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Cantor v. Detroit Edison Co.

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RECENT DEVELOPMENTS

CANTOR v. DETROIT EDISON CO.

ANTITRUST LAW—Public Utilities—A public utility, acting in accord with certain provisions of its state-sanctioned tariff, may be subject to the federal antitrust laws and may be liable in treble damages for violation of those laws. 96 S. Ct. 3110 (1976).

In Cantor v. Detroit Edison Co., the United States Supreme Court faced the issue whether a public utility company violates the Sherman Act by engaging in anticompetitive conduct sanctioned under a state-approved tariff. In so doing, the Court raised a question that it had virtually ignored since 1943 when it decided Parker v. Brown. In Parker the Court determined that Congress did not intend the Sherman Act to apply to “state action,” defining “state action” to include private acts compelled by a state acting as sovereign. Since that landmark case, litigation in this area of the law has centered on determining whether

1. 96 S. Ct. 3110 (1976).
3. A tariff is “a listing or scale of rates or charges for . . . a public utility.” Webster’s Third New International Dictionary 2341 (1971).
5. The construction is properly phrased as one of the inapplicability of, rather than immunity from, the Sherman Act. Though the term “immunity” is recognized by most courts as being imprecise in this context, these same courts continue to use the term. See, e.g., Duke & Co. v. Foerster, 521 F.2d 1277, 1279 n.5 (3d Cir. 1975); New Mexico v. American Petrofina, Inc., 501 F.2d 363, 371 n.18 (9th Cir. 1974); Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131, 135-36 (8th Cir. 1970).

While the decision in Parker dealt with the validity of the California prorate program under the Sherman Act, there is no indication that the scope of the decision does not encompass the other federal antitrust laws. Verkuil, State Action, Due Process and Antitrust: Reflections on Parker v. Brown, 75 Colum. L. Rev. 328, 330 n.19 (1975); see New Mexico v. American Petrofina, Inc., 591 F.2d 363 (9th Cir. 1974).
allegedly anticompetitive conduct of a regulated party is state action.\textsuperscript{6}

In \textit{Cantor} four Justices limited the concept of “state action” to state officials acting pursuant to legislative command.\textsuperscript{7} When the defendant is a state-regulated private party, these four Justices would apply a case-by-case approach to the problem of determining the applicability of the federal antitrust laws.\textsuperscript{8} A fifth Justice conformed \textit{Parker} to his reading of other cases and proposed, whether the defendant is a private party or a state official, that state regulation be subject to substantive examination.\textsuperscript{9} The four remaining Justices reaffirmed the basic tenet of \textit{Parker}.\textsuperscript{10} A majority of the Court was able to agree that a fairness defense, which left defendant’s conduct subject to the antitrust laws but not to treble damages, may be available under certain circumstances.\textsuperscript{11} However, four of the five Justices who would consider such a defense would limit it so severely that it would be practically nonexistent.\textsuperscript{12}

The respondent in \textit{Cantor}, Detroit Edison, was the sole supplier of electricity for about five million people in southeastern Michigan.\textsuperscript{13} It also supplied its customers with roughly fifty per-


\textsuperscript{7} Cantor v. Detroit Edison Co., 96 S. Ct. 3110, 3117 (1976). The Justices were Stevens, Brennan, White, and Marshall.

\textsuperscript{8} Id. at 3123.

\textsuperscript{9} Justice Blackmun proposed that “state-sanctioned anticompetitive activity must fall like any other if its potential harms outweigh its benefits.” Id. at 3126 (Blackmun, J., concurring).

\textsuperscript{10} They were Chief Justice Burger (concurring), id. at 3123 (Burger, J., concurring), and Justices Stewart, Powell, and Rehnquist (dissenting), id. at 3139 (Stewart, J., dissenting).

\textsuperscript{11} This majority consisted of Justices Stevens, Brennan, White, and Marshall, id. at 3121, and Justice Blackmun (concurring), id. at 3128 n.6.

\textsuperscript{12} They were Justices Stevens, Brennan, White, and Marshall. See notes 63-86 infra and accompanying text.

\textsuperscript{13} Cantor v. Detroit Edison Co., 96 S. Ct. 3110, 3113 (1976). In 1972 Detroit Edison served 1,573,838 electrical customers. Of these, 1,454,513, or 92%, were residential customers. The figure 5,000,000 is arrived at because several individuals may live in a household represented by a single customer. Brief for Respondent at 3, 4 n.5.
percent of the standard-size light bulbs they used most frequently. Since 1886, respondent or a predecessor had provided new residential customers with light bulbs for all their permanent fixtures; when these light bulbs would burn out, Detroit Edison would replace them. The customer paid no direct charge for this service; instead the cost was incorporated into respondent’s tariffs. The Michigan Public Service Commission, which pervasively regulates the distribution of electricity within the state, approved these tariffs.

Petitioner, Lawrence Cantor, was a retail druggist engaged in the sale of light bulbs. Cantor claimed that respondent’s light bulb program was anticompetitive and thereby injured him: Petitioner wished to sell light bulbs, but respondent replaced them without direct charge. The complaint alleged that respondent had thus violated the antitrust laws. Respondent moved for

14. Detroit Edison did not distribute fluorescent lamps or high intensity discharge lamps. Including those types of bulbs would have reduced respondent’s market share to about 23%. Cantor v. Detroit Edison Co., 96 S. Ct. 3110, 3113 & n.4 (1976).

15. Id. at 3113. Respondent had 35 customer service centers and approximately 50 agents to distribute its bulbs. Most customers who used the light bulb exchange program obtained their light bulbs at customer service centers. There were approximately 14 of the most commonly used light bulb sizes in the program. The bulbs were specially designed and marked, and physical exchange was required to ensure that those not involved in the program could not take advantage of it. Brief for Respondent at 5-6.

16. Detroit Edison designed its own bulbs and accepted competitive bids to select the manufacturer. The cost of these bulbs was included as a part of the cost of service to customers. It was not included as a part of Detroit Edison’s rate base though certain facilities which were involved in the distribution of the bulbs were included in the rate base. Brief for Respondent at 4 n.7.

In 1972, for a cost of $2,835,000, Detroit Edison provided its residential customers with 18,864,381 light bulbs. Respondent paid $2,363,328 to its three principal manufacturers of bulbs. The remaining $471,672 went for costs incurred by using personnel and facilities to service the program. No direct profit on the program was recorded by Detroit Edison. Cantor v. Detroit Edison Co., 96 S. Ct. 3110, 3113 & n.8, 3114 (1976).

17. In 1909 the State of Michigan began regulating electric utilities, and in 1916 the light bulb program as a part of a tariff filed by Detroit Edison was first approved. Since then, approval of respondent’s tariffs had included approval of the light bulb program. Because many commercial customers used large quantities of fluorescent lighting and were not as interested in the program, in 1964 the Michigan Public Service Commission approved respondent’s decision to eliminate large commercial customers from the program. Those customers received a general rate reduction. Id. at 3113.


summary judgment, claiming that it was shielded from liability because its conduct was completely regulated by the Michigan Public Service Commission. Since the light bulb program was required by its state-approved tariff, respondent contended that the program constituted "state action." Thus, under the doctrine of Parker v. Brown, respondent should be exempt from the operation of the antitrust laws. Although the district court and the court of appeals accepted this reasoning, the United States Supreme Court granted certiorari and reversed.

I. Parker and the State Action Exemption

A. Parker

Parker has been called "the decision which opened the eyes of the antitrust bar to the possibilities of avoiding the impact of the antitrust laws, if only state governmental action is in some way involved." During the early 1930's, California was faced with chaotic economic conditions in certain agricultural areas of the state. It sought to remedy this situation by imposing the power of the state on agricultural markets through the California Agricultural Prorate Act. This Act authorized marketing programs for the state's agricultural commodities. These programs were meant to restrict competition among growers and to maintain the prices of commodities sold to packers.

