results can be avoided through a restrained interpretation of the forum’s interest, comparative impairment will be an improvement only to the extent that the marginal increase in fairness that it achieves justifies the loss of predictability and ease of application of a forum-preference rule. The preceding analysis suggests that its costs do not outweigh that marginal benefit.

Conclusion

This Note has focused on Bernhard’s approach to choice of law problems. In subjecting the court’s use of comparative impairment to critical analysis, one must recall Justice Traynor’s remark on academic review of judicial decisions:

The composite ideal . . . is a judge who after marshalling an impressive array of relevant facts, can write an opinion that gives promise of more than a three-year lease on life by accurately anticipating the near future, who respects established folk patterns by not anticipating the too distant future, and who walks a tightrope of logic to the satisfaction of collective thinkers as well as to the plaudits of the philosophers.88

Although one can argue against the court’s adoption of comparative impairment in Bernhard, the opinion is an important addition to the field of choice of law. It is sure to arouse the interest of both the collective thinkers and the philosophers.

John J. Wasilczyk

IV

CONSTITUTIONAL LAW

A. THE RIGHT TO REASONABLE RENT REGULATION:
A NEWER ECONOMIC DUE PROCESS

Birkenfeld v. City of Berkeley.1 This case resurrects, though in new guise, the substantive due process doctrine in California. The supreme court invalidated as unconstitutional on its face a 1972 initiative amendment to the Berkeley City Charter prescribing a system of


residential rent control. Although rejecting numerous attacks on the initiative process and particular provisions of the charter amendment, the court sustained two challenges. First, the court ruled that a procedure requiring landlords to obtain a "certificate of eviction" from the city before instituting an action for summary repossession was preempted by state law. Second, the court held that enforcement of the amendment's maximum rent adjustment mechanism would violate landlords' due process rights. Since this mechanism could not be severed from the remainder of the amendment's provisions, the court struck down the initiative in its entirety.

Notwithstanding the fate of the Berkeley initiative, Birkenfeld offers California cities, within limits, the judicial equivalent of a rent control enabling act. First, the court approved as not in conflict with state law the charter amendment's restrictions on the grounds for eviction. Second, drawing on substantive due process theory, the court enumerated specific defects in the amendment's rent adjustment mechanism and suggested how these shortcomings might be cured. As a result, Birkenfeld invites cities to regulate rents within the parameters outlined by the court.

In its willingness to guard purely economic interests, the supreme court retreated from its long practice of deferring to legislative judgments concerning economic regulation. Only once since the 1930's has the court invalidated an economic regulatory scheme on substantive due process grounds. The future of economic due process is rendered uncertain by this renewed exertion of judicial power, parti-

2. The charter amendment was adopted by Berkeley voters by a vote of 27,915 to 25,301. S.F. Chronicle, Oct. 2, 1976, at 4, col. 5. It was placed on the ballot by initiative after the Berkeley City Council refused to certify the measure. 17 Cal. 3d at 137 n.3, 550 P.2d at 1007 n.3, 130 Cal. Rptr. at 471 n.3.
3. The court held that California cities may adopt rent control laws under the constitutional grant of police power so long as such provisions are consistent with general law. It rejected arguments that rent control could not be adopted by initiative in derogation of the administrative powers of the City Council; that the initiative deprived the electorate of an opportunity to engage in proper factfinding; and that the initiative violated landlords' due process rights since tenants' votes would always outnumber landlords'. 17 Cal. 3d at 140-47, 550 P.2d at 1009-14, 130 Cal. Rptr. at 473-78.
5. See CAL. CONST. art. XI, § 7.
6. 17 Cal. 3d at 173, 550 P.2d at 1033, 130 Cal. Rptr. at 497.
7. Opponents of rent control recognized this and procured passage of a bill in the California legislature forbidding local rent control unless authorized by the state. Calif. A.B. 3788, Reg. Sess. 1975-76. But Governor Edmund G. Brown, Jr., vetoed the bill minutes before it would have become law without his signature. S.F. Chronicle, Oct. 1, 1976, at 17, col. 2.
8. The last California decision to employ this doctrine invalidated a state statute empowering a board appointed by the Governor to set minimum prices in the dry cleaning business. State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc., 40 Cal. 2d 436, 254 P.2d 29 (1953).
cularly since the court relied on two theories of substantive due process with different historical roots and conflicting approaches to the scope of judicial review of economic legislation.

On the one hand, the court subjected the amendment's rent adjustment procedures to close scrutiny. This style of judicial review represented an attempt to formulate a "modest but real version of the rational-basis standard" in the due process area. On the other hand, the court relied on 19th-century notions of vested economic rights in finding that enforcement of the amendment would be confiscatory, an approach that carried the court well beyond examination of the rationality of the means of a legislative program. The tension between these conflicting theories led the court to sketch a less onerous rent control scheme, rather than to prohibit any regulation as might have been the result under older substantive due process theory.

After a brief explanation of the charter amendment, this Note will discuss the significance of the court's approval of municipal eviction controls and its new approach to economic due process.

I. The Berkeley Rent Control Program

The Berkeley charter amendment, designed to cope with localized housing shortages, aging and deteriorating housing stocks, and exorbitant rent increases, confronted a history of judicial hostility to rent regulation. Some courts have struck down municipal rent control as beyond the limits of local police power. Other successful challenges by landlords have asserted preemption by state unlawful detainer statutes. Many courts, following wartime precedents, still regard an emergency gravely threatening public welfare as a prerequisite to the regulation of rents.


10. See Blumberg, Robbins & Baar, The Emergence of Second Generation Rent Controls, 8 CLEARINGHOUSE REV. 240, 246-49 [hereinafter cited as Second Generation Rent Controls].


12. See cases cited in note 23 infra and accompanying text.

13. See, e.g., City of Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801, 804 (Fla. 1972); Lincoln Bldg. v. Baar, 1 N.Y.2d 413, 135 N.E.2d 801, 153 N.Y.S.2d 633 (1956), appeal dismissed, 355 U.S. 12 (1957). As a last resort, landlords have challenged rent control as a confiscation of their property rights. See, e.g., City of Miami Beach v. Forte Towers, Inc., 305 So. 2d 764, 768 (Fla. 1974); Marshal House,
The preamble of the charter amendment addressed itself in boilerplate terms to the emergency doctrine. It described a "serious public emergency" resulting from "[a] growing shortage of housing" endangering the health and welfare of the city, and especially of its poor, minorities, students, and aged. The stated purpose of the amendment, therefore, was "to alleviate the hardship caused by this emergency... ."

Other sections of the charter amendment provided for the implementation and continuing administration of controls. To nullify rent increases imposed after proposal of the amendment but before it became effective, the measure provided for an automatic rollback of rents to levels in effect on August 15, 1971. The amendment authorized an elected Rent Control Board to adjust maximum rents after conducting mandatory public hearings. The Board, however, had no power to adjust rents in an across-the-board fashion. Rent adjustments could be considered only after a landlord or tenant submitted a petition to the Rent Control Board and notice was given to the other party. Before a rent adjustment could be granted, the amendment required a petitioning landlord to submit to the Board a certificate issued by the city as proof of compliance with applicable housing codes. The Board in its discretion could refuse to consider an upward rent adjustment for any unit the subject of a hearing within the previous year. Landlords could not consolidate petitions for units in the same building unless a majority of tenants gave written consent. Board decisions were to be supported by the preponderance of evidence submitted at the hearing. Taken collectively, these procedures might have made it difficult to obtain speedy rent adjustments.

Finally, the charter amendment vested enforcement powers in the Board. Of crucial importance was the requirement that landlords seeking to evict obtain a "certificate of eviction" from the Board. The Board could issue such a certificate only after the landlord filed an affidavit stating, under penalty of perjury, that the unit involved

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14. This provision is typical of recent rent control legislation. See Second Generation Rent Controls, supra note 10, at 242. For a thorough history of this doctrine and criticism of its continuing influence, see Baar & Keating, The Last Stand of Economic Substantive Due Process—The Housing Emergency Requirement for Rent Control, 7 URB. LAW. 447 (1975).

15. Amendment to Berkeley City Charter, art. XVII, § 1, res. ch. 96, 1972 Cal. Stats., reprinted in 17 Cal. 3d at 174-80, 550 P.2d at 1033-40, 130 Cal. Rptr. at 497-504 [hereinafter cited as Berkeley City Charter, art. XVII].


17. 17 Cal. 3d at 171, 550 P.2d at 1031, 130 Cal. Rptr. at 495.

complied with applicable housing codes, that notice of termination was properly served on the tenant, and that eviction was sought for a purpose permitted by the amendment. If the tenant then requested a hearing, however, the certificate could not be issued if the landlord failed to prove: (1) the absence of code violations not substantially caused by the current tenant, and (2) that the eviction was not sought for prohibited retaliatory motives.10

Berkeley landlords filed a class action in superior court challenging the charter amendment. The Fair Rent Committee, a community group that had been instrumental in drafting the initiative, intervened in opposition to the plaintiffs. On April 26, 1973, the trial court preliminarily enjoined the rent rollback before it took effect; 2 months later, the court enjoined enforcement of the entire amendment. The trial judge ruled that there was no emergency justifying the imposition of rent control and that the eviction control provisions were in conflict with state unlawful detainer statutes.20

The supreme court affirmed, though on different grounds. The court first considered the amendment's eviction control provisions, finding that substantive but not procedural aspects of the measure conflicted with state unlawful detainer statutes. Second, the court held that the amendment's rent adjustment mechanism violated due process and was unduly confiscatory.21

II. Municipal Eviction Controls

The inability of cities to limit evictions has been one of the foremost obstacles to effective municipal rent control. Without eviction controls, landlords could circumvent rent ceilings by dispossessing tenants who refused to pay rent increases. Consequently, rent control laws often prescribe permissible grounds for eviction and procedures for local enforcement.22 Most courts have held that locally created eviction restrictions are preempted by state unlawful detainer

19. Id. § 7.

20. 17 Cal. 3d at 135-36, 167, 550 P.2d at 1006-07, 1028, 130 Cal. Rptr. at 470-71, 492.

21. Because of the protracted litigation, a ruling upholding the rent control program could have had the effect of rolling back rents to 1971 levels since the charter amendment prohibited rent increases upon its approval by the state legislature. Berkeley City Charter, art. XVII, supra note 15, § 4(a). The base rent under the rollback provision was keyed to the date when President Nixon, acting under section 203 of the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stats. 799 (1970) (expired 1974), ordered a national rent freeze. The landlords argued that such a harsh result, independent of the other infirmities in the amendment, would violate due process. In order to avoid this issue, the court postulated that rents would be frozen at current levels if the charter amendment were sustained. 17 Cal. 3d at 166, 550 P.2d at 1028, 130 Cal. Rptr. at 492.

22. See Second Generation Rent Controls, supra note 10, at 245.
statutes. In the view of these courts, the statutory prerequisites alone, such as nonpayment of rent or holding over past the end of the tenancy, are sufficient to permit eviction. Because eviction controls have been deemed essential to the purpose of rent regulation, these courts have struck down local rent control schemes even where there has been a separability clause.\(^{23}\)

The supreme court adopted the minority view and distinguished the procedures for seeking an eviction, which are provided by statute,\(^{24}\) from the substantive grounds for eviction.\(^{25}\) The court reasoned that the purpose of the statutory procedures is to provide a "simple and speedy remedy that obviates any need for self-help by landlords."\(^{26}\) Berkeley's eviction certificate requirement conflicted with this purpose. By demanding that landlords resort to an administrative body before commencing an unlawful detainer action, the charter amendment unduly inhibited landlords' access to a state forum. The court found, however, that the procedural purpose of the state provisions does not prevent cities from limiting the substantive grounds for eviction in order to enforce rent ceilings. The court concluded that a tenant could assert such regulatory restrictions as a defense in unlawful detainer proceedings.\(^{27}\)

Although this result makes rent control a realistic possibility, it has uncertain implications. The court's broad distinction between invalid procedural and valid substantive municipal regulation may prohibit administrative remedies designed to ameliorate the risk and lessen the costs of litigation for a tenant. The eviction certificate requirement shifted the burden of enforcing rent control away from a defending tenant. When housing is difficult to find and rents are rising, a landlord's threat of eviction may dominate the bargaining relationship. Without the option of an administrative determination of rights prior to litigation, the tenant must risk immediate eviction or capitulate to the landlord's demands. A defense in an unlawful detainer action therefore may offer tenants inadequate protection against landlords in a tight housing market.

To ameliorate this problem, a rent board might seek to enjoin an unlawful rent increase at the request of a tenant threatened with


\(^{26}\) 17 Cal. 3d at 151, 550 P.2d at 1017, 130 Cal. Rptr. at 481.

\(^{27}\) Id. at 149, 550 P.2d at 1016, 130 Cal. Rptr. at 480.
If the board moves before the landlord files his action, the landlord would have an opportunity to contest the legality of the rent ceiling at the hearing for the injunction. Such a determination might relieve the tenant of the necessity of defending a subsequent unlawful detainer action. The court, however, did not reach the question of the validity of the charter amendment's judicial remedies. It is unlikely that the court would invalidate all enforcement remedies other than substantive defenses as conflicting with the procedural purpose of the unlawful detainer statutes. The landlord's statutory right to a speedy and efficient adjudication of the question of possession and his free access to the courts would therefore not be impaired by this procedure.

The court's approval of eviction restrictions allows cities to require a landlord to have good cause for eviction. In order to enforce rent ceilings, the Berkeley charter amendment permitted evictions in only three types of cases: a tenant's misconduct or breach of specified duties owed the landlord, a landlord's good faith removal of the housing from the rental market for a permissible purpose, and a tenant's refusal to execute a renewal lease. Similar restrictions designed to prevent arbitrary evictions should create unlawful detainer defenses even if they are not part of a rent control program. A defense in an unlawful detainer action is prohibited if it is "extrinsic to the narrow issue of possession" and if it undermines the efficiency of the summary procedure. By accepting the good cause defense, the Birkenfeld court apparently found that a good cause defense in an unlawful detainer action was neither extrinsic to possession nor unduly inefficient.

