, and in so doing it has elaborated on each test prong. In *Wallace*, the Court examined the first prong, secular purpose. In *Grand Rapids*, the Court examined the second prong, primary effect. Finally, in *Aguilar*, the Court examined the third prong, excessive entanglement.

The second point which these cases demonstrate is the Court's direction for the near future. Will the Court continue to accommodate religion or will it go back to a more separationist stance? *Wallace* showed the strongest majority, a six to three margin, striking down Alabama's school prayer statute. In *Grand Rapids*, the margin was a five to four majority\(^{140}\) on defeating the Shared Time program, and *Aguilar* was a five to four majority invalidating the Title I program. Trends are hard to extract from an analysis of such close cases. It is submitted, however, that these cases suggest that the pendulum is swinging toward a more separationist position.

By understanding the Court's view of *Lemon* and how the criteria should be applied, one should gain a better understanding of how the Court is likely to apply the criteria in future cases. By examining this,

\(^{137}\) *Id.* at 3246 (O'Connor, J., dissenting).

\(^{138}\) *Id.* at 3247.

\(^{139}\) *Wallace, Grand Rapids, Aguilar*.

\(^{140}\) A seven-two majority was obtained on the Community Education Issue holding this program invalid.
we can then begin to forecast on the Supreme Court’s future treatment of establishment clause issues.

A. The Purpose Prong

In Wallace, the Court reaffirmed its use of Lemon when it struck down the Alabama prayer statute141 for failing the secular purpose prong of Lemon. The Court had emphasized in previous cases that a statute may be motivated in part by a religious purpose yet satisfy the first criterion of Lemon.142 This language has been the source of many differing opinions from the Supreme Court, as well as lower courts, since it was written. What is a clearly secular purpose? The majority, in Wallace, seemed to embrace Justice O'Connor's concurrence in Lynch143 as the pertinent answer to this question. In Lynch, Justice O'Connor stated that "The proper inquiry under the purpose prong of Lemon, is whether the government intends to convey a message of endorsement or disapproval of religion."144 If every statute that has the incidental effect of promoting or hindering a sectarian belief was invalid, the Court could not criminalize murder for fear it would promote the sectarian belief that killing is wrong.145 Justice O'Connor coined the term endorsement test146 and went on to give the parameters within which the test should operate.147 "The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."148 The kernel to be gleaned from Wallace is that when applying the Lemon purpose prong, the endorsement test should be looked to as being dispositive on whether there is a secular purpose, unless the statute in question is "entirely motivated by a purpose to advance religion."149

141. See supra note 4.
143. Lynch, 104 S. Ct. 1355.
144. Id. at 1368 (O'Connor, J., concurring).
146. Id. at 2497.
147. Id.
148. Id.
149. Id. at 2490.
B. The Effect Prong

In *Grand Rapids*, the Court applied the second criterion of *Lemon* in striking down two school aid programs. The majority showed its solidarity for the *Lemon* test by stating that “[w]e . . . reaffirm that state action alleged to violate the Establishment Clause should be measured against the *Lemon* criteria.” The Court went on to state that the school aid programs had passed scrutiny under the purpose prong of *Lemon*, and next used *Grand Rapids* to examine the effects prong. Under the effects prong of *Lemon*, *Grand Rapids* could not pass constitutional muster.

The Court identified two elements crucial in the effects prong for advancing or inhibiting religion. The Court had previously stated in *Committee for Public Education v. Nyquist* that “not every law that confers an indirect, remote or incidental, benefit upon religious institutions is, for that reason alone, constitutionally invalid.” Therefore, it seems that indirect aid to nonpublic schools, having no primary effect of advancing religion, would be valid under the second prong of *Lemon*. The second element identified is whether there is “a direct and substantial advancement of the sectarian enterprise.” This indicates that direct aid to a sectarian educational function would be invalid despite the argument that the effect of the aid would ultimately benefit the student. It is important to identify the ultimate secular end of the statute in question, then to make the crucial decision of whether the effect of that aid would be to advance or inhibit religion by direct and substantial means or whether any advancement was merely indirect and incidental. Hence, the crucial question to be answered in future parochial aid cases is whether the effect of the aid will have a direct and substantial advancement of the religious institution or whether this advancement is merely indirect and incidental.