In Parker Porter Brown, a producer and packer of raisins,

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22. Cantor v. Detroit Edison Co., 392 F. Supp. 1110 (E.D. Mich. 1974). The district court commented that it did not think a court should step in when a plaintiff had not first approached the state regulatory commission. Id. at 1112. Other courts have also deemed an antitrust suit to be a poor substitute for a plaintiff's prompt protest to the state regulatory commission and a request for an administrative remedy. See, e.g., Business Aides, Inc. v. Chesapeake & Potomac Tel. Co., 480 F.2d 754 (4th Cir. 1973); Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248 (4th Cir. 1971).
27. Ch. 754, 1933 Cal. Stats. 1969 (current version at CAL. AGRIC. CODE § 57501 (West 1988)).
sued to enjoin enforcement of a program for the marketing of the 1940 raisin crop produced in Raisin Proration Zone No. 1. Before disposing of several other issues, the Supreme Court considered whether this marketing program was invalidated by the Sherman Act. The Court began its discussion by making two assumptions. First, it assumed that the California prorate program, if it were organized and made effective solely by virtue of a contract, combination, or conspiracy of private persons, individual or corporate, would violate the Sherman Act. Second, the Court assumed that Congress could prohibit a state from maintaining such a program because of its effect on interstate commerce.

The Court noted that Congress could constitutionally subtract from a state’s authority; however, the Court would not lightly attribute to Congress an unexpressed purpose to nullify a state’s control over its officers and agents. In the Court’s view, nothing in the language or history of the Sherman Act suggested that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. Therefore, the Court concluded:

29. Brown v. Parker, 39 F. Supp. 895 (S.D. Cal. 1941). The marketing program for the 1940 raisin crop became effective on September 7, 1940. Brown was a producer and packer of raisins. He had produced 200 tons and he had contracted to sell 762.5 tons of 1940 crop raisins. Brown had expected to sell, if the program had not been put into effect, 3000 tons of 1940 crop raisins at $60 a ton. After the program became effective, the price paid to growers rose from $45 a ton to $55 a ton or higher. Parker v. Brown, 317 U.S. 341, 347, 349 (1943).

Brown’s claim for relief was founded solely upon the ground that the program violated the commerce clause, U.S. CONST. art. I, § 8, cl. 3. He argued that the program prevented his purchase of raisins in open market for later shipment in interstate commerce. Brown v. Parker, 39 F. Supp. 895, 896 (S.D. Cal. 1941). His petition for an injunction against the enforcement of the raisin prorate program was granted. The state officials took an appeal to the United States Supreme Court.

30. The United States Supreme Court also found the program valid under the Agricultural Adjustment Act, ch. 25, 48 Stat. 31 (1933) (current version at 7 U.S.C. §§ 601-624 (1970 & Supp. V 1975)), and the commerce clause. Parker v. Brown, 317 U.S. 341 (1943). It has been suggested that one of the underlying rationales of Parker was that the state’s prorate program was consonant with the aims of the Agricultural Adjustment Act. See Hecht v. Pro-Football, Inc., 444 F.2d 931, 936-37 (D.C. Cir. 1971), cert. denied, 404 U.S. 1047 (1972); Slater, Antitrust and Government Action: A Formula for Narrowing Parker v. Brown, 69 Nw. U.L. Rev. 71, 86-87 (1974). If that is true, it seems strange that the Court in Parker explicitly mentioned this consistency between state and federal agricultural policies in upholding the California act’s validity against the other two challenges but did not mention this consistency in conjunction with the Sherman Act issue with which it first dealt. See generally Simmons & Fornaciari, State Regulation as an Antitrust Defense: An Analysis of the Parker v. Brown Doctrine, 43 U. Cin. L. Rev. 61, 65-66 (1974); Note, Parker v. Brown: A Preemption Analysis, 84 YALE L.J. 1164, 1174 n.62 (1975).


The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. *Olsen v. Smith*, 195 U.S. 332, 344-45; cf. *Lowenstein v. Evans*, 69 F. 908, 910. 34

_Parker_ thus established the principle that Congress did not intend the Sherman Act to apply to a state’s actions. 35 This raises the question of what constitutes the acts of a state. There are two different tests for determining state action. In one, the identity of the party is determinative—the Sherman Act is inapplicable to the acts of the state and of state officials. In the other, adopted by _Parker_, the activity is the focus of attention—the Sherman Act is inapplicable to those acts which are compelled by a state acting as sovereign regardless of the actor’s identity.

**B. The Philosophy that Parker Adopted from Earlier Decisions**

_Lowenstein v. Evans_ 36 and *Olsen v. Smith*, 37 cited in the _Parker_ decision, 38 are important for an understanding of _Parker_. In _Lowenstein_ state officials, who had enforced a South Carolina (1942), the Court decided that a state may maintain a suit for damages under the Sherman Act. This decision was based not upon a literal interpretation of the word “person,” but rather upon the fact that the Court could perceive no reason why Congress would want to leave a state without a remedy when it is the victim of a Sherman Act violation. See *New Mexico v. American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974) ([Evans] used a functional methodology to give states the right to sue for treble damages). 35


In _Hitchcock v. Collenberg_, 140 F. Supp. 894 (D. Md. 1956), _aff’d per curiam_, 353 U.S. 919 (1957), a three-judge district court found a state licensing statute to be valid although it was contended that the statute was in contravention of the state and federal constitutions as well as the federal antitrust laws. The court stated that “the anti-trust laws deal with individual activity and not with State activity.” _Id._ at 902. It cited _Parker_ to support this proposition. The United States Supreme Court affirmed per curiam. _Hitchcock v. Collenberg_, 353 U.S. 919 (1957). It cited several cases that had held that states have this licensing power. It is arguable that the Court accepted the proposition that state statutes which are otherwise valid are not affected by the federal antitrust laws. 36


37. 195 U.S. 332 (1904).

38. _See note 34 supra_ and accompanying text.
statute which created a state liquor monopoly, were sued for violating the antitrust laws. Parker specifically cited a single page of the two-and-one-half page opinion. This is significant in that the cited page limited its discussion to the fact that the monopoly had been created by a state statute. The following page discussed the issue "whether, in declaring and asserting this monopoly in herself, and in assuming and controlling its enforcement, the state comes within the provisions of the act of congress of 1890." This following page, however, was not cited by the Parker Court.

Parker cited the initial discussion in Lowenstein for the proposition that a state legislatively may create a monopoly. The subsequent reasoning in Lowenstein was omitted to show that the decision in Parker was not limited to a finding that the Sherman Act did not apply to the states. By its citation, Parker indicated that the Sherman Act was inapplicable to the instruments used by the state.

In Olsen v. Smith, the duly licensed state pilots of the port of Galveston, Texas, brought suit to enjoin an unlicensed individual from offering his services as a pilot. The defendant claimed that the pilotage laws of Texas were in conflict with the Sherman Act because "the commissioned pilots have a monopoly of the business, and by combination among themselves exclude all others from rendering pilotage services." The Court recognized that this contention was, in essence, a denial of the state’s power to regulate:

[S]ince if the State has the power to regulate, and in so doing to appoint and commission, those who are to perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized

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39. Parker v. Brown, 317 U.S. 341, 352 (1943). This seemingly insignificant point becomes important when it is considered that, in the same citation sentence, the citation to Olsen was to both pages of its Sherman Act discussion. It appears, therefore, that the Parker Court had a reason for citing to only one page in the Lowenstein opinion.
40. Lowenstein v. Evans, 69 F. 908, 910 (C.C.D.S.C. 1895). The monopoly was given to the state which received all the profits to be used for public purposes. This appears to be the reason the Parker Court used the signal “cf.” This signal is used to indicate support from a different but analogous proposition. A Uniform System of Citation rule 2:3, at 7 (12th ed. 1976).
42. 195 U.S. 332 (1904).
43. Id. at 344-45.
agents of the State are alone allowed to perform the duties devolving upon them by law.\textsuperscript{44}

Therefore, if the defendant sought relief from the pilotage laws:

[T]he remedy is in Congress, in whom the ultimate authority on the subject is vested, and cannot be judicially afforded by denying the power of the State to exercise its authority over a subject concerning which it has plenary power until Congress has seen fit to act in the premises.\textsuperscript{45}

\textit{Olsen} found that “no monopoly or combination in a legal sense” could arise from a state-granted monopoly in its “duly authorized agents.” The state in \textit{Olsen} had “the power to regulate . . . those who are to perform . . . services” and by so regulating had made licensed pilots the duly authorized agents of the state. Hence, the Court in \textit{Olsen} found that Congress had not intended to extend the reach of the Sherman Act to state-regulated conduct. \textit{Parker} reaffirmed this finding: “We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.”\textsuperscript{46} \textit{Parker} drew from \textit{Olsen} the idea that not only acts of state officials but also state-regulated acts of private parties are acts of the state.