The court did not reach the more complex issue of whether the "right" to evict may be subjected to more onerous restrictions. The cer-


29. 17 Cal. 3d at 141 n.11, 550 P.2d at 1011 n.11, 130 Cal. Rptr. at 475 n.11.


Certificate of eviction provision attempted to require full compliance with housing codes and the absence of specified retaliatory motives. These restrictions were modeled after the judicially created defenses of breach of implied warranty of habitability and retaliatory eviction. But to the extent that code and purpose restrictions exceed judicially created tenant defenses, they may be preempted by parallel statutory repair and deductible remedies. Furthermore, if such restrictions are beyond those necessary to protect a tenant from arbitrary eviction, landlords may challenge them on substantive due process grounds.

III. A New Judicial Role in Economic Regulation

Due process, like equal protection, requires some relationship between legislative purposes and the means chosen to implement them. The test of this relationship has always been couched in terms of the "reasonableness" of the means. Before the 1930's, the courts used this rubric to justify rigorous review of economic regulation. Beginning with the New Deal, however, the courts usually have deferred to legislative judgment and found the required relationship where the means could not be called irrational. Despite this deferential attitude, the rhetoric of the reasonableness test has never been officially abandoned.

In recent years, a number of equal protection decisions have indicated that a stronger relationship between means and ends may be required, even though a suspect classification or a fundamental interest is not involved. Distinguished commentators have argued against extending such review to economic due process cases, because of the repugnant historical connotations judicial intervention would raise and for reasons of judicial economy. Nevertheless, in Birkenfeld the

34. The charter amendment prohibited issuance of a certificate of eviction when sought by a landlord in retaliation for tenant organizing, as well as for reporting housing code or rent control violations. If a tenant contested issuance of the certificate, the burden of proof on these issues was placed on the landlord. Berkeley City Charter, art. XVII, supra note 15, § 7(b)-(c), (e).
37. See, e.g., Lochner v. New York, 198 U.S. 45 (1905); see generally E. CORWIN, LIBERTY AGAINST GOVERNMENT (1948).
38. See, e.g., Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, 65 Cal. 2d 349, 420 P.2d 735, 55 Cal. Rptr. 23 (1966); Allied Properties v. Department of Alcoholic Beverage Control, 53 Cal. 2d 141, 346 P.2d 737 (1959); Wholesale Tobacco Dealers v. National Candy & Tobacco Co., 11 Cal. 2d 634, 82 P.2d 3 (1938).
40. See Gunther, supra note 9, at 42-43; McCloskey, supra note 9, at 59-62.
court applied the reasonableness test far more rigorously than courts generally have in post-New Deal economic due process cases.

The court's due process analysis can be broken down into three steps. First, the court found that under the rule of *Nebbia v. New York*, due process requires that price regulation be "reasonably" related to a proper legislative purpose. Second, the court found that the purpose of the rent adjustment mechanism—to eliminate excessive rents—could be discerned from the charter amendment's preamble. Third, the court concluded that the effect over time of the rent adjustment mechanism would be to lower rents more than is necessary to eliminate excessive rents; thus the measure is unconstitutionally confiscatory on its face. For these reasons the court ruled that the rent adjustment mechanism was not reasonably related to the amendment's stated purpose, depriving landlords of due process.

a. The Application of *Nebbia v. New York*

The supreme court introduced its two key discussions—one rejecting the emergency doctrine and the other finding the charter amendment's rent adjustment mechanism confiscatory—with citations to the due process test of *Nebbia v. New York*. *Nebbia* was the first United States Supreme Court case during the New Deal to take a hands-off posture toward state price regulation. In rejecting the emergency doctrine, *Birkenfeld* follows a growing number of courts that, taking the hands-off attitude of *Nebbia* and its progeny, have found rent control constitutionally indistinguishable from other forms of price control. Although *Nebbia*’s deferential attitude toward

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42. 17 Cal. 3d at 155, 165, 550 P.2d at 1020, 1027, 130 Cal. Rptr. at 484, 491.
43. Id. at 159-60, 165, 173, 550 P.2d at 1023, 1027, 1033, 130 Cal. Rptr. at 487, 491, 497. The court held that the statutory purpose is legitimate only if aimed at conditions having a basis in actual fact, and the absence of such "constitutional facts" may be proved at trial. The court's statement, however, that "the constitutionality of residential rent controls . . . depends upon the actual existence of a housing shortage," *id.* at 160, 550 P.2d at 1024, 130 Cal. Rptr. at 488, appears to go farther and mandate that there be a housing shortage. It would be anomalous for the court to reject the emergency doctrine, but substitute a housing shortage requirement to the exclusion of other evils, such as a rental monopoly, at which regulation may be aimed. *See* Troy Hills Village v. Township Council, 68 N.J. 604, 618, 350 A.2d 34, 41 (1975).
44. 17 Cal. 3d at 165-69, 550 P.2d at 1027-30, 130 Cal. Rptr. at 491-94.
45. Id. at 173, 550 P.2d at 1033, 130 Cal. Rptr. at 497.
46. Id. at 155, 165, 550 P.2d at 1020, 1027, 130 Cal. Rptr. at 484, 491.
47. 291 U.S. 502 (1934).
48. The most significant of these cases rejected the doctrine that price control was valid only if the business regulated was one "affected with a public interest." *Olsen v. Nebraska ex rel. Western Ref. & Bond Ass'n*, 313 U.S. 236 (1941).
legislative judgments justifies this result, it is puzzling how *Nebbia* at the same time can be cited in support of highly intrusive judicial intervention in matters of economic regulation.

It has been observed, however, that *Nebbia* did not necessarily mark the abandonment of judicial review of economic regulation;\(^{50}\) rather, judicial review could be limited to the reasonableness of the *means* of regulation without substituting the court's view of the wisdom of economic policy for that of the legislature.\(^{51}\) Such a limited reasonableness test would be based on a balancing of the public need for regulation in a particular form against the unnecessary costs that form impose on the regulated class. *Birkenfeld's* language indicates that the court applied this due process test by importing a criterion of reasonableness into an analysis of whether the rent adjustment mechanism was confiscatory.\(^{52}\)

Instead of trying to discover the actual or most plausible public needs inspiring Berkeley's particular rent adjustment mechanism, however, the supreme court judged the reasonableness of the mechanism in light of the charter amendment's stated purposes. As a result, the court in effect disapproved of central purposes of the Berkeley rent control program that were not explicitly stated; it found the adjustment mechanism unreasonable without weighing its unstated purposes against the marginal hardships they would have imposed on landlords.

b. *Unreasonableness and the Definition of Purpose*

The court's discussion in *Birkenfeld* of the purpose of the charter amendment purported not to look beyond the amendment's preamble.

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276 Md. 448, 348 A.2d 856 (1975); Hutton Park Gardens v. Town Council, 68 N.J. 543, 555-64, 350 A.2d 1, 7-12 (1975).

50. See McCloskey, supra note 9, at 38-40.

51. See generally Gunther, supra note 9, at 20-24, 41-43. Professor Gunther argues that legislative means may be intensively scrutinized to discover whether they substantially further legislative ends, while avoiding ultimate value judgments about the legitimacy of legislative purposes. But he acknowledges that difficult, albeit "narrower," value judgments must be made.

Indeed, perhaps the greatest difficulty in applying the model [of modest judicial intervention] will be to delineate the boundary between the narrow value judgments required in evaluating means and the broad ones implicit in choosing among ends—in short, to avoid a disguised examination of legislative ends . . . . The line between means and ends will be drawn primarily in such terms of breadth of value judgments . . . .

*Id.* at 48.

This Note argues that in *Birkenfeld* the court made this "narrow" value judgment implicitly, without balancing the means against their "narrow" purposes, and that the court made no attempt to distinguish such "narrow" purposes from the "ultimate" regulatory goals of the Berkeley rent control program.

52. See notes 61 and 64 infra and accompanying text. The court rejected comparable arguments that the special problems of real property ownership should be weighed in deciding whether an emergency was needed to justify regulation. 17 Cal. 3d at 158-59, 550 P.2d at 1022-23, 130 Cal. Rptr. at 486-87.
The "Statement of Purpose" contained in the preamble provided that the purpose of the measure was to alleviate hardship caused by the housing emergency. Without explanation, the court modified the purpose to "preventing excessive rents." "Alleviating hardship" and "preventing excessive rents," however, do not encompass identical concerns. The structure of the Berkeley rent control initiative indicates that the amendment was designed to alleviate other hardships, such as those caused by a deteriorating housing stock and by tenant fears of landlord retaliation for tenant complaints about code violations or rent increases. These concerns go beyond the arithmetic of rent levels. Furthermore, there are plausible legislative goals not expressly stated in the preamble or obvious from the structure of the legislation that may justify the rent control program. For instance, the court did not consider one of the most plausible hardship-related goals of Berkeley's rent control mechanism: preventing population shifts that result when low-income renters are squeezed out of a community by continual rent increases.

The court's failure to look beyond the preamble is difficult to justify. The mix of goals behind a comprehensive legislative program may be too complex to be delineated in a brief summary. Moreover, the political battles over the appropriate goals of a legislative scheme are far more likely to be fought over the structure of the act than the wording of a preamble. Limiting the inquiry into legislative purpose to the narrow confines of the preamble is particularly unrealistic where, as in Birkenfeld, the language used is plainly "boilerplate" designed to satisfy a vestigial legal requirement such as the emergency doctrine.

Despite its limited inquiry into the purposes of Berkeley's rent control program, the court refused to invalidate the initiative by finding that the rent adjustment mechanism would not substantially further the initiative's stated purpose. Clearly the rent rollback and maximum rent adjustment procedures would prevent rents from being excessive. The court's concern, rather, was that the procedures would be too

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54. 17 Cal. 3d at 165, 173, 550 P.2d at 1027, 1033, 130 Cal. Rptr. at 491, 497.
55. See Community Ownership Organizing Project, Keys to the City: Programs for Community Control in Berkeley 32, 36 (1975).
57. The asserted justification for relying solely on the stated purpose is that this will improve the quality of the political process. Gunther, supra note 9, at 44-46. Professor Gunther, however, rejects the notion that "the only judicially cognizable purpose be one explicitly set forth in a statutory preamble." Id. at 47. A judicial response that focuses narrowly on stated purposes invites reenactment of the legislation with an appropriately framed justification.
effective in accomplishing the narrowly framed purpose of preventing excessive rent. The court therefore invoked the confiscation doctrine, declaring that legislative rent control schemes must “provide landlords with a just and reasonable return on their property.”

c. The Theory of Unavoidable Confiscation

The confiscation doctrine was developed in public utility ratemaking cases in the late 19th century. These cases held that a rate too low to permit a reasonable return on investment was a “confiscation” and a taking of property without due process. In Birkenfeld, the supreme court interpreted the confiscation doctrine to require reasonableness of ratemaking procedures as well as reasonableness of rates. After analyzing the ratemaking procedure in the rent control initiative, the court found the rent adjustment mechanism unconstitutionally confiscatory, because the effect of its enforcement would “necessarily be to lower rents more than could reasonably be considered to be required for the measure’s stated purpose . . . .”

This test of a confiscation is notable in two respects. First, confiscation is not defined solely in quantitative financial terms; rather, it is measured in terms of the reasonableness of the relation between the stated purpose and the rent adjustment mechanism’s effect on rent levels. In extending confiscation analysis beyond the balance sheet, the court followed the United States Supreme Court’s view that rates are not confiscatory unless, after a balancing of investor and consumer interests, they are unjust and unreasonable from the investor viewpoint. Second, courts previously refused to intervene in ratemaking prior to completion of administrative requirements. The Fair Rent Committee argued from this body of precedent that judicial consideration of the effects of the rent adjustment mechanism would be premature. Birkenfeld rejected this approach, stating that its inquiry was directed only at the “facial validity” of the mechanism—whether “its terms [would] not permit those who [were to] administer it to avoid

58. See text accompanying note 54 supra.
59. 17 Cal. 3d at 165, 550 P.2d at 1027, 130 Cal. Rptr. at 491.
61. 17 Cal. 3d at 165, 550 P.2d at 1027, 130 Cal. Rptr. at 491.
confiscatory results in its application to the complaining parties." Thus, the court formulated a test of unavoidable, "facial" confiscation that had two elements: (1) irremediable administrative inflexibility, and (2) inevitable confiscation.

The court failed, however, to clarify the relationship between the reasonableness of rent levels and the balancing of interests subsumed under the "confiscation" rubric in the second element. Instead, the court found that confiscation would inevitably occur because of the administrative delays inherent in the Berkeley rent control program. Moreover, although the court's test of "facial" validity appears aimed at preventing an explicit de jure confiscation, the court's subsequent inquiry focused on the likelihood of a de facto confiscation.

Although the court did not look beyond the preamble for the legislative purpose of the rent adjustment procedures, it showed no hesitancy in speculating on practical administrative difficulties. The court found the powers of the Rent Control Board unreasonably limited in relation to its assigned tasks. Specifically, the court noted that the Board did not have the power to: (1) order general rent adjustments for all or for particular classes of units; (2) terminate controls on any units; (3) consider a landlord's petition for a hearing without a certificate of housing code compliance; (4) dispense with "full-blown" hearings; (5) consolidate hearings freely; and (6) delegate responsibility for holding hearings. The court reasoned that because of the lack of these powers, once rents were rolled back case-by-case procedures would be incapable of adjusting inequitable rent ceilings except for "a lucky few." This administrative inflexibility, according to the court, made some confiscation inevitable.