C. The Entanglement Prong

In *Aguilar* the Court applied the third and most confusing part of the *Lemon* test, excessive government entanglement, and held the

151. *Id.* at 3223.
152. 413 U.S. 756.
153. *Id.* at 771.
155. 105 S. Ct. at 3232.
Establishment Clause

Title I program of New York invalid. Since the early days of *Lemon*, the Court has been dogged by this element, which has been described as a "blurred, indistinct, and variable barrier."156 Despite this past confusion, the Court in *Aguilar* seems to come no closer to giving a rational explanation of the entanglement prong of *Lemon*. The closest the Court came to giving such an explanation was its statement that the crucial factor to a non-entangling aid program is "the ability of the State to identify and subsidize separate secular functions carried out at the school, without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes."157 But this simplicity is deceiving. The crucial problem is when on-the-site inspections are necessary and what criteria can be used. The Court pointed to two elements that may be helpful in deciding when inspections are necessary. One is whether the aid is going to a "pervasively sectarian environment;"158 the second is whether the aid is in the form of teachers, in which case "ongoing inspection is required to ensure the absence of a religious message."159 It is easy enough to derive that a sectarian environment is any religious organization; but ongoing inspection to ensure absence of religious content is ludicrous. Justice O'Connor has already pointed out in dissent that ongoing inspection is a transparent fantasy. She noted that in 19 years there has never been a single incident in which a Title I instructor has subtly or overtly attempted to indoctrinate the students in particular religious tenets at public expense.160 It seems reasonable that professional adult instructors can generally follow orders, and that if they could not, one would have to close every public school for fear the teachers would indoctrinate the pupils in the beliefs of religion.161 Experience has already shown that if the risk of inculcation of religion by public school teachers is exaggerated, so is the degree of supervision required.162 Logic dictates that law must be flexible and the law must recognize the lessons that come from exposure to time. Time has shown that excessive entanglement will not occur if maximum supervision is not applied. Therefore, the law should be flexible and should drop the proscription of ongoing inspection which

156. *Lemon*, 403 U.S. at 615.
158. *Aguilar*, 105 S. Ct. at 3238.
159. *Id.*
160. *Id.* at 3246 (O'Connor, J., dissenting).
161. *Id.* at 3247.
162. *Id.*
leads to entanglement and a rigid interpretation of the law. As Justice Rehnquist points out in his dissent,\textsuperscript{163} the Court has created its own "Catch-22."\textsuperscript{164} Aid must be supervised, but that supervision leads to entanglement.\textsuperscript{165}

The Court, in \textit{Aguilar}, has not given clarification of excessive entanglement but has muddied the waters further. The Court has alluded to the fact that political divisiveness\textsuperscript{166} may become more important when the government is forced to make religious judgments. Although not discussed at length, the Court implies that political divisiveness could be problematic if allowed to increase.\textsuperscript{167} This compounds the confusion of entanglement. The question to be asked is how important political divisiveness is in determining the third criterion of \textit{Lemon}. Will it become a dispositive factor, or merely remain as one factor to weigh in deciding whether a statute will cause excessive entanglement? Justice Powell's concurrence states that political divisiveness is another reason to hold \textit{Aguilar} and \textit{Grand Rapids} invalid on entanglement grounds.\textsuperscript{168} The problem is that the Court in \textit{Lynch} pointed out that political divisiveness alone is not enough to invalidate otherwise permissible conduct.\textsuperscript{169} Arguably, it is unlikely that the Court will change its mind and make political divisiveness by itself dispositive under the entanglement criterion of \textit{Lemon}, since Court precedent has continuously indicated otherwise over the years.

Logic would indicate that the quagmire of excessive entanglement has not lead to any hard and fast elements with which to measure future disputes. Justice O'Connor has recognized that the Court's most anomalous results are attributed to the entanglement prong.\textsuperscript{170} Therefore, the Court's decision in \textit{Aguilar} gives no more insight on application of excessive entanglement than previous holdings did. The lower courts must wait until the entanglement section is given adequate de-

\begin{itemize}
  \item 163. \textit{Id.} at 3243 (Rehnquist, J., dissenting).
  \item 164. \textit{Id.}
  \item 165. \textit{Id.}
  \item 166. The concept of political divisiveness means activity which would cause fragmentation or disputes along political lines.
  \item 167. \textit{Aguilar}, 105 S. Ct. at 3239 (Powell, J. concurring) (if the government must make the decisions in nonpublic schools over what is or what is not religiously connected, political divisiveness will increase).
  \item 168. \textit{Id.} at 3240.
  \item 169. \textit{Lynch}, 104 S. Ct. at 1364.
\end{itemize}

https://nsuworks.nova.edu/nlr/vol10/iss1/1
velopment in future cases, and must continue to use the test as best as is possible in its present form. In any event, the Justices' differing interpretations of what to do with the entanglement criteria will surely lead lower courts away from the goal of functional analysis, with the result being another establishment clause case on the Supreme Court's doorstep as soon as the excessive entanglement section of *Lemon* is applied.