The principles of \textit{Lowenstein} and \textit{Olsen} form the foundation of the \textit{Parker} rationale that the Sherman Act was not intended by Congress to be applicable to the anticompetitive acts of a state. A state commands state officials and private parties through statutes and other means; these state commands are exempt from the Sherman Act. State officials and private parties compelled to perform certain anticompetitive acts are exempt because their acts are the acts of the state.

\textbf{II. Cantor: The Reading of Parker}

In \textit{Cantor} eight members of the Court addressed the question of \textit{Parker}'s relevance.\textsuperscript{47} The plurality limited \textit{Parker} to its “narrow holding”: “The Court [in \textit{Parker}] held that even though

\begin{footnotesize}
\textsuperscript{44} Id. at 345 (emphasis added).
\textsuperscript{45} Id.
\textsuperscript{47} Justices Stevens, Brennan, White, and Marshall addressed this question in the Court’s opinion. 96 S. Ct. at 3117. Similarly, Chief Justice Burger addressed the question in his concurrence, \textit{id.} at 3123, as did Justice Stewart in his dissent in which Justices Powell and Rehnquist joined, \textit{id.} at 3128 \textit{passim}.
\end{footnotesize}
comparable programs organized by private persons would be illegal, the action taken by state officials pursuant to express legislative command did not violate the Sherman Act. Consequently, the plurality disregarded the rationale of Parker and limited the Sherman Act exemption for "state action" solely to action taken by state officials. Therefore, the plurality in Cantor found that Parker was not relevant to the applicability of the federal antitrust laws to private conduct required by state law.

Chief Justice Burger agreed with the dissent that Parker should be read to exempt from the Sherman Act private conduct which is required by the state acting as a sovereign. Chief Justice Burger differed with the dissent, however, as to whether the state-regulated scheme in Cantor was the result of the state's sovereign will. He believed that Michigan had formed no state policy with respect to whether a utility should have a light bulb program like Detroit Edison's. The Chief Justice concluded that approval of the program by the Michigan Public Service Commission did not implement any statewide policy. The dissent disagreed, finding that Michigan's policy was not neutral with respect to whether a utility should have had such a plan; rather, the Commission's approval of Detroit Edison's tariff expressed a state policy in favor of the light bulb program.

48. Id. at 3116.
49. Id. at 3117 & n.24. This is consonant with the decision in E. W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52 (1st Cir.), cert. denied, 385 U.S. 947 (1966). But even in that case, those dealing with the state were exempted from the federal antitrust acts. This was done in order to avoid frustrating the state's intent.

It should be noted that even when the action is taken by a state official, it must be taken as an act of government. Parker v. Brown, 317 U.S. 341, 351-52 (1943). If the state officials join in what is essentially a private anticompetitive activity, they cannot claim that the Sherman Act is inapplicable to such activity. Goldfarb v. Virginia State Bar, 421 U.S. 773, 791-92 (1975); Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975).

51. Id. at 3123-24 (Burger, C.J., concurring). Since in Chief Justice Burger's view the state's policy was neutral with respect to the light bulb practice, the Commission's approval, even though it required Detroit Edison to maintain the program, was not the act of a sovereign. Cf. Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975) (Parker does not protect governmental defendants without demonstration that state intent was to restrain competition in a given area); New Mexico v. American Petrofina, Inc., 501 F.2d 363 (9th Cir. 1974) (if the defendant is not the state, legislature must declare its intent to supplant competition in an industry); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), cert. denied, 400 U.S. 850 (1970) (for valid governmental action to confer antitrust immunity, the government must have determined that competition is not the best method of regulating an area of the economy). See generally Comment, Antitrust Immunity—Reevaluation & Synthesis of Parker v. Brown—Intent, State Action, Causation, 19 WAYNE L. REV. 1245 (1973).
The interpretation given to *Parker* by Chief Justice Burger and the dissent comports with the approach adopted in 1975 by the United States Supreme Court in *Goldfarb v. Virginia State Bar.* In *Goldfarb* the Court, addressing the scope of the *Parker* doctrine, observed that “[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign.” *Goldfarb* indicated that the activity, not the actor, is the essential determinant: if the activity is compelled by a state acting as sovereign, the actors are exempt from the Sherman Act.

III. **Cantor: The Applicability of the Sherman Act**

Both the plurality and Chief Justice Burger, despite the use of different approaches, concluded that the *Parker* “state action” exemption was inapplicable to the facts of *Cantor.* The next question was whether Detroit Edison should be exempt from liability for the program. Chief Justice Burger joined in this part of the plurality opinion to form a majority, which recognized two possible reasons why private conduct required by state law should be exempt from the antitrust laws. First, it would be unfair to conclude that a private party who merely has obeyed the state’s sovereign command thereby has violated federal law. Second, where the state already regulates an area of the economy, Congress may not have intended to superimpose the antitrust laws, an additional and perhaps conflicting regulatory mechanism.

A. **The Fairness Problem**

The Justices in the majority first addressed the argument that it would be unjust to impose liability for violation of a federal law upon a private party for merely obeying the command of a state sovereign. They observed that this unfairness did not exist here or, perhaps, in any actual case. A typical case involves a blend of private and public decisionmaking. In *Cantor* the ma-
majority found that the light bulb program was the product of a decision in which both the regulated party and the regulating state agency had participated. The majority stated that "[t]here is nothing unjust in a conclusion that [Detroit Edison's] participation in the decision is sufficiently significant to require that its conduct implementing the decision, like comparable conduct by unregulated businesses, conform to applicable federal law."57

The dissent criticized58 this rationale as being inconsistent with that of Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,59 where the Court found that no violation of the Sherman Act could be predicated upon mere attempts to influence the passage or enforcement of state laws. Two reasons underlay the decision in Noerr. First, the legislative and executive branches depend upon the people expressing their wishes. Those with a hope of personal gain furnish much of the information upon which governments act. If these people were forced to refrain from participating due to fear of Sherman Act liability, governments would be deprived of a valuable source of information.60 Second, the right to petition is one of the freedoms guaranteed by the Bill of Rights.61 To abridge this right because of a petitioner's financial interest would emasculate the guarantee and raise grave constitutional questions.62

In Cantor the dissent found that the persuasive reasoning of Noerr demonstrated that Sherman Act liability should not be predicated upon Detroit Edison's participation in instituting the light bulb program. Utility regulation is heavily dependent upon the participation of the regulated utilities. Such utilities will, henceforth, withhold their expertise for fear of incurring Sherman Act liability.64 The dissent also argued that the majority's position would impair the right to petition.64

Mr. Justice Blackmun's concurrence suggests a third argument against predicating antitrust liability upon a utility's par-

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n.25. The Parker Court explained that this was just a condition the state imposed upon the prorate program. See Parker v. Brown, 317 U.S. 341, 352 (1943).
58. Id. at 3134 (Stewart, J., dissenting).
60. Id. at 137.
61. See U.S. Const. amend. I.
64. Id.
participation in securing favorable regulation. He noted that every state enactment is initiated by its beneficiaries. It would scarcely make sense to immunize only those who are powerful enough to lobby behind the scenes, and who thus can avoid the appearance of participation.

B. The Congressional Intent Problem

In Cantor the majority discussed the following rationale for finding that congressional intent was not to apply the federal antitrust laws to private conduct prescribed by state law. Antitrust legislation imposes a competitive standard; regulatory agencies impose a public interest standard; since these two standards are fundamentally inconsistent, the federal antitrust laws should not be applied in areas of the economy pervasively regulated by state agencies. The majority found this reasoning unacceptable. It observed that conduct may be subject to state regulation and to the federal antitrust laws without having to satisfy inconsistent standards. Public utility regulation is imposed on the assumption that a public utility is a natural monopoly and requires state regulation to replace the forces of competition. Therefore, the state's regulation of the utility's distribution of electricity was not necessarily inconsistent with federal regulation of the utility's activities in competitive areas, such as the light bulb market.