The court's assessment of the Board's administrative powers was anything but sympathetic. The charter amendment gave the Board sufficient discretion to permit it to mitigate delays. The Board's rule-making power provided flexibility in designating the maximum rent. The charter amendment specified factors for mandatory Board consideration—property taxes, operating and maintenance expenses, capital improvements, appurtenances, and the condition of the premises—that lent themselves to speedy decision-making on the basis of standardized formulas. Furthermore, the charter amendment permitted

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64. 17 Cal. 3d at 165, 550 P.2d at 1027, 130 Cal. Rptr. at 491.
65. Id. at 171, 550 P.2d at 1031, 130 Cal. Rptr. at 495.
66. Id. at 172, 550 P.2d at 1032, 130 Cal. Rptr. at 496.
67. Id. at 169, 550 P.2d at 1030, 130 Cal. Rptr. at 494. The court stated that the rent adjustment mechanism would be "sufficient for the required purpose only if it is capable of providing adjustments in maximum rents without a substantially greater incidence and degree of delay than is practically necessary." Id.
68. Berkeley City Charter, art. XVII, supra note 15, § 5.
69. The Rent Control Board planned to minimize contested hearings, to provide
the Board to consider other factors that could have expedited rent adjustments. For example, although the Board was required to hold a hearing to confirm a rent adjustment even when a petition was unopposed, a lack of opposition to a petition might have been considered presumptive evidence of the validity of the rent increase. Most importantly, however, the amendment imposed no restrictions on the structure of the rent adjustment itself. Conceivably, once a hearing had been held, the Board could have specified the duration and character of the adjustment according to predicted changes in economic circumstances. Hence, rent adjustments need not have been fixed absolutely at a single level, but could have been graduated in steps over time or automatically adjusted according to variations in external parameters such as property tax increases or the Consumer Price Index.

Even if delays would have occurred, it is not apparent why unreasonable financial loss was inevitable. The court made no careful estimate of the Board's potential caseload to determine the likely number and duration of administrative delays. Whatever delay that careful analysis would have revealed was likely to occur, the court did not explain why delay in itself meant unreasonable confiscation. Rather, its analysis apparently rested on unstated assumptions about the rate of inflation, the cost-absorption potential of landlords, the long-term profitability of rental properties, the structure of property ownership, the length of time over which rates of return should be calculated, and the proportion of the landlord class discriminated against.

Even assuming that administrative delays would have produced some financial loss, this loss must be balanced against the purposes of the rather intricate administrative structure before an unconstitutional confiscation may be found. The court's analysis, however, was seriously distorted by its interpretation of the purpose stated in the pre-

formulas for standardized, automatic decisions, and to work out adjustments informally between the parties and Board staff. The Board anticipated handling between 3,000 and 5,000 rent adjustment decisions and 300 to 500 eviction hearings in the 1973-74 fiscal year. Its expected budget for the fiscal year ending June 30, 1974, would have approached $300,000. Declaration of Dan Siegal, former chief administrative officer of the Berkeley Board, Intervenors' Brief in Response to Court's Question.

It is difficult to see why the court stated that adjustment decisions could not be worked out informally, when the charter amendment required only that the Board take formal action and document its decision. The court interpreted the requirement that a decision be supported by a preponderance of the evidence—no more than a basis for judicial review—to mean that hearings must be "full-blown." See 17 Cal. 3d at 172 n.36, 550 P.2d at 1032 n.36, 130 Cal. Rptr. at 496 n.36.

70. 17 Cal. 3d at 170, 550 P.2d at 1030-31, 130 Cal. Rptr. at 494-95.

71. See id. at 169-70, 550 P.2d at 1030, 130 Cal. Rptr. at 494. The court ignored the figures presented by the Rent Control Board's former chief administrative officer and without any evidence in the record, raised the specter of a Board faced with petitions from over 17,000 units. See note 69 supra.
amble. The court's restrictive definition of purpose—preventing excessive rents—failed to account for the public and tenant needs that inspired the case-by-case decisionmaking structure.

The absence of a general rent adjustment power from the Berkeley charter amendment rested on the theory that a fair rent can only be based on the landlord's actual costs. Across-the-board increases may be inequitable because of differences in the condition of the housing stock and the extent of disparities in base rents established by an initial rent rollback. Unless individual determinations are made to adjust rents to costs, a deteriorating unit in need of repair might receive the same adjustment as a new unit with the same rent but a different cost structure.

A case-by-case procedure also permits balancing the interests of the tenant directly against those of the landlord. For instance, the Berkeley initiative allowed the Board to consider factors such as the tenant's ability to pay, his length of residence, the conduct of his tenancy, as well as hardships confronting landlords. The court's insistence on an across-the-board adjustment power ignored the advantages of a finely tuned case-by-case approach.

Conclusion

The supreme court's due process analysis in Birkenfeld leaves rent control drafters with little choice but to adopt the powers deemed unreasonably missing from the Berkeley program. By defining a confiscation in vague terms of delay, the court avoided providing any definite standard against which new rent control proposals might be tested; by narrowly interpreting the charter amendment's stated purpose, the court left uncertain how the purposes of rent control procedures should be presented to the courts and to the voters.

Nonetheless, Birkenfeld is an important precedent for substantive due process doctrine. In departing from a policy of deference to the

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   An across-the-board rent increase defeats one of the basic purposes of rent control: to make landlords prove their actual costs before any rent increase is approved. It shifts the burden of rent control to tenants, by allowing rent hikes and forcing tenants to apply for decreases if they feel the rent hike is unfair. After an across-the-board increase, many landlords end up charging higher rents than they would have without rent control. This criticism was aimed at the Massachusetts Rent Control Enabling Act, ch. 842, §§ 1-14, 1970 Mass. Acts (expired 1976). The supreme court implicitly endorsed the Massachusetts statute, because it "gives local rent control Boards the very powers . . . withheld from the Berkeley Board by the charter amendment." 17 Cal. 3d at 172 n.36, 550 P.2d at 1032 n.36, 130 Cal. Rptr. at 496 n.36.
73. Second Generation Rent Controls, supra note 10, at 244.
74. See text accompanying note 65 supra.
legislature in matters of economic regulation, the court substituted its judgment of reasonableness for that of the voters. The court attempted to restrict this value judgment to the means adopted to implement rent control and to soften that judgment's impact by detailing the defects of the Berkeley procedures. Although this limitation is responsive to the excesses of substantive due process in the early part of this century, it does not prevent an implicit judgment on the legitimacy of the regulatory purposes. A reasonableness test necessarily involves assigning weights to competing values so that they may be balanced.

As commentators have recognized, this sort of narrow value judgment has no inherent limits. It shades imperceptibly into major questions of the legitimacy of the regulatory purpose. Perhaps the boundary may only be delimited, as in Birkenfeld, by the detailed suggestion of a less onerous regulatory alternative. For this the stated purpose may be a necessary fiction. But exclusive reliance on the stated purpose inhibits justification of the attempt to regulate. This may entrench established economic interests as effectively as giving them expressly protected status. Birkenfeld may do no more than prescribe alternative means of rent regulation; but it sets a disquieting precedent for economic due process.

Hank Lerner

B. SCHOOL BOARD'S AFFIRMATIVE DUTY TO ALLEVIATE SEGREGATION REGARDLESS OF CAUSE

Crawford v. Board of Education; NAACP v. San Bernardino City Unified School District. In these companion cases the supreme court held that the equal protection clause of the state constitution requires school boards to take reasonably feasible steps to remedy segregation,

75. See notes 9 & 51, supra.
76. See Gunther, supra note 9, at 44. Professor Gunther's model of modest interventionism only shifts the burden of adducing justification. Under this model, the rent adjustment mechanism would have been rational since it substantially furthered the legislative purpose of preventing excessive rents. Id. at 21. See text accompanying note 58 supra.

3. CAL. CONST. art. I, § 7(a).
regardless of its cause. In 1963, the court had declared in *Jackson v. Pasadena City School District*\(^4\) that a causal connection with past discriminatory practices was not necessary to establish a school board's duty to remedy segregation. In that case, however, the school board was found to have purposely furthered segregation by gerrymandering school attendance zones. The source and scope of the remedial duty in the absence of discriminatory state action were not explained.\(^5\) *Crawford* and *San Bernardino* reaffirm the *Jackson* dictum and provide a limited clarification of the duty that it prescribed.

Part I of this Note discusses the factual settings of the cases and their holdings. Part II considers the threshold problem of establishing the state action requisite for a constitutional violation against the background of federal cases distinguishing between de jure and de facto segregation. The California Supreme Court abandoned the traditional distinction and declared that state action could be established independently of segregative intent or action. Part III explains the significance of this departure with respect to identifying a constitutional violation and imposing a corresponding remedial duty on the school board.

### I. The Cases

#### a. Crawford v. Board of Education

In August 1963, just months after the supreme court's decision in *Jackson*, minority school children in the Los Angeles Unified School District filed a class action suit to compel the school board to eliminate racial segregation in the district. The plaintiffs unsuccessfully sought the voluntary adoption of a desegregation plan for several years, and finally went to trial in October 1968.

The trial court's undisputed findings were that the district's schools were substantially segregated and had become increasingly so during the period from 1966 to 1968, and that the school board had failed to take steps toward implementing any reasonably feasible program to alleviate the segregation. The court also ruled that the board, at least since May 1963, had engaged in affirmative and bad faith acts of de jure segregation.\(^6\) It noted that minority children suffer serious harm

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\(^6\) The court cited such practices as (1) the siting and construction of new schools so that heavy segregation inevitably resulted upon the schools' opening because of the school board's "neighborhood school" assignment policy; (2) the implementation of an "open transfer" policy permitting transfers out of a school attendance zone but without providing the needed transportation; (3) the establishment of "feeder school" policies, by which the student population of the district's higher grade schools were
when their schools are segregated, whether the segregation is de jure or de facto. Furthermore, it found that the physical facilities, teachers, and curriculum in Los Angeles’ minority schools were of lower quality than those in the predominantly white schools. The school board was ordered to devise and implement a meaningful desegregation plan.

b. NAACP v. San Bernardino Unified School District

Unlike the Los Angeles Board of Education, the San Bernardino Unified School District had taken affirmative steps to alleviate segregation before the NAACP and individual minority students instituted this class action suit. Although the exact results of such efforts were not clear, no racial or ethnic imbalance existed in the district’s six senior high schools as of November 1972, and the number of minority-imbalanced junior high and elementary schools had actually declined from 1966 to 1972. Although fewer schools were found to be segregated, the degree of racial isolation in the segregated schools had increased in the same period; a number of schools had minority enrollments of close to 100 percent. The school board therefore directed the superintendent of schools to develop a desegregation plan. At first, the board instructed the superintendent to include busing in his plan if necessary, but later excluded the possibility of mandatory busing in response to community hostility. The board claimed that financial limitations made a large-scale transportation program impossible.

The plan subsequently adopted and implemented decentralized the school district into 10 planning units. Each unit was composed of three or four predominantly majority schools and one or two predominantly minority schools, and thus reflected the ethnic and economic distribution of the district as a whole. Voluntary integration was to occur within each unit.

With the possibility of mandatory busing ruled out, the plaintiffs brought this suit in April 1972. The NAACP sought an order requi-
ing the school board to devise and adopt a plan for the complete elimination of racial segregation and racial imbalance. The NAACP contended that the school board, by its adoption of the planning unit program, had failed to meet its constitutional obligation under *Jackson*. It also based its suit on various statutes and administrative regulations relating to the elimination of racial imbalance in public schools. Following a two-stage trial, completed in May 1973, which included expert testimony that the school board's current desegregation plan was deficient, the trial court concluded that segregation existed within the district and that the voluntary desegregation program could not achieve integration. The board therefore had a constitutional obligation to take reasonable and feasible steps to alleviate the situation. Unlike *Crawford*, however, there was no finding that de jure segregation existed or that the physical facilities or staff of predominantly minority schools were inferior.

c. The Holdings

On appeal, the California Supreme Court affirmed both superior court decisions. Both school boards argued that the *Jackson* dictum was not controlling and that therefore they had no constitutional duty to alleviate de facto segregation. The supreme court found that *Jackson*'s controlling precedence was clear, in light of subsequent cases following that decision without reservation. As explained in *Crawford*, the trial court's finding of "segregation," coupled with its conclusion that the school board had failed to undertake reasonably feasible steps to desegregate, was sufficient to invoke the court's equitable powers.

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9. The statutes (ch. 1765, §§ 1-2, 1971 Cal. Stats. 3814) were repealed by an initiative measure passed November 4, 1972. The trial court, though, in its final order of September 1973, continued to rely on the racial balance concept found in those sections. The supreme court ruled this standard to be improper. See text accompanying notes 41-42 infra.

10. In both cases, the defendants claimed that the segregation was de facto. In *San Bernardino* the trial court concluded that this contention was irrelevant. 17 Cal. 3d at 314, 551 P.2d at 49, 130 Cal. Rptr. at 745. In *Crawford* the trial court, after evaluating the evidence before it, termed the segregation de jure, and the school board appealed from this determination. 17 Cal. 3d at 285, 551 P.2d at 30, 130 Cal. Rptr. at 726. See text accompanying note 6 supra.

11. Mulkey v. Reitman, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966) (state's involvement in the initiative process significant enough to constitute state action); San Francisco Unified School Dist. v. Johnson, 3 Cal. 3d 937, 479 P.2d 669, 92 Cal. Rptr. 309 (1971) (statute, requiring parental consent to the assignment of a student to a school beyond a reasonable walking distance, unconstitutional if applied to districts manifesting racial segregation, whether de jure or de facto in character); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (de facto wealth discrimination not justified by analogy to de facto racial segregation.)

12. In both decisions the supreme court rejected the lower courts' definitions of segregation. See text accompanying notes 41-42 infra.
of relief. Thus Jackson and its progeny establish in California that a school board's constitutional obligation to alleviate segregation exists regardless of whether the segregation is caused by intentional action by the school board or by other factors.13

The court noted that federal cases had not yet ruled on the obligation to remedy de facto segregation; for this reason and perhaps also to rest its decision on an adequate nonfederal ground, it relied only on California law.14 Nevertheless, an examination of the federal case law may help to illustrate the judicial background of the instant decisions.