D. Forecasting Future Trends in Establishment Clause

Future cases raising issues of state involvement with religion can generally expect an application of the *Lemon* criteria. If the law is of recent origin and raises issues regarding the establishment clause, the three prong *Lemon* test will generally be applied. Challenged laws or programs can satisfy the purpose prong provided that they are not clearly motivated by a religious purpose and that the government does not intend to convey a message of endorsement or disapproval of religion. Cases involving the effects prong can be sustained if the advancement or inhibition of religion is merely an indirect and incidental by-product of the laws primary function. The entanglement prong will cause some difficulty in cases in which supervision must be maintained by the state in order to assure adequate administration of that aid. But entanglement will occur when the state becomes enmeshed with a given denomination in matters of religious significance. Political divisiveness will still be only one factor to be weighed in determination of entanglement, and will not alone be dispositive on the issue.

Cases involving long standing traditions may be decided in accordance with *Marsh*. The Court, in carving out an exception to *Lemon*, seems to indicate that certain practices may be deemed constitutional if they have their roots in long-standing traditions. Therefore, traditions which have been practiced in the states for many years may be validated as becoming a part of the fabric of our society and may be exempt from examination under the three part *Lemon* test.

Cases involving symbols, or symbolic activities, which violate the establishment clause should also be analyzed using the *Lemon* test. The Court has been more likely to give a moderate reading of *Lemon* in light of symbols which have their origins in the roots of long-standing traditions. The critical issue in symbol cases must be resolved by examining not only the religious nature of the activity, but also the context in which it takes place.
III. Conclusion

The Court has once again reaffirmed its adherence to the *Lemon* test thereby clarifying the language of *Lynch v. Donnelly*. The purpose and effect prongs have been amply examined and explained by the Court. Excessive entanglement once again has left the lower courts with little more than a clue as to what parameters entanglement encompasses. Some Justices have expressed their dissatisfaction with the entanglement prong\(^\text{171}\) and a change may be forthcoming. The majority in *Aguilar* seemed more inclined to include political divisiveness as a dispositive factor in entanglement cases, but without further elaboration, this will be confined to explanation in some future case. The Court has laid the first stones to a smoother path in unraveling establishment clause litigation. Further fine tuning of the *Lemon* criteria and a dispositive position on entanglement in particular, will lead lower courts and legislatures in the direction of a more encompassing establishment clause standard and will give the guidance that has been sorely needed.

*Dale Alan Bruschi*

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Reviewed by Laurence M. Hyde, Jr.*

This well-conceived and provocative book undertakes to answer the question: "Is test-case litigation a sensible way to promote the welfare of children?" The book delivers more than it promises. It quite thoroughly deals with the complex issue undertaken, but at the same time, it provides an unusually clear look at American courts and the role they play in the making of public policy, including the strengths and weaknesses of policy-making through litigation. While the focus is on test-case litigation brought by public interest groups as class actions, many of the insights are equally applicable to other kinds of cases.

Mnookin has used the vehicle of well-selected cases as a means of examining the following problems:

1. **The enigma of children's interests.** Neither the public interest group nor the court can reliably determine the best interest of children as a class or of an individual child. It is difficult to forecast the impact of a policy decision on a child or on many children. The difficulty is compounded because one must predict the consequences of alternative policies of children in different circumstances. It is compounded because a policy that benefits some children hurts others.

2. **The dilemma of the legitimate role of courts.** In a democracy, public policies are made by popularly elected representatives. However, the language in which a policy is enacted may well be open to more than one interpretation, and even if the language is clear with respect to situations the legislation envisioned, cases often present situations not contemplated by the legislature. Thus, courts cannot resolve these questions without making policy. While this is true of other kinds of policy, it has special importance in the field of children's policy, because children lack political power.

3. **The paradox of child advocacy.** Children need advocates because they cannot speak for and defend their own interests. Yet, since

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this is true, how can the advocate know for certain what those interests are? How can the advocate, the public interest agency, or the court know that the interests being pressed are not those of the advocate, the agency, or the parents, since the nominal client is not able to control the litigation?