The Justices of the majority would not permit the federal interest in competition in the light bulb market inevitably to be subordinated to the state's interest in regulating its utility's distribution of electricity. They reasoned that Congress could

65. Id. at 3126 (Blackmun, J., concurring).
66. Id. Mr. Justice Blackmun was discussing whether the Sherman Act's effect on a state-sanctioned scheme should depend on who initiated the scheme—private actors or the state.
67. Id. at 3119.
68. Id. See, e.g., Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1302-03 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972); cf. Northern Natural Gas Co. v. FPC, 399 F.2d 953, 959 (D.C. Cir. 1968) (federal regulation).
69. Cantor v. Detroit Edison Co., 96 S. Ct. 3110, 3119 (1976); see generally Note, Regulation, Competition, and Your Local Power Company, 1974 UTAH L. REV. 785, 787; Note, Parker v. Brown: A Preemption Analysis, 84 YALE L.J. 1164, 1175 (1975). For a contrary view, see Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (Marshall, J., dissenting). Justice Marshall in his dissenting opinion observed that while costs of initiating electric service are substantial, the rewards might be high enough to encourage competition. But the state has reduced profit margins by regulating public utilities and therefore there is less private competition and less pressure for state ownership of such utilities. In other words, there may be no such thing as a natural monopoly.
scarcely have intended state regulatory agencies to have broader power than federal regulatory agencies to exempt private conduct from the antitrust laws. Assuming state regulation could exempt private conduct, it could do so only when exemption is necessary to make the state regulation effective. In *Cantor* the light bulb program was not exempted because, in the majority's opinion, it was not essential to Michigan's regulation of its electric utilities. The majority reasoned that even if it assumed it was not Congress's intent for the antitrust laws to apply to areas of the economy primarily regulated by a state, that assumption would not have foreclosed the enforcement of the antitrust laws in an essentially unregulated area of the economy such as the market for electric light bulbs. Thus the majority concluded that Detroit Edison's light bulb program, although required by the terms of the utility's tariff, was not exempt from the antitrust laws.

The dissent criticized the majority's reasoning on three grounds. First, it dismissed as an abstract proposition the possibility that the majority could find the federal antitrust standards and the state regulatory standards to be consistent. According to the dissent, the majority could not find such consistency because of its assumption that absent state regulation there would have been an antitrust violation here. Second, the dissent believed the majority was mistaken in assuming that Congress intended the standard for exemption to be at least as severe for a state agency as for a federal agency. The majority erred, in the dissent's view, in failing to recognize that where federal regulation conflicts with federal antitrust laws, the problem is to reconcile the inconsistent commands of the same sovereign; where state regulation conflicts with federal antitrust laws, the state regul-

71. *Id.* at 3120. It should be noted that the majority only assumed that the standards for finding an exemption from the federal antitrust laws for a federal agency's regulations are the minimum standards for finding an exemption for a state agency's regulations. Private conduct which is compelled by a regulatory federal agency is exempt from the federal antitrust laws, in the absence of any other federal law granting an exemption, only when exemption is necessary to make the federal regulation effective. While it is beyond the scope of this note to deal with this implied repeal doctrine, a collection of United States Supreme Court cases on this subject can be found at Annot., 45 L. Ed. 2d 841 (1976).


73. *Id.* at 3119.

74. *Id.* at 3121.

75. *Id.* at 3134-35 (Stewart, J., dissenting).

76. *Id.* at 3135 (Stewart, J., dissenting).
tion must fall. 77 Third, the dissent accused the majority of participating in a substantive examination of state regulation. For a state-regulated utility to be exempt from the Sherman Act, the state regulation must conform to the assumption that a public utility is a natural monopoly; in addition, such regulation must be sufficiently central to the regulation of the utility’s natural monopoly powers. 78

The dissent appears to have confused two types of conflict: the conflict that may exist between federal antitrust standards and state regulatory standards, and the conflict that may exist where state-regulated private conduct violates the federal antitrust laws. In Cantor the majority concluded that Michigan’s regulation of Detroit Edison’s distribution of electricity was consistent with the application of antitrust standards to the light bulb market. 79 Furthermore, the majority did not create “a statutory simulacrum of the substantive due process doctrine,” as the dissent suggested. 80 Rather, the majority only assumed that there were situations in which state regulation would lead to exemption from the antitrust laws. The majority did not say that state regulatory laws could repeal federal antitrust laws. Instead, it stated that even if Congress did not intend the federal antitrust laws to apply to conduct essential to a state’s regulation of its utilities, Cantor does not present such a case. There is no guarantee that if such a case should arise, the majority would find it exempt from the federal antitrust laws.

It should be noted that the majority’s reasoning did not deal with invalidating state regulatory measures; it dealt solely with whether “private conduct required by state law is exempt from the Sherman Act.” 81 The majority’s opinion left Detroit Edison’s tariff intact but held that Detroit Edison could be found liable for following such tariff and could be enjoined from following such tariff. The ramifications of this are, of course, quite plain. If Detroit Edison is not enjoined from following the state-approved tariff, state law will continue to compel Detroit Edison to follow such tariff; furthermore, federal law will continue to impose liability upon Detroit Edison for following such tariff. Detroit Edison will find itself between Scylla and Charybdis.

77. Id.
78. Id. at 3136 (Stewart, J., dissenting).
79. Id. at 3119-20.
80. Id. at 3140 (Stewart, J., dissenting).
81. Id. at 3117.
IV. JUSTICE BLACKMUN'S APPROACH

A. Preemption and the Rule of Reason

Justice Blackmun, in his concurrence, adopted an entirely different approach to the applicability of the Sherman Act to a state's actions. He viewed the state-approved tariffs, which regulated both the distribution of electricity and the light bulb program, to be state action. Unlike the other Justices, however, he did not feel state action should be automatically exempt from the Sherman Act. While the other Justices differed over whether the light bulb program was state action and therefore was exempt, Justice Blackmun found the light bulb program to be state action and then proceeded to examine it substantively.82

First, he noted that Congress could, if it wished, preempt those state laws that are inconsistent with the federal policy of free competition in interstate commerce. The question was thus one of discerning congressional intent concerning preemption.83 Justice Blackmun found that the Sherman Act's legislative history did not address the question. The framers evidently believed they lacked the power, under the commerce clause, to regulate economic activity that was within the domain of the states.84 But the Court has since held that Congress intended the reach of the Sherman Act to expand along with that of the commerce power.85

Justice Blackmun next considered whether the Sherman Act should preempt inconsistent state laws.86 Believing Parker was but one of three cases in which the Court had faced this problem, Justice Blackmun contended that the Court had already resolved this conflict. He believed the Court had, in both Northern Securities Co. v. United States87 and Schwegmann Brothers v. Calvert Distillers Corp.,88 decided that inconsistent state statutes were

82. Id. at 3126-28 (Blackmun, J., concurring).
83. Id. at 3124 (Blackmun, J., concurring).
86. Cantor v. Detroit Edison Co., 96 S. Ct. 3110, 3124 (1976) (Blackmun, J., concurring). See generally Note, Parker v. Brown: A Preemption Analysis, 84 Yale L.J. 1164 (1975). Federal law is given primacy by the supremacy clause of the Constitution, U.S. Const. art. VI, cl. 2. This is to ensure that congressional policy is not defeated by inconsistent state policies.
87. 193 U.S. 197 (1904).
preempted by the Sherman Act. But if the Sherman Act generally preempts inconsistent state laws, the problem is to determine which laws are preempted and to what extent they are preempted.