II. Ascertaining State Action

a. The De Jure/De Facto Distinction

The United States Supreme Court held in its landmark school desegregation case, Brown v. Board of Education, that “[s]eparate educational facilities are inherently unequal”15 and declared that separate schools violated the equal protection clause of the 14th amendment. In attempting to implement Brown, the courts have faced the threshold question of what degree of state involvement is necessary before a constitutional violation can be found. Traditionally, the courts have applied the “de jure” label to segregation caused by sufficient state involvement to impose a constitutional duty to desegregate and have characterized other segregation as “de facto.”

The distinction between de jure and de facto segregation was first articulated by a court in United States v. Jefferson.16 Whereas de jure segregation was associated with state action and governmental involvement, de facto segregation denoted “non-racially motivated separation of the races” and “fortuitous racial separation.” De facto segregation arose from residential segregation and adherence to racially neutral neighborhood school plans, rather than from compulsion of state law or officially announced policy.

13. Because of the de jure finding in Crawford, reliance on Jackson may have been unnecessary. See note 10 supra. By reaffirming Jackson in its Crawford decision rather than in San Bernardino, however, and then extending the holding to apply to San Bernardino, the court removes any lingering doubt that the cause of segregation might be a factor in imposing a remedial duty.
14. 17 Cal. 3d at 290, 551 P.2d at 33-34, 130 Cal. Rptr. at 729-30. The principle that the United States Supreme Court will not review state court decisions based on adequate nonfederal grounds is elementary. Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1875). See generally Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943 (1965). For another recent California Supreme Court decision resting on independent state grounds, see People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976).
Given the complexity and variety of possible situations, the distinction between the two types of segregation has not been obvious. Even in *Jefferson*, an express governmental policy to segregate was not necessary for a finding of de jure segregation. The Fifth Circuit recognized that naturally occurring housing patterns and the neighborhood school policy could be used by school boards to camouflage racially motivated actions to perpetuate previously active state discrimination. Thus, in the south, where a past history of de jure segregation had deliberately been continued, the segregation could not be termed fortuitous; rather, it was “pseudo de facto”—that is, de jure. In such a case the school board had an affirmative duty to integrate its school systems, rather than merely to refrain from discrimination.

The Supreme Court has at least implicitly adhered to the distinction between de jure and de facto segregation. Rather than facing the distinction squarely, the Court has expanded the category of cases in which de jure segregation may be found. The intentional promotion of segregation may be inferred from school board policies that do not outwardly distinguish among students by race.

Such an inference was easily drawn in the southern states, where schools had traditionally been racially segregated by official policy. In *Swann v. Charlotte-Mecklenburg Board of Education* the court attempted to define the scope of the duty of school authorities and district courts to remedy segregation. Although residential patterns in the area covered by the Charlotte-Mecklenburg school system had resulted from governmental action other than school board decisions, the Court relied on the district court's finding that the school boards had strategically located schools and had limited their enrollment to foster segregation. Because the state had a long history of governmental policies that deliberately separated students according to race, the school authorities were guilty of a constitutional violation and were required to devise affirmative, rather than racially neutral, remedial measures.

In *Keyes v. School District No. 1* the Supreme Court raised a presumption of de jure segregation in dealing with a school system that had never experienced racial segregation mandated or permitted by a state constitutional or statutory provision. The district court found intentional discrimination in the northeast portion of Denver known as Park Hill, but no similar showing was made for the heavily segregated core city area. The Court held that the finding of intentional segregation in one portion of the school system gave probative value to the

17. 372 F.2d at 876.
19. *Id.* at 7.
20. *Id.* at 5-6.
assessment of intent in other parts of the same school system; it emphasized that "the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is purpose or intent to segregate," rather than outwardly discriminatory conduct.

The Court did not discuss the meaning of "intent," but Justice Powell noted that its subjective nature evaded ready recognition. In a separate opinion, concurring in part and dissenting in part, he advocated the abolition of the distinction between de jure and de facto segregation. A showing of a "substantial" degree of segregation, in his view, was sufficient to establish a prima facie case that the school authorities were responsible and to warrant imposing on them the burden of demonstrating that they were nevertheless operating an integrated school system.

Some courts have responded to the problem of the "initial tortuous effort of . . . deducing 'segregative intent'" by judging intent objectively, according to the effects of school board actions, rather than subjectively, according to the motive of the school members. This approach was taken in *Hart v. Community School Board of Education*, in which the Second Circuit, adhering to the de jure requirement, adopted from tort theory an objective reasonable person standard. In holding that "de jure segregation may be based on actions taken, coupled with omissions made, by governmental authorities which have the natural and foreseeable consequence of causing educational segregation," the court considerably expanded the concept of what constitutes intent.

The decision illustrates how far the federal courts may be willing to go in assessing school board responsibility for causing segregation. Like the Supreme Court cases preceding it, however, the holding offers only limited assistance in resolving the issue of how fully to implement *Brown* and achieve a unitary school system absent a de jure case of segregation. If a causal connection between school board action and segregation is not shown, the federal courts are still without authority to effect a remedy.

22. [A] finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions.

*Id.* at 208.

23. *Id.* (emphasis in original).

24. *Id.* at 224 (Powell, J., concurring and dissenting).

25. "Id.

26. 512 F.2d 37 (2d Cir. 1975).

27. *Id.* at 50.
The limits of a school board's duty to desegregate when segregation results from residential patterns rather than from explicit or inferred discriminatory action were realized recently in *Pasadena City Board of Education v. Spangler.* In *Spangler,* the district court found unconstitutional segregation in the school district. In addition to ordering a segregation plan, it retained jurisdiction to evaluate the plan and its execution in succeeding years. The court's order was not appealed, but 4 years later successors to the original defendants moved for relief, including a modification of the requirement that no school in the district should have a "majority of any minority students." The district court refused to allow the modification, but the Supreme Court reversed. The Court found that the desegregation plan had initially been successfully implemented and that changes in the racial mix of the student bodies had occurred subsequently. Such changes, however, were not attributable to school board activity, and the school board could not continue to be held responsible for remedying the existing racial imbalance.

The implications of the holding are not clear, because the Court limited its holding to the issue of a district court's authority in imposing a plan designed to achieve a unitary school system. The question of the validity of the original trial court order was not before the Supreme Court, and the Court considered it unnecessary to determine whether the district court's retention of jurisdiction should be terminated. Dissatisfaction with the "no majority of any minority" standard, however, is implied. The Court ruled that the district court had exceeded its authority in requiring annual readjustments of attendance zones to maintain this standard.

Arguably, a different result might have been reached had the district court not contemplated continued yearly reevaluations of the school board's implementation of the plan, or if a different standard of segregation had been applied. Nevertheless, the Court's requirement that segregation must be de jure before an affirmative remedial duty will be required is clear.

29. *Id.* at 2701.
30. The majority recognized that the school board had not achieved a fully unitary system in areas other than student assignment, such as the hiring and promotion of teachers, even during the initial period of implementing the plan, but was satisfied that the establishment of a racially neutral student attendance system had fulfilled the district court's function of remedying previously racially discriminatory attendance patterns. As Justice Marshall noted in his dissent, whether or not the unitary system was achieved was irrelevant as long as this narrow purpose was achieved. *Id.* at 2707 (Marshall, J., dissenting).
31. *Id.* at 2702-03.
32. *Id.* at 2707.
b. Abandonment of the Distinction in California

In Crawford and San Bernardino the California Supreme Court eschewed the de jure/de facto distinction altogether, thereby abolishing the requirement of a causal connection between school board action and existing segregation. The court reasoned that these school boards enjoyed pervasive control over daily and long-range plans that determined racial and ethnic attendance patterns, and inferred from this control the board's responsibility for the segregated condition of the schools. It concluded that a school board's involvement in the control, maintenance, and ongoing supervision of its school system is sufficient to constitute segregative state action.

The court also recognized the practical realities of desegregation litigation, noting that although the federal cases expanded the de jure concept, making it easier to show the segregative intent, continuation of the concept did nothing to lighten the overall litigative burden. To this extent Crawford and San Bernardino reflect the court's sensitivity to the litigative tasks of school boards and the courts as well as those of the plaintiffs in school desegregation cases.

III. Segregation as Per Se Unconstitutional

The de jure/de facto distinction not only often posed an insurmountable task for plaintiffs to overcome, but also proved to be meaningless in light of empirical evidence that the harmful effects did not vary with the source of the segregation. Although the court relies

33. The court drew analogies from California cases setting higher standards for the constitutional obligations of state officials compiling jury lists. In People v. Superior Court (Dean), 38 Cal. App. 3d 966, 113 Cal. Rptr. 732 (3d Dist. 1974), the court held that officials entrusted with the task of formulating a panel for the grand jury endowed with the criminal indictment function had an affirmative duty to develop procedures that would achieve a fair cross section of the community; abstention from intentional discrimination was not enough.

34. 17 Cal. 3d at 294, 551 P.2d at 36, 130 Cal. Rptr. at 732.

35. The California court explained that the factual inquiries would be endless because every act or failure to act by the school board would have to be evaluated not only in the present but also in the past, and because actions of state entities other than the school board and of private developers would have to be scrutinized. Id. at 298-300, 551 P.2d at 39-41, 130 Cal. Rptr. at 735-37.

36. The experience in the Crawford trial is instructive. The trial itself ran intermittently for 65 court days, and the reporter's transcript on appeal ran to 62 volumes. The trial court's findings of fact were not issued until May 1970, a year after the conclusion of the trial. Seven years had elapsed since the commencement of the action. Id. at 287, 551 P.2d at 31, 130 Cal. Rptr. at 727.

37. E.g., U.S. COMM. ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS (1967). This study was used in San Francisco Unified School Dist. v. Johnson, 3 Cal. 3d 937, 479 P.2d 669, 92 Cal. Rptr. 309 (1971), which relied in part on Jackson in deciding the constitutionality of an Education Code provision prohibiting the school board from busing school children without parental consent. The court said that school
on Brown’s conclusion that “separate educational facilities are inherently unequal,”88 Brown was based in part on a stigma of inferiority imparted by an explicit policy of segregation.89 Obviously, school board action based on racially neutral policies, such as the neighborhood school policy, is not per se discriminatory,40 even though they may camouflage covert practices. Crawford goes further than Brown and finds harm in the segregation, not in the action of the school board. Thus the court’s definition of segregation merits attention.

The court rejected definitions based on racial percentages or on a concept of racial balance—the definitions used by the lower courts in Crawford and San Bernardino. Instead, it defined segregation in terms of isolation and deprivation, and assumed the “traditional” harmful effects to flow from the segregation.41 Segregated schools are schools in which the minority student enrollment is so disproportionate as realistically to isolate minority students from other students and thus deprive minority students of an integrated educational experience. . . . It is such segregated schools which traditionally have resulted in the inherently unequal educational opportunities condemned in Brown.42

The recognition that segregation is inherently evil regardless of cause should shift the judicial role from one preoccupied with assessing responsibility against school boards for causing segregation to one of enforcing remedial responsibilities. The court states a constitutional preference for the goal of integration: once segregation is shown the remedial duty will follow.

This shift of focus is not likely, however, to bring about an immediate solution to the problem of segregated schools in California. The court’s disapproval of definitions characterizing segregation in concrete mathematical terms requires a more thorough analysis of factors

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88 347 U.S. at 495.
89 Kaplan, supra note 5, at 171 n.52.
40 In Crawford the defendant contended that school boards are required to alleviate de facto segregation only if minority children were denied equal educational opportunities, relying on the interpretation of Jackson in People ex rel. Lynch v. San Diego Unified School Dist., 19 Cal. App. 3d 252, 96 Cal. Rptr. 658 (4th Dist. 1971). The court dismissed this contention in a footnote, saying that it embodied a reincarnation of the discredited “separate but equal” doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896). 17 Cal. 3d at 293 n.5, 551 P.2d at 35 n.5, 130 Cal. Rptr. at 731 n.5.
41 Once segregation has been defined in terms of harm, it is unnecessary to distinguish it from its harmful effects. An obligation to alleviate segregation and its effects, however, is imposed. See 17 Cal. 3d at 285, 551 P.2d at 30, 130 Cal. Rptr. at 726.
42 Id. at 303, 551 P.2d at 43, 130 Cal. Rptr. at 739.
causing deprivation, an analysis presumably to be undertaken by the school boards. Racial and ethnic composition of the student body, faculty, and staff as well as community and administration attitudes toward the school are factors that Keyes$^43$ and Swann$^44$ suggest will be taken into consideration to establish a prima facie case of segregation.

Indeed, the court states expressly that rapid desegregation is not a requirement. Rather, a balancing approach between integration and the interest in neighborhood schools is struck. School board actions to alleviate segregation will be judged according to a "reasonably feasible" standard, and judicial deference will be accorded school boards as long as "meaningful" progress toward integration is made.

This balancing approach is a commendable result of the court's acknowledgment that school authorities face immeasurable social and economic constraints in determining what desegregation methods to apply. But it is also a necessary approach, given that school boards are to be held responsible for remedying a situation caused at least in part by governmental and private entities over which the school board has no control. Nevertheless, it is unlikely that the courts will retire from judicial activism in school desegregation. For one thing, the terms "meaningful progress" and "reasonably feasible" invite judicial review. Moreover, the court does not include the option of taking no action as one of the "reasonably feasible" alternatives available to the school board if segregation exists. Thus, where a school board—such as the Los Angeles School Board in Crawford—has failed even to initiate a program aimed at alleviating segregation, the trial court's arsenal of equitable powers would not preclude the imposition of specific remedial measures, including busing, as part of a desegregation plan.

Conclusion

Crawford and San Bernadino present two diverse examples of school board conduct subject to review. The California Supreme Court's substantive ruling transcends limits imposed by the federal courts in defining a school board's duty or the court's remedial powers. Yet the decision gives impetus to practical experimentation by educators to devise local desegregation plans based on a weighing of the needs and economic resources of individual school districts. A substantial portion of the decision's subsequent history is likely to be enacted by social scientists searching for the "reasonably feasible" in school desegregation plans.