4. The debate over judicial competence. To what extent is the judicial branch of government the appropriate branch for policy decision-making, considering the inherent limitations of the adjudicative process? "Courts, simply because they are courts, may not be able to evaluate policy issues adequately. They are captives of the parties . . . ."

The book examines these issues by means of a detailed analysis of five public policy cases. They are:

1. Smith v. Offer, brought by the New York Civil Liberties Union to determine whether foster parents have a right to an administrative hearing prior to removal of children placed in their care under contract.

2. Bellotti v. Baird, in which the medical director of an abortion center and two pregnant, unmarried minors brought suit to challenge the Massachusetts statute requiring the unmarried minor to secure the consent of both parents in order to obtain an abortion, or, in the alternative, to have a parental refusal overridden by a state court judge.

3. Halderman v. Pennhurst State School and Hospital, brought to complain about conditions in a state residence for mentally retarded children. The case became a wholesale attack on the very existence of institutions for mentally retarded people, and sought the dispersal of the residents to small, community-based facilities.

4. Roe v. Norton, a case brought by Connecticut Legal Aid lawyers on behalf of welfare mothers in relation to governmental efforts to pursue child support rights against the fathers of their "illegitimate" children.

5. Goss v. Lopez, a class action against the Columbus, Ohio School Board to determine the rights to a hearing prior to suspension of children involved in racial disturbances.

Mnookin's issues are carefully examined by the contributing writers who deal with these issues in relation to each of these cases, demonstrating the issues' applications to the several cases. Each case, in varying degrees, contains the enigma, the dilemma, the paradox and the issue of competence. Therefore, each case demonstrates that there is a serious question as to whether we can determine the successes achieved by test-case litigation, even though the public interest litigant wins, and the win involves considerable impact upon the rights, services, agencies
and clients.

The book is a valuable reference to anyone interested in children's issues, but beyond that to anyone seriously interested in how courts function as problem solvers, reform agents and policymakers. One of the serious problems that courts face in their essential task of maintaining public confidence is the lack of understanding of inherent limitations of courts in ways so clearly shown by this book.

In discussing the dilemma of public policy decisions being made by courts, Mnookin makes the point that, since all federal judges and many state judges are appointed for life and not elected by the public and are not subject to recall by the public for unpopular decisions, they are not an ideal democratic policymaker. This reviewer was disappointed that Mnookin did not further explore the issue of whether this removal of courts from the direct control of the popular will was desirable in the overall political scheme under which our nation functions. However, in spite of leaving that important question untouched, the book is intellectually satisfying and well worth careful and serious attention to readers concerned with issues of how our various branches of government interact and how they deal with important issues.
A constitutional convention occurred in 1982, but it went unnoticed by the people of the United States. It did not deal with amendments to the federal constitution, a topic much in the news lately, but it did deal with matters of national concern. This convention was called to draft the constitution for a new state, a state which the convention chose to name "New Columbia" because it would encompass the present District of Columbia.¹

Shocked readers may wonder if the above announcement is fiction, like Orson Wells' announcement of the martian invasion in the legendary "War of the Worlds" broadcast. Rest assured it is not. The convention did occur. Miraculously it did produce a state constitution and, even more miraculously, that constitution was ratified by the voters. However, New Columbia has not yet become, and may never become, a state.

The motivations for seeking statehood are simple enough. Many District residents feel that they are the victims of colonialism and racism. They are ruled by a foreign power, the United States, ² which exercises nearly total control over the District, particularly its finances. The residents of the Districts have no voting member in the United States' legislature, the Congress, only an envoy.³ The District residents have been deprived of the fundamental right of citizenship in a democ-

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¹ P. Schrag, Behind the Scenes: The Politics of a Constitutional Convention 9-10 [hereinafter cited as Schrag].
² The District of Columbia also will be referred to hereafter as "the District" or "D.C."
³ The envoy is the District's one nonvoting member of Congress. However, D.C. voters have cast votes for the President and Vice President since the twenty-third amendment to the Constitution was ratified in 1961. Also, by statute, D.C. voters do elect the Council of the District of Columbia and the District's Board of Education.
racy, the right to choose their own government. What makes this "colonialism" feel even more oppressive is that the residents of the District, unlike the members of Congress or their constituents, are primarily black and poor. Statehood would mean the right to elect two Senators and at least one member of the House of Representatives. Statehood would also free the District from the control of Congress on local matters.