Justice Blackmun's solution was a rule of reason: Statesanctioned anticompetitive activity should be preempted by the Sherman Act if the activity's potential harms outweigh its benefits. He believed the factor of state sanction attests to the strength of the justification for the anticompetitive activity. He proposed that anticompetitive state action which interferes with intrastate competition be subject to the same stringent review under the Sherman Act as anticompetitive state action which interferes with interstate competition is subject to under the commerce clause. For Justice Blackmun a particularly strong justification for anticompetitive state action exists where the state


The dissent believed that to the extent congressional action reveals congressional intent with respect to state regulation of electric service, it is probative. Cantor v. Detroit Edison Co., 96 S. Ct 3110, 3140 (1976) (Stewart, J., dissenting). "Federal regulation...[is] to extend only to those matters which are not subject to regulation by the States." Federal Power Act, 16 U.S.C. § 824(a) (1970).

90. Cantor v. Detroit Edison Co., 96 S. Ct. 3110, 3126 (1976) (Blackmun, J., concurring). In Note, Parker v. Brown: A Preemption Analysis, 84 YALE L.J. 1164 (1975), it was argued that state regulation should be subject to a preemption analysis. Initially, the court would decide if a possible conflict existed between the state regulation and the federal antitrust laws. Since the federal antitrust laws are not meant to be an exclusive system of regulation for the economic system, state action would be invalid only if it interfered with the policies behind those antitrust laws. These policies are to maintain efficient resource allocation, to ensure fair prices, and to preserve small competitors. Therefore, when the market prevents simultaneous attainment of all three of these policies, the state's decision as to which goal to effectuate would not be contrary to the antitrust laws. Hence it would not be preempted. No state regulation would necessarily be voided; rather, it would be subject to a rule of reason. Since Standard Oil Co. v. United States, 221 U.S. 1 (1911), it has been recognized that the Sherman Act forbids only restraints of trade or commerce which are unreasonable. See generally Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division (pt. 1), 74 YALE L.J. 775 (1965). The factor of state involvement would be considered in applying the rule of reason.

seeks the same objectives as the Sherman Act seeks—efficient resource allocation and low prices. Thus, in a market where competition is ineffective, the state may substitute its own control for the forces of competition: “But ending competition in the lightbulb market cannot be accepted as an adequate state objective without some evidence—of which there is not the least hint in this record—that such competition is in some way ineffective.”

Justice Blackmun noted that the decision in Parker was entirely consistent with this approach, because it was reasonable for the State of California to have attempted to stabilize wildly fluctuating agricultural prices. He believed that the identity of the parties was irrelevant to whether the state-imposed restraint was preempted. His basic premise, that the Court had already decided that the Sherman Act preempts inconsistent state laws, can be tested by examining the two cases he relied upon for this proposition—Northern Securities Co. v. United States and Schwengmann Brothers v. Calvert Distillers Corp.

B. Northern Securities and Schwengmann Brothers

Northern Securities involved an attempt by stockholders of two competing and parallel railroad lines to place the two systems under common control. This control was to be placed in a corporation organized under the laws of New Jersey. The stockholders were to receive shares in the holding corporation in return for their shares in the railroads. The holding corporation was to manage both railroads as if there were a single ownership. The shareholders thus sought to avoid the impact of the antitrust laws while eliminating the unprofitable forces of competition.

The United States brought suit under the Sherman Act to

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93. Id. at 3128 (Blackmun, J., concurring). In Consumers' Sanitary Coffee & Butter Stores v. Illinois Commerce Comm'n, 348 Ill. 615, 181 N.E. 411 (1932), the Supreme Court of Illinois was faced with a challenge to a similar light bulb program approved by the Illinois Commerce Commission. The court considered the question to be whether an electric rate could include a compulsory charge for light bulbs. The rate was found unlawful and unreasonable. It gave the electric utility an unlawful monopoly of the light bulb business to the detriment of other light bulb dealers. Also, it unreasonably compelled customers, even if they wanted to purchase light bulbs elsewhere, to pay the electric utility for the light bulbs.
95. 193 U.S. 197 (1904).
96. 341 U.S. 384 (1951).
enjoin the holding corporation from receiving dividends from or voting the stock of the two railroads. The corporation argued that it was a state corporation and that, in acquiring the stock of the railroad corporations, it was acting consistently with the powers conferred by its charter. To grant the relief requested, the argument continued, would be an unauthorized interference with New Jersey's sovereign control over its internal commerce. The Government argued that it was attacking only the combination which existed among the stockholders of the competing railroads, and that this combination, through the use of a common corporate trustee, violated the Sherman Act by restraining interstate and international commerce.

The Court reasoned that because of the supremacy clause, the State of New Jersey could not, by chartering the holding corporation, authorize this combination's objective. Therefore, Northern Securities stands not for the principle that the Sherman Act preempts inconsistent state laws, but rather for the principle for which Parker cited the case, that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."

In Schwegmann Brothers v. Calvert Distillers Corp., plaintiffs were liquor distributors engaged in a price-fixing scheme. They sought to enjoin the defendant, a New Orleans retailer, from selling below the minimum prices fixed by the scheme. Louisiana law permitted this type of price-fixing. The Court noted that absent congressional approval mere state authorization of such price-fixing would not immunize the scheme. Plaintiffs, however, sought this approval in a 1937 amendment to the Sherman Act. The Court, based on an analysis of the amendment, found that there was no congressional approval for the type of price-fixing involved. Therefore, Schwegmann also is based upon the Parker principle that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it,

98. Id. at 355.
99. Id. at 332.
100. Id. at 335.
101. U.S. Const. art. VI, cl. 2.
104. 341 U.S. 384 (1951).
105. Id. at 386.
106. Id. The amendment was the Miller-Tydings Act, ch. 690, 50 Stat. 693 (1937) (amending 15 U.S.C. § 1 (1934)).
or by declaring that their action is lawful." The state must impose the restraint "as an act of government."108

V. THE IMPOSITION OF TREBLE DAMAGES AND CONSIDERATIONS OF FAIRNESS

The plurality, Mr. Chief Justice Burger, and Mr. Justice Blackmun all concluded, although through different approaches, that the antitrust laws were applicable to the light bulb program. The plurality and Mr. Chief Justice Burger decided that the program was not "state action" and should not otherwise be exempt from the antitrust laws. Mr. Justice Blackmun considered the program to be "state action" but proceeded to examine it substantively, concluding that Detroit Edison's tariff provisions for the light bulb program were preempted by the Sherman Act. There still remained the question of the fairness of imposing treble damages for conduct compelled by the provisions of a state-sanctioned tariff.

The plurality recognized that fairness might be a defense against the imposition of treble damages. If the regulation had increased the likelihood of antitrust violation, or if respondent had relied upon a justified understanding of immunity, perhaps such a fairness defense would have been appropriate.109 However, these considerations were found absent by the plurality in Cantor. The plurality reasoned that since the Michigan Public Service Commission merely approved the tariff proposed by Detroit Edison, the utility's risk of violating the antitrust laws had not been increased.110 In essence, the plurality would impose treble damages because the utility rather than the state had proposed the tariff. Predicating such damages upon a utility's participation in regulatory decisionmaking is subject to the same criticism that was leveled at predicating liability, in the first instance, upon such participation.111

Furthermore, the plurality decided that Detroit Edison could not justifiably claim that it was led to believe its conduct was exempt from the antitrust laws. The plurality noted that the

110. Id.
111. See notes 63-66 supra and accompanying text.
Court had not previously sustained a claim that otherwise unlawful private conduct was exempt from the antitrust laws because it had been compelled by state law. However, several United States Supreme Court decisions, some previously examined, strongly suggest this proposition. Further, many circuit court decisions have sustained just such claims. Consequently, it should be considered that:

In civil cases, unlike criminal cases, it is appropriate to recognize that businessmen must rely upon counsel, who in turn are guided by the existing precedents in making difficult decisions on the effect of the antitrust laws on specific business conduct. In suits for damages in such cases it is particularly appropriate to be mindful of the injustice of retroactive imposition of the penalty of treble damages.

Undoubtedly both Detroit Edison and the Michigan Public Service Commission relied upon existing precedents to determine the legality of the light bulb distribution program.

Mr. Justice Blackmun believed that a fairness defense to damages should be available whenever the damages would be based upon conduct required by state law. Because the parties had not addressed themselves to that issue below, he would not foreclose that defense to Detroit Edison. He did, however, make some further observations about the fairness defense: The defense represents a judicial attempt to permit a party to escape imposition of damages for acts done involuntarily; it is not a declaration that the state restraint is legal. The fairness defense should only apply to a damage claim and not to a claim for injunctive relief.