Sylvia Yau

$43$. 413 U.S. at 196.
$44$. 402 U.S. at 18.
C. OBSCENE MATERIAL AS A PUBLIC NUISANCE

People ex rel. Busch v. Projection Room Theatre.¹ By judicial decision, California has entered the growing ranks of states that provide injunctive relief against the distribution or exhibition of obscene materials.² For over a century California's broad public nuisance statute had been relegated to a somewhat plebeian role as a weapon against such diverse annoyances as noxious odors and blockage of public highways. In Busch the supreme court enlisted the nuisance statute for the more controversial task of suppressing obscenity. The decision may mitigate possible chilling effects on freedom of expression by permitting adjudication of the issue of obscenity in civil proceedings in which the criminal liability of the defendant is not at stake.³ The decision, however, significantly dilutes certain protections of freedom of expression that have been erected by the legislature.

The defendants in Busch were bookstore and theatre owners who allegedly sold and exhibited obscene materials. The district attorney brought an action for injunctive relief under the California public nuisance statute.⁴ The defendants demurred to the complaint, arguing that the sale and exhibition of even concededly obscene materials to willing adults did not support a cause of action under the statute. The supreme court held that the demurrer should have been overruled.⁵

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2. Recent state statutes providing for injunctive relief against the exhibition or dissemination of obscene materials include CONN. GEN. STAT. ANN. § 53a-199 (West 1972); LA. REV. STAT. ANN. § 13:4711 (West Supp. 1976); MASS. GEN. LAWS ANN. ch. 272, § 30 (West Supp. 1976); N.Y. CIV. PRAC. LAW § 6330 (McKinney Supp. 1976); OHI0 REV. CODE ANN. §§ 3767.01-03 (Page 1971); 18 PA. CONS. STAT. ANN. § 5903(h) (Purdon 1973). In California, before the decision in Busch, the regulation of obscene materials was left to the criminal process under CAL. PENAL CODE § 311.2 (West 1970). In some circumstances, however, a person fearing prosecution under that statute could bring an action for declaratory judgment that the materials in question were not obscene. Zeitlin v. Arnébergh, 59 Cal. 2d 901, 383 P.2d 152, 31 Cal. Rptr. 800 (1963).


4. The maintenance of a public nuisance may be enjoined on the application of an appropriate district or city attorney. CAL. CIV. PROC. CODE § 731 (West 1967). See also CAL. CIV. CODE § 3491 (West 1970).

5. The supreme court also sustained a demurrer to the district attorney's complaint for relief under the Red Light Abatement Law, CAL. PENAL CODE §§ 11225-11235 (West 1972). That law declares that "[e]very building or place used for the purpose of illegal gambling . . . , lewdness, assignation, or prostitution . . . ." is a public nuisance.
A public nuisance in California includes "[a]nything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood ...." Although this statute has been on the books since 1873, the Busch opinion set forth the first authoritative construction of the "indecency" clause. The court held that "indecent" includes not only conduct that assaults one of the five senses, but also activity that offends moral sensibilities, even where only a willing audience is subjected to the obscene materials.  

The court approached the constructional problem with an explicit awareness of its duty to construe statutes so as to sustain their validity and rejected two constitutional attacks on the use of the nuisance statute to enjoin the sale or exhibition of obscene materials. First, the court cured the facial vagueness of the term "indecent" in its application to books and films by construing it to include only such obscenity as is proscribed by statute and case law. Second, the court held that properly framed injunctions under the nuisance statute were not unconstitutional prior restraints of presumptively protected material. To reach this result the court held that a trial judge could not enjoin the operation of bookstores or theatres or the handling of all obscene materials. The injunction could issue only against specific books or movies after those items had been adjudicated to be obscene in a "full and fair adversary hearing."  

The crux of the Busch decision rests in two additional and troublesome constitutional judgments underlying the decision. The court attributed to the legislature the judgment that the harmful social effects of private viewing of obscenity are so clear that no showing of an invasion of a public interest should be required in a proceeding for injunctive relief. The court also implicitly attributed to the legislature

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a judgment that the “constitutional fact” of obscenity may fairly be determined without a jury and by a judge employing a “preponderance of the evidence” standard. In each case, the implicit and unwarranted assumption of the Busch court was that the legislature intended to exercise its power to its furthest reach within judicially established limitations. The following sections will analyze these constitutional judgments underlying Busch. The final section marshals evidence of legislative preoccupation with obscenity regulation and draws some conclusions about how judges in the course of construing statutes should approach the constitutional judgments underlying the statutes.

I. Obscenity and Public Injury

Since the promulgation in Roth v. United States11 of the “definitional” approach to obscenity cases,12 the lack of a demonstrable causal connection between obscene expression and any particular social evil has been a focal difficulty in attempts to reconcile first amendment guarantees with the unprotected status of obscene speech.13 The Busch court had to face the problem of whether obscene speech causes public injury because the statutory definition of public nuisance refers to acts that “interfere with the comfortable enjoyment of life or property by an entire community or neighborhood.”14 Cases permitting injunctive relief under the general public nuisance statute require a trial level determination that an interest shared by the public has been invaded.15 Thus, in Harmer v. Tonlyn Productions, Inc.16 a court of

12. The Court in Roth held, in effect, that obscenity is not “speech” within the protection of the first amendment. Since that case, the courts have focused on the classification problem and rarely have examined the social interests that justify the suppression of obscenity. See G. Gunther, Cases and Materials on Constitutional Law 1282-83 (9th ed. 1975).
13. See, e.g., United States v. Roth, 237 F.2d 796, 801-27 (2d Cir. 1956) (Frank, J., concurring), aff’d 354 U.S. 476 (1957); Cairns, Paul & Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 Minn. L. Rev. 1009 (1962); Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 937-39 (1963); Kalven, The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1, 3. Even if a correlation between obscenity and some social evil could be established, a “fundamental principle” of the first amendment is that the legislature must regulate the antisocial conduct directly rather than by restricting expression, at least unless the expression produces some “clear and present danger” of harm. Emerson, supra at 938. See Kalven, supra at 7-16. See note 20 infra.
15. E.g., Dean v. Powell Undertaking Co., 55 Cal. App. 545, 203 P. 1015 (1st Dist. 1921). The Busch court itself stated that one of the elements of a cause of action under the statute is that “the results of the act must interfere with the comfortable enjoyment of life or property.” 17 Cal. 3d at 49, 550 P.2d at 603, 130 Cal. Rptr. at 331 (emphasis in original). See also Comment, Can an Adult Bookstore be Abated
appeal held, on allegations similar to those in *Busch*, that the requisite public injury was lacking because the obscene materials were inflicted only upon those who chose to view them.

The supreme court in *Busch* took sharp issue with the *Harmer* characterization of the effect of obscenity. It cited the landmark case of *Paris Adult Theatre I v. Slaton* in support of the proposition that the state's interest in regulating obscenity extends to the "quality of life and the total community environment." The majority also argued that the legislature would not be acting irrationally were it to conclude that private viewing of obscene materials causes antisocial conduct. Due process and the first amendment would thus not prevent the legislature from enacting statutes that dispense with the requirement that public injury be shown at the trial level where indecency is sought to be enjoined. In holding that the California legislature had dispensed

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as a Public Nuisance in California?, 10 U.S.F.L. Rev. 115, 123-24 (1975), asserting that "actual injury" to the public must be shown at trial. Because "nuisance" is a peculiarly amorphous concept the required level of proof will vary greatly with the interest that is asserted to have been invaded. City of Bakersfield v. Miller, 64 Cal. 2d 93, 99, 410 P.2d 393, 397, 48 Cal. Rptr. 889, 893, *cert. denied*, 384 U.S. 988 (1966).

16. 23 Cal. App. 3d 941, 100 Cal. Rptr. 576 (2d Dist. 1972). The court in *Harmer* also held that the plaintiff, a private party, had failed to allege such special damages as would distinguish his injury from that of the general public. *Id.* at 943, 100 Cal. Rptr. at 576. Nothing in *Busch* suggests that private plaintiffs now have standing to bring a suit for injunction against the distribution of obscene materials.

17. 413 U.S. 49 (1973).

18. 17 Cal. 3d at 51-54, 550 P.2d at 605-06, 130 Cal. Rptr. at 333-34. The argument that the states have an interest in regulating obscenity in order to maintain a "decent society" was articulated in *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting). *See also* People v. Luros, 4 Cal. 3d 84, 480 P.2d 633, 92 Cal. Rptr. 833 (1971); Bickel, 22 PUB. INTEREST 25-26 (commenting on Berns, Pornography vs. Democracy: The Case for Censorship, 22 PUB. INTEREST 3 (1971)).

19. 17 Cal. 3d at 51-54, 550 P.2d at 605-06, 130 Cal. Rptr. at 333-34.

20. It could be argued that the legislature did not intend to require proof of public injury in every case because the difficulty of proving injury would render the "indecency" clause of the public nuisance statute a nullity. The argument is not persuasive. The level and kind of proof will necessarily vary with the interest asserted to have been invaded and the degree to which a consensus may be reached as to the harmful effects of the invasion. Where unwilling adults or children are subjected to obscenity it seems realistic to regulate the obscenity as assaultive conduct. *See Emerson, supra* note 13, at 938-39. The injury is analytically different from that involved where only willing adults view the material and requires no tenuous causal hypotheses; a public interest is invaded by the assault itself. The injury also arises in more narrowly definable situations: unsolicited obscenity in the mail; sidewalk newspaper racks; publicly displayed billboards; drive-in theatres displaying obscenity on publicly visible screens. A few cases support the assertion that the public interests in suppressing indecent expression are various. *See* Erzorin v. City of Jacksonville, 422 U.S. 205 (1975); Rabe v. Washington, 405 U.S. 313 (1972); Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970); Ginsberg v. New York, 390 U.S. 629 (1968). This analysis supports the narrower construction of the public nuisance statute urged in Justice Tobriner's dissent. 17 Cal. 3d at 65-66, 550 P.2d at 615, 130 Cal. Rptr. at 343.
with the requirement, the majority failed to distinguish the trial court finding of public harm, which the legislature has actually required in the public nuisance statute, from those hypothetical judgments regarding public harm that a legislature may constitutionally make. An examination of the precode common law of nuisance and the structure of the public nuisance laws in California suggests that, contrary to the holding in Busch, the legislature never intended to legislate to the limits of its constitutional power by declaring that all obscenity invades public interests and is thus enjoimbale as a public nuisance.

a. Obscenity as a Public Nuisance Under Common Law

California courts are bound to construe code provisions that are substantially the same as the common law as continuations of the common law.\textsuperscript{21} Public nuisance at common law encompassed a host of "rag-ends of the law,"\textsuperscript{22} including various acts "in derogation of public morals"\textsuperscript{23} such as possession or exhibition of obscene books or pictures.\textsuperscript{24} Contrary to the general rule,\textsuperscript{25} no proof of injury to the public was required in cases of activities harmful to morals; the conduct was denounced as a "nuisance per se."\textsuperscript{26} In a sense, therefore, the Busch court injected sub silentio the common law category of nuisance per se into the current public nuisance statute.

Differences between modern and common law approaches to obscenity argue against a borrowing of the common law nuisance per se doctrine. The common law nuisance per se cases exhibit a persuasive lack of concern about the causal connection between immoral activities and injury to the public; at most one encounters the "empirical" explanation that socially useless or immoral activity naturally tends to promote idleness or to draw together crowds of dissolute persons.\textsuperscript{27} A per se approach is less appropriate today given contemporary doubts about such causal hypotheses.\textsuperscript{28}

\textsuperscript{21} CAL. CIV. CODE § 5 (West 1970). CAL. PENAL CODE § 370 (West 1972) apparently attempts to codify the common law. See J. JOYCE & H. JOYCE, LAW OF NUISANCES §§ 3-7 (1906) [hereinafter cited as J. JOYCE].

\textsuperscript{22} Newark, The Boundaries of Nuisance, 65 L.Q. Rev. 480, 482 (1949), quoted in Pioseer, Private Action for Public Nuisance, 52 Va. L. Rev. 997, 998 (1966). Blackstone defined a nuisance as being "anything that worketh hurt, inconvenience or damage." 3 W. BLACKSTONE, COMMENTARIES *216.

\textsuperscript{23} H. WOOD, THE LAW OF NUISANCES § 23 (1st ed. 1875) [hereinafter cited as H. WOOD].

\textsuperscript{24} Id. § 69.

\textsuperscript{25} Id. § 19, at 29.

\textsuperscript{26} Id. §§ 23, 24; J. JOYCE, supra note 21, §§ 15, 16.

\textsuperscript{27} See, e.g., H. WOOD, supra note 23, §§ 24, 33, 38, 43, 49, 58 (citing cases and authorities); J. JOYCE, supra note 21, § 391.

\textsuperscript{28} See text accompanying note 13 supra.
Moreover, the common law calculus of competing public and private interests did not accord any independent weight to expression. Indecent expression was treated as conduct without social utility, like operating commercial places of amusement or being a common scold. Under a modern constitution that raises expression to a protected freedom, the judiciary should be reluctant to attribute to the legislature a continuing adherence to the "nuisance per se" concept in the first amendment area. Such adherence would not necessarily be unconstitutional, but as Justice Harlan remarked in regard to the law of defamation, the concept "originated in soil entirely different from that which nurtured these constitutional values."  