The procedure for admitting a new state is very simple. It involves only a simple legislative act. Absent a veto by the President, a majority vote in both houses of Congress could admit the new state. But there lies the difficulty. Statehood for D.C. would deprive Congress of a prerogative it now enjoys; controlling its working environment which includes patronage opportunities. Statehood is also resisted because it

4. Congress passed a proposed amendment to the Constitution of the United States which provided for voting representatives for D.C. residents, but not statehood. The amendment would become effective only if ratified by three-fourths of the state legislatures within seven years. Some of the opposition to the statehood movement was apparently based on the fear that statehood was unattainable and the agitation for it would jeopardize any chance the amendment would be ratified. On August 22, 1985, the seven-year period expired and the unratified amendment died.

5. Moreover, an affluent District resident will generally maintain a voting residence in one of the states and, consequently, be able to vote for senators and representatives.

6. There are arguments against statehood, such as: 1) the area is too small to function effectively as a state; 2) it does not have an adequate tax base; and 3) the seat of national government should be controlled by the national government, not by a state. Schrag does not attempt to thoroughly analyze or refute these. See generally, Provision for the Admission of the State of New Columbia into the Union: Hearing on H.R. 3861 Before the Subcomm. on Fiscal Affairs and Health of the House Comm. on the District of Columbia, 98th Cong., 2d Sess. (1984) [hereinafter cited as Hearing].

7. Under article IV, section 3, clause 1, of the United States Constitution, this is all that is required for the admission of a state. The admission of the District as a state may, however, present special problems because the existence of the district is specified in the Constitution. Article I, section 8, clause 17 gives the Congress exclusive legislative power "...over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States ..." Also the twenty-third amendment specifies that the District shall appoint electors for the office of President and Vice President.

Senator Ted Kennedy asserted that the District of Columbia could be admitted as a state by the regular means, that a constitutional amendment is not necessary. Not everyone may share his certainty and this may prove to be another impediment to the achievement of statehood. See, Hearing at 31-32. See also, S. 5740. 98th Cong., 2d Sess. (1984) (speech by Senator Kennedy introducing S. 2672, the NEW COLUMBIA ADMISSION ACT).
might cause a shift in the balance of power in Congress. Statehood's proponents have nothing with which to bargain for the needed votes.

Philip Schrag is a Georgetown University law professor. He became interested in the statehood issue when the question of whether to hold a constitutional convention appeared on the ballot. In a moment of innocent curiosity, he inquired about the progress of the convention. A short time later, he was campaigning for election as a delegate.

Based on his credentials, Schrag would seem to be an ideal convention delegate. He received an excellent formal education at Harvard College and Yale Law School. He served as Assistant Counsel to the N.A.A.C.P. Legal Defense and Education Fund and as New York City's Consumer Advocate; all ideal opportunities to learn about the problems of poverty and racial discrimination, problems which afflicted the District. He also served as Deputy General Counsel to the United States Arms Control and Disarmament Agency and was a teacher of legislation (as well as other subjects). His background in government, politics and diplomacy seemed complete.

Schrag's prime motivation for becoming a delegate was his belief that his skills and knowledge would be an asset to the convention. However, before declaring his candidacy, he consulted a respected but unidentified advisor. His mysterious advisor warned that his education and his professional status would be viewed with suspicion and hostility by the other delegates. Living in an affluent white section of the District, and being white, male, Jewish, and a teacher at a private Catholic university would all be obstacles to his effective participation in the constitution-making. "'Don't do it [seek election as a delegate],’ my Source says. 'It could be a disaster for you . . . . It doesn’t matter if you lose [the election]. The headache is winning.'”

8. This has been expressed by the phrase, the "Four Too's;” i.e., a congressional delegation from the District would be "too liberal, too urban, too Democratic and too black.” This phrase was used by supporters of the proposed constitutional amendment (supra note 4) to explain the rejection of that amendment by the states.

News/Sun-Sentinel, July 21, 1985, §A, at 10, col. 1. The point is that any proposal which would give the District voting representatives in Congress, e.g. statehood, would be subjected to extraordinary scrutiny by a hostile Congress.

9. In its defense, Congress might point out that it did approve the proposed amendment which would give the District voting representatives. However, it has been suggested that it was an empty gesture and that the Congress approved the proposed constitutional amendment only because of the certainty that the amendment would never be ratified by a sufficient number of state legislatures.