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116. Cantor v. Detroit Edison Co., 96 S. Ct. 3110, 3128 n.6 (1976) (Blackmun, J., concurring). In determining the bounds of this fairness defense, an analogy, although not mentioned in Justice Blackmun's opinion, might profitably be drawn to the body of law which deals with the nonretroactive application of new rules of law. This body of jurisprudence has focused mainly on the criminal process where the issue has been whether a decision defining new constitutional rights of a defendant in a criminal case should be...
VI. Conclusion

The "state action" doctrine announced in *Parker* served a useful purpose, coming as it did at the end of the era of substantive due process. It enabled the federal judiciary to avoid returning to substantive examinations of state regulations.\(^{117}\) Application of the Sherman Act to a state’s regulatory activities would applied retroactively to convictions of others. Lemon v. Kurtzman, 411 U.S. 192, 197 (1973). But the problem of retroactivity is not confined to that area, and increasingly a doctrine of nonretroactivity is being recognized in civil cases. Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971). Indeed, the earliest instances of recognition of this doctrine occurred in civil cases. *Id.* See, e.g., Havemeyer v. Iowa County, 70 U.S. (3 Wall.) 294 (1865); Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1863). It has even been recognized in the antitrust field by some courts. *See* e.g., Hanover Shoe, Inc. v. United Shoe Mach. Corp., 377 F.2d 776, 789 (3d Cir. 1967), *rev’d on other grounds*, 392 U.S. 481 (1968); Wainwright v. National Dairy Prods. Corp., 304 F. Supp. 567, 572-73 (N.D. Ga. 1969); Lyons v. Westinghouse Elec. Corp., 235 F. Supp. 526, 536-37 (S.D.N.Y. 1964). This doctrine may be especially appropriate in the antitrust field. *See* note 115 *supra* and accompanying text.

The courts generally consider three separate factors in deciding whether to apply a new rule retroactively. First, the court must decide whether a new principle of law is being established. Second, the court must examine the history, purpose, and effect of the rule of law to determine whether retroactivity will further or retard its operation. Finally, the court must determine whether retroactive application will produce injustice or hardship. Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971).

In Wainwright v. National Dairy Prods. Corp., 304 F. Supp. 567 (N.D. Ga. 1969), the court faced the question whether a *Parker* claim of state action could be predicated upon a statute which later had been declared unconstitutional by the Georgia Supreme Court. In invalidating the law, the Georgia Supreme Court had been interested in prohibiting future restrictions on trade. This purpose would not be furthered by allowing a damage recovery for past action under a then-valid statute, for the loss of competition could not be revived. The court reasoned that whatever effect the statute may have had on the defendant’s activities, its impact could not be changed by its subsequent invalidity. The presence of the statute was an operative fact upon which businessmen had relied and therefore retroactive imposition of treble damages would be unjust.

This reasoning would be equally applicable under Justice Blackmun’s approach. Even if the Sherman Act were held to invalidate a state enactment, those regulated companies which had been required by state law to obey that enactment should be allowed to raise it as a defense to damages. The analogy to nonretroactivity cases is not, however, as applicable under the plurality’s approach, which does not substantively examine the state enactment and then determine the liability of the particular defendant; rather, it questions directly whether the federal antitrust laws should be applicable to the particular defendant’s conduct and, if so, whether a damage recovery should be allowed. *See also*, Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U.L. Rev. 693 (1974); *Note, Parker v. Brown: A Preemption Analysis*, 84 Yale L.J. 1184 (1975).

\(^{117}\) *Verkuil, State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 Colum. L. Rev. 322, 322-33 (1975). The fact that the *Parker* Court realized that this is what was at issue is demonstrated by the title it gave to the section of its opinion that dealt with the Sherman Act: “Validity of the Prorate Program under the Sherman Act.” *Parker v. Brown*, 317 U.S. 341, 350 (1943).
mean precisely such substantive examination. But circumstances change, and, in light of recent concern about the regulatory process's inflationary effects, it seemed that the Parker doctrine deserved limitation. After many previous refusals, the Court was persuaded to review this doctrine in Cantor. Unfortunately, the Justices could not agree on limits to be placed upon Parker.

Four of the Justices attempted to limit Parker severely, stating that in Parker "[t]he only Sherman Act issue decided was whether the sovereign State itself, which had been held to be a person within the meaning of § 7 of the statute, was also subject to its prohibitions." This, of course, is inconsistent with the Parker Court's reasoning. A fifth Justice would limit Parker to its facts. He found that the reasonableness of the state regulation, rather than the identity of the defendant state officials, justified the result in Parker. The four remaining Justices continued to interpret Parker as it has been interpreted as recently as 1975: Private acts must be compelled by a state acting as sovereign to be characterized as state action.

The four Justices who would make the Parker defense available only to state officials offered no procedure for dealing with those cases to which Parker would not apply. They observed:

Although it is tempting to try to fashion a rule which would govern the decision of the liability issue and the damage issue in all future cases presenting state action issues, we believe the


Former President Ford gave a nationwide television address on October 8, 1974, outlining 10 ways of combating inflation. N.Y. Times, October 9, 1974, at 1, col. 6. One of these consisted of several proposals to reduce the inflationary impact of federal regulation. See Address by President Ford, N.Y. Times, October 9, 1974, at 24, col. 2. Former President Ford "urge[d] state and local units of government to undertake similar programs to reduce inflationary effects of their regulatory activity." Id. at 24, col. 3.
120. See note 3 supra.
121. Cantor v. Detroit Edison Co., 96 S. Ct. 3110, 3117 (1976). These four Justices were Justice Stevens, who wrote the Court's opinion, and the three Justices who joined him in his interpretation of Parker: Justices Brennan, White, and Marshall. See notes 48-50 supra and accompanying text.
122. See notes 36-46 supra and accompanying text.
123. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). The four Justices were Chief Justice Burger (concurring) and Justice Stewart, joined in his dissent by Justices Powell and Rehnquist. See notes 51-54 supra and accompanying text.
Court should adhere to its settled policy of giving concrete meaning to the general language of the Sherman Act by a process of case-by-case adjudication of specific controversies.\(^{124}\)

Implicit in this approach is "the consequent difficulty in predicting with certainty [the Sherman Act's] application to various specific facts situations."\(^{125}\) This lack of guidance for regulated utilities and for their regulating commissions may expose the regulated utilities to substantial treble damage liability. This approach is particularly harsh given the limited scope of a defense based on fairness permitted by these four Justices. Since regulated utilities will no longer be able to claim reliance on a "justified understanding that [regulated] conduct was immune from the antitrust laws,"\(^{128}\) the only fairness defense remaining will be one predicated upon a lack of sufficiently significant participation by the regulated utility in the decisionmaking.\(^{127}\) Such a circumscribed fairness defense appears unjustly to punish a lack of lobbying power, to deprive the right to petition, and to hinder state utility regulation by drastically reducing valuable input from the regulated company.\(^{128}\)

In *Cantor* Justice Blackmun, who agreed with the decision in *Parker* because the state program there was reasonable, displayed the most satisfactory approach for dealing with the problem of applying the federal antitrust laws to state-regulated public utilities. His approach concentrates not on the party's liability or immunity, but on whether the state-imposed restraint should stand or fall.\(^{129}\) States and utilities could experiment with new approaches when needed, but at the same time consumers


\(^{125}\) Id. at 3121.

\(^{126}\) Id.

\(^{127}\) See notes 109-110 supra and accompanying text.

\(^{128}\) See notes 63-66 supra and accompanying text.