Even if California's nuisance statute were viewed as a continuation of the common law, such a reading would not justify a per se rule in an injunctive setting. At common law a public nuisance was a low-grade crime; a proceeding for injunctive relief was possible only at the instance of a private party suffering particular injury to his property and was considered "an extraordinary interposition" of equity jurisdiction. The necessity of a trial level showing of an injury distinct from that suffered by the public assured that the nuisance per se rubric was not employed by courts of equity. One court stated in 1919 that "[n]o instance can be found . . . where a court of equity has ever taken cognizance of a public nuisance founded purely in moral turpitude." The California Supreme Court has itself observed that "[a]n action on behalf of the state . . . to enjoin activity which violates general concepts of public policy finds no basis in the doctrines of the common law." The common law regulation of obscenity as a public nuisance thus provides no support for the adoption of a nuisance per se doctrine under the California public nuisance statute.

b. Obscenity Regulation Under Statutory Nuisance Law

The statutory structure of nuisance regulation further suggests that the common law nuisance per se notion is inappropriate in injunctive proceedings against obscene materials. The California Civil Code

30. Prosser, supra note 22, at 999.
31. 2 J. Story, Equity Jurisprudence § 924a (10th ed. 1870); J. Joyce, supra note 21, §§ 421-30.
32. J. Story, supra note 31, § 924. See also J. Joyce, supra note 21, §§ 422, 424 (1906). Wood's treatise on nuisances, cited by the majority, 17 Cal. 3d at 50, 550 P.2d at 604, 130 Cal. Rptr. at 332, as authority for its construction of the indecency clause, does not even mention equitable relief against public nuisances. See H. Wood, supra note 23, §§ 769-814, 829.
34. People v. Lim, 18 Cal. 2d 872, 877, 118 P.2d 472, 475 (1941).
expressly prohibits the enjoining of crimes except where the crime is a nuisance or an act of unfair competition. More than 50 different misdemeanors are specifically declared by the code to be nuisances and are made enjoinable. In effect, each of these "legislatively declared public nuisance[s] constitutes a nuisance per se against which an injunction may issue without allegation or proof of irreparable injury. Where, however, the legislature has not expressly declared that an act is a nuisance, the prosecutor seeking an injunction must prove public injury to establish that the act is a nuisance under the general nuisance statute. Despite the legislature's manifest willingness generally to complement the criminal process with injunctive remedies, no express complement to the misdemeanor offense of exhibiting obscene materials appears in the code. This statutory scheme strongly implies that the requirement of finding public injury under the general nuisance statute should not be eliminated in obscenity cases until the legislature expressly declares the activities covered by the misdemeanor statute to be a public nuisance.

The supreme court in Busch, however, relied on Weis v. Superior Court and People v. Lim to buttress its conclusions that the general nuisance statute encompassed obscene exhibitions without requiring a trial court showing of public injury in each case. In Weis, the court enjoined as a public nuisance an indecent live exhibition called "The Sultan's Harem." In Lim, the district attorney sought an injunction against an illegal gambling establishment; the court held that the complaint stated a cause of action under the public nuisance statute.

35. CAL. CIV. CODE § 3369 (West 1970).
36. E.g., CAL. BUS. & PROF. CODE §§ 5460-5464 (West 1974) (unauthorized advertising displays); CAL. BUS. & PROF. CODE §§ 23300, 23301, 23396, 25604 (West 1964) (sale of liquor without a license); CAL. FOOD & AGRIC. CODE §§ 53541, 53561 (West 1968) (maintaining certain nursery stock); CAL. GOV'T CODE §§ 50485.2, 50485.12 (West 1966) (airport airspace hazards); CAL. HEALTH & SAFETY CODE §§ 4461, 4485 (West 1970) (any acts in violation of article relating to public drinking water reservoirs); CAL. INS. CODE §§ 1844, 1845 (West 1972) (acting as insurance analyst without a license); CAL. LAB. CODE §§ 2645, 2646 (West 1971) (maintenance of nonconforming employee housing); CAL. LAB. CODE §§ 3710.2, 3712 (West 1971) (conducting business without workman's compensation security); CAL. PENAL CODE §§ 330, 11223 (West 1972) (maintenance of gambling house); CAL. PENAL CODE §§ 315, 11225 (West 1972) (maintenance of building for prostitution); CAL. PUB. RES. CODE §§ 4437-4441 (West 1972) (accumulation and disposal of waste material); CAL. PUB. UTIL. CODE §§ 13573, 13574, 13576 (West Supp. 1976) (discharge of waste water); CAL. STS. & HY. CODE § 731 (West 1969) (parking vehicle on highway to sell items inside); CAL. WATER CODE §§ 305, 306 (West 1971) (uncapped artesian well).
38. See text accompanying note 15 supra.
40. 18 Cal. 2d 872, 118 P.2d 472 (1941).
Given the factual allegations on which the two cases were based, the decisions do not establish that the prosecutor need not show public injury at the trial level. In *Weis*, the court may have rested its decision either on the assaultive impact of the indecency upon unwilling persons or, as the *Busch* court assumed, on the presumed injury to public morals. In *Lim*, the prosecutor alleged harm to public morals, but the supreme court appeared to rest its decision instead on the allegations that disorderly persons were disturbing the peace and obstructing the traffic. By contrast, the prosecutor in *Busch* did not even allege that the public suffered any injury.

The supreme court relied on *Weis* and *Lim* to show that "despite the concurrent application of the criminal statutes" an activity may be enjoined where it is "expressly declared" to be a statutory public nuisance. But stating this rule does not answer the question of whether the general public nuisance statute "expressly" refers to obscenity when it makes indecent "things" enjoiable. The crucial question is whether the 1872 codification of common law nuisances—virtually any behavior that by the received wisdom of that era "interfered with the comfortable enjoyment of life or property"—expressly provides for the injunction of the conduct that is proscribed by the criminal obscenity law. In *Lim* the court observed that because a nuisance in one period may not be a nuisance in another, the injunctive power must be found within the terms of the statute rather than by reference to the expansive and amorphous common law definitions of public nuisance. The criminal law addresses itself in specific terms to the "constitutional fact" of obscenity and has been rewritten as recently as 1975. In contrast, the indecency clause of the public nuisance statute has remained unconstrued and unemployed in its potential application to expression since its enactment in 1873. The clause cannot in any realistic sense be said to embody the present legislative policy on obscenity regulation.

41. 30 Cal. App. at 733-34, 159 P. at 465.
42. 18 Cal. 2d at 882, 118 P.2d at 477.
43. 17 Cal. 3d at 49-50, 550 P.2d at 604, 130 Cal. Rptr. at 332. The holding of *Lim* was characterized by one commentator as being that criminal acts in California are not enjoineable unless they have been expressly declared by the legislature to be public nuisances. 15 S. CAL. L. REV. 372 (1942).
44. CAL. PENAL CODE § 370 (West 1972).
45. The supreme court cited Huffman v. Pursue, Ltd., 420 U.S. 592, 605 (1975), to show that a state may invoke the processes of equity "to protect the very interests which underlie its criminal laws . . . ." 17 Cal. 3d at 53, 550 P.2d at 606, 130 Cal. Rptr. at 334. But that case involved a statute that referred explicitly to the misdemeanor obscenity offense.
46. 18 Cal. 2d at 878-79, 118 P.2d at 476.
The California legislature has drawn the constitutionally troublesome conclusion in Penal Code section 311.248 that obscenity impairs the public interest; the Busch court attempted to defer to that judgment by reading out of the public nuisance statute the requirement of a trial-level demonstration of injury in fact. But there are additional serious constitutional difficulties in transplanting this judgment made in the context of criminal regulation to the area of civil processes. By requiring proof of public injury in actions for injunctions under the nuisance statute, the legislature left to trial courts the determination that private viewing of the particular obscene material before it harms the public. The legislature thus exercised self-restraint in not legislating to the full extent of its constitutional powers to determine the causal issue. It is ironic that in the name of judicial self-restraint in deferring to legislative conclusions about causation, the court negated a legislative exercise in self-restraint in the first amendment area.

In short the Busch court addressed the wrong question. Rather than determining that the legislature could constitutionally permit injunctions against obscenity as a nuisance per se, the court should have interpreted the public nuisance statute to determine whether the legislature had in fact done so. Had the court squarely approached the question of statutory interpretation, it would have found only equivocal support for its conclusion in the precode common law and little, if any, support in the statutory scheme and postcode cases. Given the contemporary uncertainty about the harmful effects of private immorality and concern for the costs of suppressing free expression, the Busch court should have accepted the statutory public injury requirement at face value and sustained the demurrer because the complaint did not allege that private exhibition of the obscene materials invaded a public interest.

II. The Procedural Significance of Busch

After Busch, civil proceedings in which no invasion of a public interest need be shown may entirely displace the adjudication of obscenity in criminal proceedings. In addition to inferring a legislative

resurrected by a prosecutor may represent only an ad hoc administrative decision rather than a legislative choice; such a statute, he concludes, should be unenforceable on account of its desuetude).

49. The probable result of such a holding would be to limit to the criminal process the public regulation of dissemination of obscene materials to willing adults. It is unlikely that a prosecutor could establish public injury in these cases on any consistent basis. See text accompanying note 13 supra. Such a holding would still overrule Harmer v. Tonlyn Prods., Inc., 23 Cal. App. 3d 941, 100 Cal. Rptr. 576 (2d Dist. 1972), but only to the extent that Harmer held that "as a matter of law" no public injury could be shown to result from private viewing of obscene material.
judgment that the private viewing of obscene material is per se an enjoinable public nuisance, the Busch court implicitly attributed to the legislature a willingness to permit findings of obscenity by a single judge rather than a jury, in a proceeding in which obscenity must be determined "by a preponderance of the evidence," rather than "beyond a reasonable doubt."

In the long run, the greatest impact of Busch may lie in these procedural changes. Procedure is critical in regulating first amendment rights because here, as the Supreme Court has stated, the "procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive law to be applied." Because the Roth definitional approach assumes that obscenity is classifiable "as poison ivy is among other plants," and suppressable once so classified, the factfinding process—a process changed substantially by Busch—may be the salient feature of any system of obscenity regulation.

Given the substantive test of obscenity it is arguable that the procedures authorized by Busch are unconstitutional. The argument of this Note, however, does not go so far. But even if the procedures approved in Busch are constitutionally permissible, they demonstrably dilute protections that the legislature had accorded first amendment values by consigning the regulation of obscenity to the criminal process.

50. Speiser v. Randall, 357 U.S. 513, 520 (1958). In Speiser the Court invalidated a tax assessment procedure that burdened first amendment associational rights by effectively shifting to the taxpayer the burden of proving he was not a member of a subversive organization. The Court so held in spite of the general rule that the state is free to allocate the burden of proof to the taxpayer to show his entitlement to an exemption. See Smith v. California, 361 U.S. 147, 151 (1959).

Particularly in the first amendment area the manner in which the state implements its interests cannot be divorced from the "underlying" substantive law. See generally Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518 (1970). The self-imposed rule of restraint of courts of equity in vindicating policies of the criminal law was grounded partly in a mistrust of the power of equity's processes. See generally Mack, The Revival of Criminal Equity, 16 Harv. L. Rev. 389 (1903). See also People v. Lim, 18 Cal. 2d 872, 880, 118 P.2d 472, 476 (1941); Hedden v. Hand, 90 N.J. Eq. 583, 593-97, 107 A. 285, 290-91 (1919). This Note argues that this generalized reluctance should have been acute in Busch because the civil procedures authorized are singularly unsuited to adjudicating the substantive issue of obscenity vel non.


54. Injunctive suppression of obscenity may in some respects be more pro-
One effect of the Busch court’s approval of injunctions against obscene materials is that juries will no longer decide the obscenity issue. But the value of having a jury pass on the “prurient interest” and “patent offensiveness” components of obscenity is incontrovertible, because these questions are cast in terms that require an answer reflecting the sensibilities of an average person applying community standards. Idiosyncratic sensibilities will be weeded out if 12 jurors rather than a single judge pass on the question of obscenity. The desirability of such a jury determination finds support in both the California statutes and case law. The criminal obscenity statute provides that litigants need not submit expert testimony to establish the “community standards” element. Moreover, a court of appeal recently held that the jury may ignore any such expert testimony that is offered and admitted. These determinations strongly imply that the only “experts” on obscenity are those drawn from a cross section of the community.

55. See People v. One 1941 Chevrolet Coupe, 37 Cal. 2d 283, 298-99, 231 P.2d 832, 843 (1951) (dictum); People v. Frangadakis, 184 Cal. App. 2d 540, 545-46, 7 Cal. Rptr. 776, 779-80 (1st Dist. 1960); Meek v. DeLatour, 2 Cal. App. 261, 83 P. 300 (1st Dist. 1905). See also CAL. CONST. art. 1, § 16. Frangadakis is one of many cases stating that the right to a jury trial is determined by asking whether the case would have been tried to a jury under the common law in 1850, the year the state constitution was ratified. The statute involved in that case declared that the sale of liquor without a license was a nuisance per se and expressly authorized the district attorney to bring an action for injunctive relief.

56. See In re Giannini, 69 Cal. 2d 563, 572-74, 446 P.2d 535, 542, 72 Cal. Rptr. 655, 662 (1968). It has frequently been observed that the criteria for determining obscenity vel non imply the value of a jury role. E.g., MODEL PENAL CODE § 207.10, Comment at 46-49 (Tent. Draft No. 6, 1957); People ex rel. Busch v. Projection Room Theatre, 17 Cal. 3d at 72-73, 550 P.2d at 619, 130 Cal. Rptr. at 347 (Tobriner, J., dissenting). See also Kalven, supra note 13, at 39: “I wonder whether the only experts on the issue [of obscenity] are not the jury . . . .” The Supreme Court has held that there is no constitutional right to have a jury decide whether a work is obscene. Alexander v. Virginia, 413 U.S. 836 (1973) (per curiam). See also Dennis v. United States, 341 U.S. 494 (1951) (no constitutional right to have a jury decide whether speech constitutes a clear and present danger). The per curiam opinion in Alexander did not discuss the right to a jury trial as an incident of the first amendment; from the authority cited it appears that the holding may rest on the incomplete incorporation of the seventh amendment as against the states.

57. See 1 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 220-21 (1947).


60. Furthermore, the virtual impossibility of formulating a definition of obscenity
Another effect of permitting injunctive relief is the reduction of the prosecutor's burden of proof. In a criminal trial the issue of obscenity must be determined beyond a reasonable doubt; in a proceeding to enjoin the distribution of obscene materials as a public nuisance the same issue will apparently be decided on a "preponderance of the evidence." Such a standard permits an adjudication of obscenity even if the trier of fact entertains some reasonable doubts as to whether the material is patently offensive, appeals to the prurient interest in sex, or lacks socially redeeming value.