10. Schrag at 42.
well have been entitled "The Education of Philip Schrag."

Schrag could have given us a sterile report about what the convention did, and where the mistakes were made, and why. But he goes far beyond that. He reports the twists and turns of the real convention, including his own errors, from the unique vantage point of a participant. We suffer along with Schrag as he learns, and sometimes relearns, the lessons of group dynamics, politics and race. We experience, along with Schrag, the discomfort of an educated white liberal who finds himself a member of the racial minority and even, for a moment, a reluctant participant in a "white caucus." Schrag sets an example by his willingness to seek advice which he carefully weighs before acting. His openness to learning from his experiences reminds the reader that the learning process must continue forever, regardless of the strength of one's resume. As we enjoy his triumphs, however minor, we appreciate the value of his perseverance.

Professor Schrag also provides us with an interesting introduction to the District's politics and history, particularly through his portrayals of the individuals involved. As he discusses the convention itself, he alternates between chapters of his personal reminiscences of the convention and chapters of formal history which chronicle the official events, debates, motions, committee reports, speeches, and the votes. The contrast gives even the most trusting reader doubts about the validity of determining the true legislative intent from a legislative history. While the chapters on the formal history do become a bit dry, the reader knows that an interesting real-life-story chapter is not too many pages away. The sum of the two together is really more than either read alone. The juxtaposition adds something because of the contrast, and because while reading the dry history, one's appetite is whetted for the real dirt which is to follow.

However, there are a few surprises in the book. Schrag is considered an innovator in legal education, a pioneer in clinical teaching, who designed and implemented a legislation simulation to give law students an appreciation for the legislative process. Law students could have participated in the convention as members of the legislative staff or as aides to the delegates, receiving an exceptional educational experience. But, law students are seldom mentioned. The frequent complaints about the lack of convention staff makes their absence particularly conspicuous. It is possible that no law students were interested, but that seems unlikely considering the huge number of law students in the
D.C. area.\textsuperscript{11} No explanation is given.

The lack of media coverage of the convention and the New Columbia constitution it produced is also surprising. The opposition to statehood by the District’s power structure may explain the minimal coverage by the local press, but statehood for the District should be a matter of national interest, and there is no explanation for the lack of meaningful national coverage. Only the opening and closing ceremonies seemed to attract very much attention. Perhaps statehood is not an interesting topic. Perhaps even a newsworthy event needs a public relations professional to get it into the news, and the convention lacked the appropriate staff. It seems unlikely that something more sinister was afoot.

The constitution produced by this convention is a monument to the spirit of the delegates. Underfunded, understaffed, lacking facilities and support, hampered by the lack of formal preparation and a ninety-day deadline, and peopled by political amateurs who also had to hold down full time jobs, the convention seemed doomed from the start. Somehow a constitution was produced.\textsuperscript{12} While it seems unlikely that this constitution will ever become effective,\textsuperscript{13} it may be an important step in the evolution of the government of the District of Columbia or its successor. Serious readers, however, may prefer to study the law review article, which was the predecessor of this book, because in that version the footnotes appear on the bottom of each page rather than at the end of the chapter.\textsuperscript{14}

Schrag’s narrative is easy to read and comfortable, but something is missing. It seems too restrained when he describes his own experiences. When he describes anger or frustration, he just does not sound angry or frustrated. His training as an academic, may have made his unemotional reporting inevitable, or he may simply have exceptional

\textsuperscript{11} In addition to the students at Georgetown, law students from American University, Antioch, Catholic University, George Mason University, and Howard University are in the D.C. area.

\textsuperscript{12} The Constitution of the Proposed State of New Columbia is reproduced in its entirety in Schrag at 257 app. B.

\textsuperscript{13} For a criticism of the proposed constitution see Oulahan, The Proposed New Columbia Constitution: Creating a “Manacled State,” 32 Am. U.L. Rev. 635 (1983) which contains negative criticism of the preamble and the bill of rights by a delegate who was a member of the Judiciary Committee of the Convention. See also, Hearing; particularly the statement of Senator Spector at 43-48.

\textsuperscript{14} Schrag, By the People: The Political Dynamics of a Constitutional Convention, 72 Geo. L.J. 819 (1984).
emotional control. That minor flaw may deprive Professor Schrag of a popular audience and this book will probably not become the basis of a major motion picture, although it is easy to imagine Alan Alda in the lead role. However, for the lawyer, for the student, or for the citizen, Professor Schrag has provided lessons about civics, humility, politics, group psychology, race, poverty, religion and education. That is quite an accomplishment.

15. E.g., do you know which state has a unicameral legislature and what the arguments are both for and against a unicameral legislature? Do you even know what a unicameral legislature is?