\(^{129}\) See notes 82-94 supra and accompanying text. While Justice Blackmun's rule of reason involves a substantive examination of state regulation, the result of preemption by the Sherman Act is different than the result of unconstitutionality under the due process clause, *see*, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923); *Lochner v. New York*, 198 U.S. 45 (1905). It is also different than unconstitutionality under the commerce clause, *see*, e.g., *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945). Unconstitutionality under the due process or commerce clauses results in regulation being wholly invalidated. But if a state enactment is invalidated because it is preempted by the Sherman Act, Congress can, if it so desires, pass a law enabling the state to resume regulating. For example, the McGuire Bill, ch. 745, 66 Stat. 631 (1962) (amending 15 U.S.C. § 45(a) 2-5 (1946)), was a congressional reaction to the decision in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).
and competitors are protected. The allowance of the broad fairness defense against treble damages advocated by Mr. Justice Blackmun would mean that state-regulated public utilities would not have to pay such damages for merely following the dictates of state law.\textsuperscript{130}

While the United States Supreme Court in Cantor did not resolve the issue of the application of the federal antitrust laws to state regulated public utilities, the Court's decision does not portend a bleak future for such utilities. Even if Parker has been, as the dissent says, "trivialize[d] . . . to the point of overruling,"\textsuperscript{131} all of the opinions indicate that utilities, by obeying certain state regulations, will not necessarily violate the federal antitrust laws. Private conduct which is regulated by the state in accordance with federal policy, or in furtherance of a necessary and significant state interest, appears to be acceptable to the Court.\textsuperscript{132} Moreover, where there is a natural monopoly regulated under standards consonant with those of the federal antitrust laws, all of the opinions agree that the private conduct is not necessarily violative of those laws.\textsuperscript{133}

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\textsuperscript{130} According to the dissent, this defense will mean that customers of regulated public utilities will not have the cost of massive treble damage awards passed on to them. See Cantor v. Detroit Edison Co., 96 S. Ct. 3110, 3129 (1976) (Stewart, J., dissenting).

\textsuperscript{131} Id.

\textsuperscript{132} Id. at 3123. The fear was that a host of state regulatory agencies may be given broad power to grant exemptions from the antitrust laws for reasons wholly unrelated either to federal policy or even to any necessary and significant state interest. Id. at 3124 (Burger, C.J., concurring). To have found an exemption for the light bulb exchange program would have served no federal or state policy. Id. at 3126-28 (Blackmun, J., concurring). See also id. at 3139 (Stewart, J., dissenting).

\textsuperscript{133} Id. at 3119. (Chief Justice Burger had joined in this part of the Court's opinion); id. at 3127 (Blackmun, J., concurring). The dissent believed that no restraint imposed by a state as an act of government should lead to liability under the federal antitrust laws. But see note 69 supra.
IN RE HOFFMAN

TRUSTS AND ESTATES — Illegitimate Children and Will Construction — A will provision "to issue" should be construed to refer to illegitimate as well as legitimate descendants in the absence of an express qualification by the testator. 53 App. Div. 2d 55, 385 N.Y.S.2d 49 (1st Dep't 1976).

Why bastard? wherefore base? When my dimensions are as well compact, My mind as generous, and my shape as true, As honest madam's issue? Why brand they us with base? With baseness? bastardy? base, base?

This plea for amelioration of the plight of illegitimates was confronted most recently in a case posing the question: Is an illegitimate offspring entitled to inherit under a will provision "to issue" in the absence of unequivocal evidence of the testator's intent? This question, one of first impression for the New York State Appellate Division, First Department, was answered in the affirmative by a unanimous court in In re Hoffman.2 The court's decision, which marks a radical departure from both ancient3 and recent4 judicial precedent, is based upon recent developments in constitutional law as well as changes perceived by the court in societal attitudes toward illegitimates.

Historically, the rights of illegitimates in diverse areas, in-

1. W. Shakespeare, King Lear, Act I, scene ii, lines 6-10.
3. At common law, in Blackstone's words:
   "The incapacity of a bastard consists principally in this, that he cannot be heir to anyone, neither can he have heirs, but of his own body; for, being nullius filius, he is therefore of kin to nobody and has no ancestor from whom any inheritable blood can be derived."

H. Krause, Illegitimacy: Law and Social Policy 25 (1971)(quoting 1 W. Blackstone, Commentaries on the Laws of England (W. Kerr, London 1857)). For early cases following this tradition in ascribing an intent to testator, see Flora v. Anderson, 75 F. 217 (C.C.S.D. Ohio 1896); Marsh v. Field, 297 Ill. 251, 130 N.E. 763 (1921); Lyon v. Lyon, 88 Me. 395, 34 A. 180 (1896); Fiduciary Trust Co. v. Mischou, 321 Mass. 615, 75 N.E.2d 3 (1947); Kemper v. Fort, 219 Pa. 85, 67 A. 991 (1907). The courts have justified this canon of construction against illegitimates on the assumption that a testator would more than likely have intended to devise and bequeath to only legal heirs. For a discussion of this traditional construction, see Note, The Effect of Statutes Altering the Position of Illegitimate Children on Judicial Construction of Wills, 45 Harv. L. Rev. 890 (1932).

4. For more recent cases adopting this same policy against illegitimates, see, e.g., In re Will of Flemm, 85 Misc. 2d 855, 381 N.Y.S.2d 573 (Sur. Ct. Kings County 1975); In re Thomas, 81 Misc. 2d 891, 367 N.Y.S.2d 182 (Sur. Ct. Erie County 1975); In re Belton, 70 Misc. 2d 814, 335 N.Y.S.2d 177 (Sur. Ct. N.Y. County 1972).
cluding inheritance, have been severely circumscribed.\(^5\) In its struggle to ameliorate the plight of illegitimates, however, the Hoffman court has left its proposed solution inordinately vulnerable to criticism. This vulnerability results from the court's failure adequately to establish definitive standards and guidelines for the application of this new pronouncement in future cases.

In defense of the court's decision in Hoffman, the unresolved ambiguities\(^6\) and unaddressed clashes with statutory policy and pronouncement\(^7\) will be explored in this note. Workable solutions to these serious problems will be proposed. These include possible judicial and statutory formulations, with a view toward strengthening the basis of the progressive, though problematic, Hoffman approach. Statutory proposals offer the preferred solution, since they provide broad, coordinated measures and assure the necessary uniformity. Such a uniform position would clear up existing ambiguities concerning the inheritance rights of illegitimates.\(^8\)

Mary U. Hoffman died in 1951 leaving a will which created a trust. The trust provided that each of two cousins was to receive income for life, to continue until the death of the survivor. Upon the death of the first cousin, his one-half share of the income was made payable for the balance of the trust's duration "to his issue." One cousin was still living at the time of this contest. The other, William Bayard Hawthorne, died in 1965, survived by a daughter and a son. The son, Stephen Bayard Hawthorne, died in 1972, leaving two children. Stephen never married the mother of these two children and no order of filiation\(^9\) had been entered. However, Stephen Bayard Hawthorne voluntarily acknowledged

5. Illegitimates have not only been discriminated against with regard to their right to inherit, but also with regard to their rights to parental support, workmen's compensation benefits, wrongful death causes of action, and social security benefits. In recent years, however, these rights have been extended to some degree. See New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (the right to welfare assistance accrues to both illegitimates and legitimates); Gomez v. Perez, 409 U.S. 535 (1973) (the right to parental support accrues to both legitimates and illegitimates); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1971) (workmen's compensation benefits should be paid to both illegitimates and legitimates upon the death of the father); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968), and Levy v. Louisiana, 391 U.S. 68 (1968) (the equal protection clause affords illegitimates the same right as legitimate children to maintain a wrongful death action).

6. See text accompanying notes 36-48 infra.

7. See text accompanying notes 49-63 infra.

8. See notes 154-164 and accompanying text infra.

Illegitimates' Inheritance Rights

these two children during his lifetime, and paternity was stipulated for the purposes of this litigation. The Surrogate’s proceeding settled the account of the trustee, The Bank of New York, and construed the will to exclude these illegitimate infants from the class depicted by the word “issue.” The Appellate Division, First Department, reversed this construction based upon a change in the perception of rights for illegitimates. The court found this change in attitude reflected in federal and state statutes as well as in treatises on the subject.