Not only will the preponderance test be difficult to apply, its use will substantially dilute apparent legislative protections of first amendment values. Any procedure used to identify obscene materials will result in some errors. The decision as to what burden of proof to place upon a prosecutor or plaintiff will depend on an evaluation of the relative costs of erroneous determinations. The "fact" of negligence is decided on a preponderance of the evidence because society views the social disutility of an error in the plaintiff's favor as being no greater than the disutility of an error in the defendant's favor. This model is unacceptable for criminal cases because society finds it far more serious to convict an innocent man than to free a guilty one. Whether the model is proper where first amendment values are at stake is similarly open to serious doubt.

The foregoing discussion illustrates two propositions. First, the substantive basis for suppression of expression—a finding of "obscenity"—implies the inadequacy of a judge employing a pre-

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in the abstract may make the jury the most appropriate vehicle for adjudicating the "fact" of obscenity. Learned Hand analogized the difficulty of defining obscenity to the difficulty of defining negligence. He stated that the jury's finding that some act is obscene should be considered "a small bit of legislation ad hoc, like the standard of care." United States v. Levine, 83 F.2d 156, 157 (2d Cir. 1936).


63. The preponderance standard is often viewed as requiring a balancing of evidence on both sides of the issue. C. Mccormick, HANDBOOK OF THE LAW OF EVIDENCE § 339 (2d ed. E. Cleary 1972). But because in California expert testimony on obscenity need not be given any weight, it is not clear what evidence can be balanced in an obscenity case. The result may be that the trier of fact must decide the case according to what he thinks "probably" is correct. Cf. In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring) (preponderance standard should reach such a result). Such a lukewarm degree of conviction for first amendment adjudications is highly questionable. See McKinney v. Alabama, 96 S. Ct. 1189, 1197-99 (1976) (Brennan, J., concurring).


65. Id. at 372.

ponderance test. Second, jury trials and the use of a reasonable doubt standard should reduce the number of times the state erroneously suppresses protected material. Given the value of jury trials and the reasonable doubt standard in protecting free expression, the supreme court should have considered the possibility that such procedures were an essential part of the legislative fabric.

III. The Legislative and Judicial Roles in Protecting First Amendment Values

Judicial lawmaking must be evaluated in at least two dimensions. Along one spectrum its legitimacy must be assessed by the extent to which the law made harmonizes with the discernible legislative will. The preceding two sections have argued that the supreme court's construction of the public nuisance statute in *Busch* was inconsistent with the intent of the California legislature. A related inquiry looks to evidence of legislative attention to the issue presented by the case. As legislative attention to the problem attenuates there is a greater need for creative judicial activity; conversely, there is less room for judicial activism in a well-articulated legislative scheme.

The clearer the evidence of a legislative-judicial dialogue in a given area, indicating the legislature's assumption of joint regulatory responsibility, the less likely it will be that a litigant's ad hoc resurrection of a tangentially related but unconstrued statute represents the majority will. Courts faced with such a litigant—like the prosecutor in *Busch*—should insist on a compelling showing that the statute remains consistent with the more carefully evolved policy of the dialogue. Unfortunately, by focusing only on constitutional limitations on legislative activity, the court in *Busch* failed to make such a determination.

An examination of recent California legislative history demonstrates the legislature's active awareness of its responsibility for making constitutional judgments in the area of obscenity regulation. The 1970 amendments to section 311,67 the penal code provision defining "obscenity," incorporated two important judicial developments in obscenity law. The legislature incorporated the holding of *Mishkin v. New York*68 by encompassing sexually deviant audiences in the measurement of "prurient appeal," and codified the decision in *Ginzburg v. United States*69 to permit evidence of commercial "pandering" to be probative of obscenity. In 1975 the legislature recon-

sidered the obscenity law and amended the statute to bar conviction of a financially disinterested employee of a distributor of obscene matter even though obscenity laws could constitutionally be applied to such a person. Though the decision in Miller v. California had loosened the constitutional definition of obscenity by relaxing the "utterly without socially redeeming value" requirement, the legislature did not in its 1975 amendments extend the statute's reach to the new constitutional boundary. In 1969 the legislature overruled the decision of In re Giannini, indicating a belief that jurors rather than experts can most adequately ascertain present "community standards."

In addition to articulating in detail those cases where equitable nuisance proceedings should complement criminal law, the legislature has given substantial consideration to the specific question posed in Busch: should injunctive proceedings be used against obscenity? A California Assembly subcommittee established for the purpose of studying "all facts relating to or affecting" the penal code sections governing obscenity reported in 1959 that "California has no present legislation by which a person can be enjoined from distributing obscene literature." The subcommittee urged passage of a new section permitting a district attorney to obtain an injunction against such activity. In 1972, California voters rejected an initiative proposition that would have allowed injunctive relief against the distribution of obscene matter; the Assembly Committee on Criminal Justice 2 years later defeated provisions in an assembly bill that would have provided the same remedy. As this activity indicates, the legislature has been continually rethinking the obscenity statute; there is little room, therefore, for creative judicial implementation of a policy that may well displace the legislative scheme.

70. CAL. PENAL CODE § 311.2(b) (West Supp. 1976).
72. 413 U.S. 15 (1973). The Court held that material need not be "utterly" without social value to be suppressed as obscene but could be so classified if, taken "as a whole" it lacked "serious" social value. Id. at 24.
73. 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968).
75. See text accompanying notes 36-38 supra.
76. That injunctive relief is permissible by judicial constitutional standards has been apparent since 1957. See Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).
78. Id. at 8. See also id. at 23-26.
79. Id. at 23-26. Though the report displays the belief that pornography is a social problem of considerable magnitude, id. at 10, the subcommittee recommended that in injunctive proceedings a three-judge panel decide the issue of obscenity. Id. at 23-26.
80. 17 Cal. 3d at 70, 550 P.2d at 617, 130 Cal. Rptr. at 345 (Tobriner, J., dissenting).
81. Id. at 70-71, 550 P.2d at 617-18, 130 Cal. Rptr. at 345-46.
Legislators as well as judges in California take an oath to uphold and defend both the California and federal Constitutions.\textsuperscript{82} Moreover, judicial deference to legislative judgments—extreme in such standards of judicial review as the “rational basis” test—implies the superior competence of the legislative branch in making some constitutional decisions.\textsuperscript{83} The mechanism of judicial review requires that the essential character of the legislative role must be to provide greater protection for constitutional values than the judicially established constitutional minimum.\textsuperscript{84} The legislature could leave obscenity entirely unregulated or require the unanimous verdict of 36 jurors before a publication could be suppressed as obscene.\textsuperscript{85}

Thus where it is possible that a particular construction of a statute actually diminishes the constitutional protections erected by the legislature, mutual respect of the coordinate branches should require that the judiciary undertake an especially scrupulous assessment of the dominant political will as expressed in the overall statutory scheme. It is inconsistent with such a judicial duty to attribute to the legislature the unsatisfactory judicial causal hypotheses about the harmful effects of private viewing of obscenity that were developed over several decades out of deference to explicit and varied legislative attempts to suppress obscene expression. It is also inappropriate for a court to presuppose a legislative indifference to the manner in which obscenity is regulated simply because injunctive proceedings have received judicial sanction.

Conclusion

In deciding that the legislature intended civil regulation of obscenity, the court effectively concluded that the protections of the first

\textsuperscript{82} CAL. CONST. art. 20, § 3.


\textsuperscript{84} The statement in the text partakes to some extent of Justice Brennan’s “ratchet theory” of legislative power to define the content of constitutional rights, namely that legislators may increase but may not dilute constitutional rights. Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966). For a criticism of this theory see Cohen, \textit{Congressional Power to Interpret Due Process and Equal Protection}, 27 STAN. L. REV. 603, 606-08 (1975). In some circumstances a legislator may well be advised to enact laws beyond the present apparent scope of legislative power, especially where the legislator believes the courts have misinterpreted the Constitution due to erroneous factual assumptions; otherwise the courts will never have an opportunity to overrule previous erroneous decisions. In the context of statutory interpretation where more than one constitutionally permissible construction is possible, however, the proposition in the text is supportable.

\textsuperscript{85} See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 64 (1973). At least two state legislatures have specifically retained the right to demand a jury trial of the issue of obscenity in civil proceedings. MASS. GEN. LAWS ANN. ch. 272, §§ 28C, 28D (West Supp. 1976); 18 PA. CONS. STAT. ANN. § 5903(i) (Purdon 1973).
amendment afforded by injunctive proceedings were preferable to the legislative protections of trial by jury and proof beyond a reasonable doubt. As long as none of these protections is constitutionally mandated, such a balancing of competing policy interests should be left to the legislature.

The model of judicial and legislative roles that best explains the behavior of the Busch court posits a rapacious legislature against which only the courts stand equipped or willing to protect first amendment values. To the extent that such a model becomes accepted by either the legislature or the judiciary the consequence must be that the sense of political responsibility to animate constitutional values is diminished.

Bruce E. Coolidge

D. EXTENDED INCARCERATION OF YOUTH OFFENDERS

People v. Olivas. The defendant, 19 years of age when arrested, was convicted in superior court of misdemeanor assault. Rather than selecting among the usual adult correctional alternatives, the court committed Olivas to the California Youth Authority pursuant to section 1731.5 of the Welfare and Institutions Code, which allows such disposition for offenders who are under the age of 21 at the time of their arrest. Although the maximum jail term provided on the face of the penal statute for misdemeanor assault was 6 months, the defendant's in-

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1. 17 Cal. 3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976) (Wright, C.J.) (unanimous decision) (overruling In re Herrera, 23 Cal. 2d 206, 143 P.2d 345 (1943)).
3. After certification to the Governor as provided in this article a court may commit to the authority any person convicted of a public offense who comes within subdivisions (a), (b), and (c), or subdivisions (a), (b), and (d), below:
   (a) Is found to be less than 21 years of age at the time of apprehension.
   (b) Is not sentenced to death, imprisonment for life, imprisonment for 90 days or less, or the payment of a fine, or after having been directed to pay a fine, defaults in the payment thereof, and is subject to imprisonment for more than 90 days under the judgment.
   (c) Is not granted probation.
   (d) Was granted probation and probation is revoked and terminated.
   The Youth Authority shall accept a person committed to it pursuant to this article if it believes that the person can be materially benefited by its reformatory and educational discipline, and if it has adequate facilities to provide such care.
   CAL. WELF. & INST. CODE § 1731.5 (West 1972).
carceration under section 1731.5 was indeterminate and could have continued for as long as 2 years or until he reached the age of 23, whichever occurred later.\(^5\)

This division of the class of assault misdemeanants into age-based subclasses subject to disparate treatment raised a traditional equal protection problem. In considering equal protection claims involving age distinctions in criminal dispositions, courts have generally recognized the state’s interest in rehabilitating youth offenders and have upheld classifications rationally related to this legitimate state purpose.\(^6\) In \textit{Olivas}, however, the California Supreme Court held that section 1731.5 violated the equal protection clauses of the federal and state Constitutions\(^7\) insofar as it permitted incarceration of youthful misdemeanants convicted in superior court beyond the maximum period for the incarceration of adults permitted by the Penal Code.\(^8\) The court reached this result by holding that the legislative classification inherent in section 1731.5 impinged on Olivas’ “fundamental interest” in “personal liberty”\(^9\) without being “necessary” to further a “compelling state interest.”\(^10\)

\(^5\) \textit{CAL. WELF. & INST. CODE} § 1770 (West 1972).


\(^8\) 17 Cal. 3d at 257, 551 P.2d at 389, 131 Cal. Rptr. at 69.

\(^9\) \textit{id.} at 251-52, 551 P.2d at 385, 131 Cal. Rptr. at 65.

\(^10\) \textit{id.} at 255, 551 P.2d at 387, 131 Cal. Rptr. at 67.
This Note examines three aspects of the *Olivas* decision. First, it considers the soundness of the approach to equal protection embodied in the court's determination that Olivas' interest in "personal liberty" was "fundamental" and therefore subject to strict judicial review. Second, assuming that a "fundamental interest" was involved, the Note discusses the court's analysis of the legislative purpose behind section 1731.5 and whether the classification was necessary to further the state's interest in rehabilitating youthful offenders. Finally, the Note discusses the generative impact that *Olivas* is likely to have on the evolution of equal protection doctrine in California.

**I. Liberty as a Fundamental Interest**

During the Warren years, the United States Supreme Court developed a two-tiered approach to equal protection. The Court subjected legislative classifications that involved "fundamental interests" or "suspect classifications" to "strict scrutiny," sustaining them only when the classifications were found necessary to further a "compelling state interest;" at the same time the Court allowed legislatures substantial freedom in areas of economic regulation, upholding the regulation if it bore some rational relationship to any conceivable legitimate state purpose.

The Warren Court's approach to equal protection has been criticized for its tendency to divide cases into artificially neat categories. The preliminary step—determining whether a classification was suspect or permissive, or whether an interest was fundamental or conventional—often dictated the result on the merits, at least if the "compelling interest" or "conceivable state purpose" standards were literally applied. Only rarely could a "suspect classification" or classification affecting a "fundamental interest" be necessary to further a compelling state interest. Conversely, nonsuspect classifications not

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impinging upon fundamental interests were nearly always sustained, since all statutes are rationally related to some conceivable state purpose.  

Evolving a doctrine that would continue judicial protection of constitutionally important individual interests while escaping the rigidity of the Warren Court's approach has been one of the most challenging tasks faced by both the United States and California Supreme Courts in the 1970's. The Burger Court, though not explicitly repudiating the Warren Court's formulation, has limited its scope by refusing generally to recognize new fundamental interests and suspect classes. When questions involving classifications and interests not previously found suspect or fundamental have been presented for adjudication, the Burger Court has occasionally applied a heightened rationality standard, which requires that the legislative classification bear "a significant relationship" to a "recognized" government purpose. Commentators have noted that this approach has allowed the Burger Court to use the equal protection clause as "an interventionist tool without resorting to strict scrutiny language." This heightened rationality standard, though mitigating the inflexibility of the Warren Court's approach, has problems of its own. The Court has not indicated how to define a "significant relationship" or what comprises a "recognized" governmental purpose: when new equal protection questions are presented, the Court may apply a standard stricter than one based on some rational relation to any conceivable state purpose, but less strict than the compelling interest standard, which usually forebodes invalidation of the state's classification scheme.


16. Forum: Equal Protection and the Burger Court, 2 HASTINGS CONST. L.Q. 645, 648-49 (1975) (remarks of Professor Forrester); Gunther, supra note 11, at 12. Alienage, however, has been specifically recognized by the Burger Court as a suspect classification. Graham v. Richardson, 403 U.S. 365 (1971).


19. Perhaps the clearest example of this heightened rationality approach is Eisenstadt v. Baird, 405 U.S. 438 (1972). The Court refused to give effect to a state statute that denied unmarried persons access to contraceptive devices on the same basis as married persons. Refusing to find the interest involved "fundamental," the Court purported to apply the traditionally limited rationality test. But although there were conceivable state interests advanced by the statute—such as deterrence of sexual activity and regulation of the dissemination of potentially dangerous articles—the Court nevertheless struck down the statute, apparently because of its close relation to the constitu-
In the equal protection area the California Supreme Court has attempted to build on the Warren Court's approach, having identified education,20 unanimous jury verdicts,21 the right to earn a lawful living,22 and candidacy for public office23 as "fundamental interests."24 The court, however, has not been able to avoid the problems inherent in the Warren Court's formulation of equal protection. For instance, it is difficult to perceive the essential elements of a "fundamental interest." Where suspect classifications are involved, some suggestive criteria—immutable characteristics, highly visible traits, historical disadvantage, or lack of political representation—serve to control judicial decisionmaking.25 In the collage of interests that the California Supreme Court has called "fundamental," however, no unifying characteristics appear.26 This apparent lack of overarching principle increases the likelihood that the court will act based on its own values and perceptions of public good rather than according to clearly articulated constitutional principles.

To support its holding that personal liberty is "a fundamental interest," the Olivas court narrated the history of Anglo-American due process.27 But assuming that due process guarantees may "exist largely because of the great concern our system of justice exhibits for procedures which can result in deprivation of personal liberty,"28 due process
legal development does not support an inference regarding the content of the equal protection clause. With the brief exception of the era of _Lochner v. New York_, American constitutional doctrine has explicitly rejected the notion that due process empowers the judiciary to invalidate policy decisions by the political branches where notice and hearing have been adequate. Furthermore, even if the procedural protection offered by the due process clause suggests that interests in personal liberty ought to be "fundamental" for equal protection purposes, the court must explain why property interests, equally protected by the explicit language of the due process clauses of the California and Federal Constitutions, are not also fundamental.

II. The State's Interest in Rehabilitation

The _Olivas_ court recognized the state's interest in the "rehabilitation of youthful offenders," but declined to consider whether that interest is compelling. Instead, it held that longer youth commitments under section 1731.5 are not necessary to further the state's interest even if it is compelling. Noting that "we cannot determine what minimum period of confinement is sufficient to achieve the state's goal of meaningful rehabilitation," the court concluded that there had been "no showing made that youthful offenders necessarily require longer periods of confinement for rehabilitative purposes than older adults."

The court's analysis would have sufficed if section 1731.5 required longer periods of confinement for youth offenders than for adult members of the same class. Such a requirement, however, is not present in section 1731.5; rather, that section embodies the traditional rehabilitative theory that it is not the reality but the possibility of longer confinement that encourages rehabilitation. The court therefore should not have required the state to demonstrate that youthful offenders necessarily require longer periods of confinement for rehabilitative purposes. Instead, the state should have been required to show that the indeterminate commitment allowed by section 1731.5 was necessary to

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29. 198 U.S. 45 (1905).
31. 17 Cal. 3d at 255, 551 P.2d at 387, 131 Cal. Rptr. at 67.
32. _Id._
33. _Id._ at 256, 551 P.2d at 388, 131 Cal. Rptr. at 68.
increase the likelihood that members of the class would become less antisocial and thereby further the state's interest in rehabilitation.

If indeterminate commitment, as applied by the Youth Authority, has in fact produced no incentive to rehabilitate, the classification would not further the state's interest in youth rehabilitation. If it could be shown that some class incentive toward rehabilitation did result from indeterminate youth commitments, however, the next question would be whether other practical alternatives were available that did not equally impinge on the fundamental interest in liberty. Finally, if *some* incentive were found to result from indeterminate sentencing and no practical alternatives were available, the court would have to face the question whether the state's interest in increasing the incentive to become more rehabilitated through indeterminate youth commitment is compelling for purposes of equal protection.

**III. Generative Impact of Olivas**

In the past California courts have generally upheld the legislature's criminal justice classifications when supported by a "rational basis." Theoretically, however, the court's broad definition of the fundamental interest in personal liberty and its adoption of the Warren Court's strict-scrutiny test for classifications that impinge upon fundamental interests could increase substantially the degree of judicial supervision of the legislature's criminal justice policies. Application of strict scrutiny to all classifications impinging on personal liberty could lead to invalidation of penal provisions that classify actors, such as statutes that provide harsher punishment for *ex-felons* than for other offenders, on the ground that such classifications are not necessary to further a compelling state interest. Moreover, the funda-

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mental interest in liberty identified in *Olivas* could even require strict scrutiny of legislative classifications of crimes since such classifications directly impinge upon the defendant's interest in personal liberty, an interest broadly defined as any "considerable limitation on the freedom of action which all citizens possess."  

Because the *Olivas* court probably did not intend to lay the foundation for highly intrusive judicial reexamination of the legislature's criminal justice policy, the court will need to restrict the sweep of its theoretical framework in future cases. In the past the court has limited the scope of equal protection precedents by reddefining the "fundamental interest" or by failing to see the impairment of fundamental interests in difficult cases. Another possibility would be for the court to apply strict scrutiny only to certain classifications impinging on personal liberty. If the court adopts this approach, however, it must be prepared to explain why some classifications, such as the age classification in *Olivas*, are so insidious that they provoke strict scrutiny, while others do not.

38. A defendant could argue that the statute imposes harsher punishment for his offense than for other equally serious offenses. For example, burglary is subject to greater punishment if committed after dark. *Id.* at 4802-03, §§ 206.5, 207 (amending Cal. Penal Code §§ 460, 461 (West 1970)). Kidnapping is punished more severely if committed for financial gain. *Id.* at 4785, §§ 136, 136.5 (amending Cal. Penal Code §§ 208, 209 (West 1970; Supp. 1976)). Possession of "concentrated cannabis" is subject to greater maximum punishment than possession of marijuana. *Id.* at 4770, § 71 (amending Cal. Health & Safety Code § 11357(a), (c) (West Supp. 1976)). Other provisions vary the punishment for crimes according to the identity of the victim. E.g., *Id.* at 4785, §§ 137.5, 138 (amending Cal. Penal Code §§ 211a, 213 (West 1970)) (robbery of bus or cab driver); *Id.* at 4788-91, §§ 149.5, 150.5, 152.5 (amending Cal. Penal Code §§ 241, 243, 245 (West Supp. 1976)) (assault, battery of peace officer).

In the Uniform Determinate Sentencing Act of 1976, the legislature stated the public policy underlying the classification of crimes, declaring that "the purpose of imprisonment for crime is punishment" and that this purpose is best served by uniform sentences, "proportionate to the seriousness of the offense." *Id.* at 4818, § 273 (to be codified as Cal. Penal Code § 1170(a)(1)). "Seriousness" was not defined, but presumably refers to the moral wrongfulness of the crime and to the danger it poses to society. If classifications of crimes were strictly scrutinized, the government's interest in proportioning punishment to "seriousness" could be characterized as compelling. The remaining issue would be whether one crime is so much more serious than another that disparate punishments are "necessary" to further that interest.

39. 17 Cal. 3d at 245, 551 P.2d at 380-81, 131 Cal. Rptr. at 60-61.

40. See, e.g., D'Amico v. Board of Medical Examiners, 11 Cal. 3d 1, 18, 520 P.2d 10, 23, 112 Cal. Rptr. 786, 799 (1974), where the court narrowed the fundamental interest in the pursuit of lawful employment, identified in Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971), to exclude the pursuit of professional occupations.

41. See, e.g., Weber v. City Council, 9 Cal. 3d 950, 513 P.2d 601, 109 Cal. Rptr. 533 (1973), where the court held that a statute denying residents of certain areas the right to vote on annexation on the basis that the areas were sparsely populated did not constitute a deprivation of the fundamental right to vote.
It will be difficult for the court to distinguish *Olivas* from challenges to other correctional statutes that classify offenders according to age. Strict scrutiny of the juvenile court laws could introduce a substantive requirement of equality between juveniles and adults in the deprivation of liberty, thereby adding significantly to the procedural reforms achieved under the due process clause. For instance, parole restrictions of juvenile offenders for periods exceeding the maximum adult parole periods might be invalidated unless found necessary to further a compelling state interest. Similarly, provisions of state law that allow juveniles to be incarcerated for behavior that includes no violations of law might not survive strict judicial scrutiny.

Perhaps most vulnerable to equal protection is Welfare and Institutions Code section 628(a)(4), which allows pretrial detention of juveniles without bail under certain circumstances. Such a distinction might be found unnecessary to further the state's interest in youth rehabilitation and public safety because of the difficulty of showing that

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43. Future cases will not present the problem of extended confinement itself. An amendment passed 3 months after the *Olivas* decision provides that the physical confinement of a juvenile who has committed a criminal offense may not exceed the maximum term that could be imposed on an adult for the same offense. 1976 Cal. Legis. Serv. 4527-29, ch. 1071, §§ 29, 30 (amending *Cal. Welf. & Inst. Code* §§ 726, 731 (West 1972)).

The amendment, however, preserves juvenile court jurisdiction over wards of the Youth Authority to age 21, and does not affect the various probationary powers of the court and probation officers. *Id.* at 4527-28, § 29 (amending *Cal. Welf. & Inst. Code* § 726 (West 1972)) (limits on parental control); *id.* at 4528, § 29.3 (amending *Cal. Welf. & Inst. Code* § 727 (West Supp. 1976)) (supervision by probation officer, parent participation in counseling); *id.* at 4529, §§ 29.5, 30 (amending *Cal. Welf. & Inst. Code* §§ 730, 731 (West 1972)) (work to support dependents, uncompensated work programs, "any and all reasonable conditions that [the court] may determine fitting and proper," etc.). Although adult prisoners may receive up to 1 year of parole supervision, or 3 years if paroled from a life sentence (see *id.* at 4826, ch. 1139, § 278 (to be codified as *Cal. Penal Code* § 3000); *Cal. Penal Code* §§ 3052-3056, 3059-3064 (West 1972)), parole conditions set by the Youth Authority may remain in effect for many years after a maximum term of imprisonment has expired. See 1976 Cal. Legis. Serv. 4529, ch. 1071, § 30 (amending *Cal. Welf. & Inst. Code* § 731 (West 1972)); *Cal. Welf. & Inst. Code* §§ 1176, 1177 (West 1972). The *Olivas* court defined the interest in liberty to include freedom from such restraints. See *Breed v. Jones*, 421 U.S. 519 (1975) (double jeopardy). See 17 Cal. 3d at 245, 551 P.2d at 380-81, 131 Cal. Rptr. at 60-61.


the release of a youth offender on bail is significantly more dangerous than the release of an adult offender similarly situated; moreover, the rehabilitative value of pretrial detention of the youthful offender appears marginal.

Some language in the *Olivas* opinion, however, appears to emphasize the narrowness of the holding. For instance, the court noted that section 1371.5 was constitutionally infirm because persons committed under the statute had been “prosecuted as adults, adjudged by the same standards which apply to any competent adult, and convicted as adults in adult courts.” Thus, because Olivas was treated “in the same manner as any competent adult during the process which resulted in his conviction,” the court found that he could not be incarcerated for longer than the term provided for adults in the Penal Code. This language could be construed as requiring only that the boundaries between the adult and juvenile criminal justice systems be rigorously maintained. This restrictive language, however, is inconsistent with the court’s sweeping equal protection approach. It remains to be seen whether the court will respect this limiting language or follow the logical import of its analysis. The latter course would lead to a more intrusive review of legislative classifications affecting the personal liberty interest.

**Conclusion**

In *Olivas* the court held that youthful misdemeanants convicted in an adult court cannot be committed to the Youth Authority's control for a period longer than the maximum penal sentence for adults convicted of the same offense. The court's characterization of Olivas’

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46. 17 Cal. 3d at 242-43, 551 P.2d at 379, 131 Cal. Rptr. at 59 (footnote omitted) (emphasis in original).
47. *Id.* at 243, 551 P.2d at 379, 131 Cal. Rptr. at 59.
48. A juvenile over age 16 may be transferred to a criminal court for trial if found “not to be a fit and proper subject to be dealt with under the juvenile court law.” 1976 Cal. Legis. Serv. 4526, ch. 1071, § 28.5 (amending CAL. WELF. & INST. CODE § 707(a) (West Supp. 1976)). The criminal court may nevertheless commit the transferred juvenile to the Youth Authority under section 1731.5. See note 3 supra. The Youth Authority may retain control over him for a longer period if he is committed by a criminal court instead of a juvenile court. *Compare* 1976 Cal. Legis. Serv. 4530, ch. 1071, § 34 (amending CAL. WELF. & INST. CODE § 1769 (West 1972)), with CAL. WELF. & INST. CODE §§ 1770, 1771 (West 1972). The supreme court has said that the juvenile court may order transfer to the criminal court, anticipating a commitment to the Youth Authority, in order to allow a longer period of “rehabilitative efforts.” People v. Olivas, 17 Cal. 3d 236, 240 n.5, 551 P.2d 375, 377 n.5, 131 Cal. Rptr. 55, 57 n.5 (1976) (dictum). See Jimmy H. v. Superior Court, 3 Cal. 3d 709, 715, 478 P.2d 32, 36, 91 Cal. Rptr. 600, 604 (1970). This practice of bouncing a juvenile offender from one system to another suggests that there is no distinct dichotomy between the juvenile and adult justice systems.