Prior to Hoffman, courts had placed the burden on the illegitimate claimant to demonstrate the testator’s clear and unequivocal intent to include illegitimates within the category of “issue.” The essence of the court’s position in Hoffman is that where no unequivocal facts elucidate the testator’s intent, equal and opposite inferences as to his intent to include or exclude illegitimate issue must follow. In such a situation, the court

12. The Surrogate’s decree was entered on September 23, 1975, in New York County (DiFalco, S.).
16. See, e.g., In re Underhill's Estate, 176 Misc. 737, 739, 28 N.Y.S.2d 984, 986 (Sur. Ct. N.Y. County 1941), where the court stated:
It is to be presumed that the testator used words in their ordinary and commonly accepted meaning unless the context of the will or the relevant attending circumstances indicate a different sense. The word “issue” has been many times interpreted by the courts of this State and has been uniformly construed to mean lawful issue and to exclude illegitimate offspring. Such is the settled interpretation of the term even though the word in the will is not qualified by the adjective “lawful.”
deemed it unfair to exercise "judicial preference"\(^7\) to bar illegitimates completely from testamentary dispositions in favor of antiquated notions of morality. Such morality, according to the Hoffman court, has its roots "in an earlier society where there was no sense of injustice in the teaching that the sins of the fathers were to be visited upon their children and succeeding generations."\(^8\) The court viewed this presumption against illegitimates as an irrebuttable and insurmountable obstacle to recovery. Under circumstances like those presented in Hoffman, where much time has elapsed since the testator's death, it is almost impossible for the illegitimate to substantiate the testator's intent to include illegitimates.

The court in Hoffman detected a softening in the judicial policy toward illegitimates' rights in inheritance. It perceived this changing attitude in instances where courts have strained to "legitimize" persons previously labeled illegitimates, such as children of technically void marriages\(^9\) and children born out of wedlock but legitimized by their parents' subsequent marriage.\(^10\) The court stressed that these two types of illegitimates have often recovered even under the more limited will provision "to lawful issue."\(^11\)

The Hoffman court further justified its departure from common law precedent by demonstrating that principles of equality for illegitimates have traditionally existed, even during an era marked by very strong anti-equality sentiments. The court relied upon Eaton v. Eaton,\(^22\) a 1914 Connecticut will construction case, as evidence of this past judicial enlightenment. However, it failed to mention the presence of an additional factor in Eaton which further justified an outcome in favor of illegitimates: The testator in that case knew of the existence of his daughter's illegitimate

\(^{18}\) Id. at 56, 385 N.Y.S.2d at 50 (quoting Exodus, 20:4; W. Shakespeare, Merchant of Venice, Act III, scene v, line 1).
\(^{19}\) See, e.g., In re Vought, 29 App. Div. 2d 97, 285 N.Y.S.2d 780 (1st Dep't 1967).
\(^{20}\) See, e.g., Olmsted v. Olmsted, 190 N.Y. 458, 83 N.E. 569 (1908); In re Sheffer, 139 Misc. 519, 249 N.Y.S. 102 (Sur. Ct. Kings County 1931).
\(^{21}\) In re Hoffman, 53 App. Div. 2d 55, 59, 385 N.Y.S.2d 49, 52-53 (1st Dep't 1976). Courts have held that when the word relating to children in the will is qualified by the adjective "lawful," it is ordinarily understood to mean those begotten and born in lawful wedlock and none others. Central Trust Co. v. Skillin, 154 App. Div. 227, 229-30 (2d Dep't 1912).
child. A reasonable testator would not have used the unrestricted wording "to issue" had he not intended this known illegitimate to share in his will. Despite the presence of this possibly distinguishing factor, Eaton is still valuable precedent because of its strong language supporting illegitimates' inheritance rights in will constructions. 23

The court in Hoffman overstated its position when it declared that the most recent holding against illegitimates in this context was the thirty-five-year-old case In re Underhill's Estate. 24 The Hoffman court failed to discuss Estate of Leo Levy, 25 a twelve-year-old New York County Surrogate's Court decision. The court in Leo Levy, declaring that the words "her descendants" and "more remote descendants" used in a will did not include the illegitimate child of the deceased's wife, based its construction of this wording upon the pronouncement in a prior New York case. 26 This prior case had established the general rule of construction that when the words "child," "children," or "descendants" are used in a statute, these terms include legitimate or lawful children or descendants. 27 However, this failure to deal with Leo Levy does not mar the logic of the Hoffman result. The Hoffman court's premise was that despite the scarcity of judicial precedent in favor of including illegitimates, the current use of a court-imposed presumption of "issue" which would operate automatically to exclude illegitimates would be grossly unfair

23. The majority in Eaton stated:
In a word, the natural corollary of the English rule that the word "child" or "children," when used in a statute, is to be restrained to signify legitimates only, is done away with as it logically must be. That corollary is the logical consequence of the proposition that the illegitimate is the child of nobody. When that proposition is transposed into ours that an illegitimate is the child of its mother, then all logical foundation for the corollary that the word "child" or "children" in statute, will, or deed is to be interpreted as limited to legitimates disappears, and the logical corollary becomes the reverse, so that presumptively the word "child" or "children" in a will embraces offspring legitimate and illegitimate.


27. Id. at 130, 12 N.Y.S.2d at 751.
and contrary to the modern view. It indicated that the trend toward statutory revision was well underway when the testator executed the will in controversy.

The court in Hoffman used another means to circumvent the traditional common law deference to precedent. Emphasizing the equally longstanding historical recognition of the flexibility of law under changing circumstances, the court quoted from another recent case: 

"[F]rom the earliest times, the doctrine of stare decisis did not require a strict adherence to precedent in every instance."

As final justification for its departure from precedent, the Hoffman court relied on expanding concepts of the equal protection clause of the fourteenth amendment. While the court did not fully develop this justification, it nevertheless affords a convincing rationale when comprehensively analyzed.

The most crucial deficiency in the Hoffman opinion is the lack of acknowledgment and resolution of several complex and closely related issues. In failing to clarify the specific requirements for setting off future applications of its holding, the court has created a danger of possible fraud, injustice, and arguable inconsistencies with related statutory policy. The court did not explore the ramifications or the impact of its new recognition of an illegitimate’s right to inherit in this limited context, nor did it address an undesirable possible consequence: Permitting blanket inheritance rights for all illegitimates may actually undermine the intents of long-deceased testators by making their wills, probated long ago, subject to current attack. Furthermore, Hoffman did not answer the question whether this liberalizing holding is confined to situations like Hoffman where there exists no evidence of the testator’s actual intent. The court gave no indication of the quantity and type of evidence required for proof of paternity in a will construction proceeding. Moreover, the court failed to discuss whether the standards for paternity proof in intestate succession should carry over to will construction proceedings, and it failed to deal with the possibility that its decision

29. See notes 13-15 supra and accompanying text.
32. See text accompanying notes 100-153 infra.
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might result in an onslaught of spurious claims that would unduly burden probate proceedings. Finally, the Hoffman opinion did not substantiate adequately its conclusion that the presumption against illegitimates is unconstitutional because of “expanding concepts of equal protection.” This superficial treatment is especially significant inasmuch as the court did not distinguish a seemingly contrary United States Supreme Court pronouncement on the inheritance rights of illegitimates. Nor did the court cite or explain a recent New York Court of Appeals decision which upheld the constitutionality of New York's statutory presumption against unfiliated illegitimates inheriting by intestate succession.

THE EFFECT OF THE RETROACTIVE APPLICATION OF Hoffman

The court in Hoffman did not discuss the problem of “skeleton rattling” in applying this new interpretation of the word “issue” to previously probated wills. This problem concerns the possibility that every prior provision “to issue” in which illegitimates were involved may now be subjected to this modern construction of testator's intent, perhaps in derogation of the testator's true intent. The potential injustice in this is evident in the situation where a long-deceased testator specifically provided for his illegitimate child in his will. According to Hoffman, if a testator also made a more generalized bequest “to issue” in his will, it is possible that this illegitimate child would take twice. This would result in a windfall for the illegitimate at the expense of testator's legitimate heirs.

This unjust result, however, is not necessarily mandated by Hoffman's abrogation of the presumption against illegitimates. According to Hoffman, once facts against the illegitimate's position are introduced, the illegitimate is once again required to submit affirmative proof that the testator intended to include him. That the testator specifically provided for this illegitimate

33. See text accompanying notes 100-102 infra.
34. The court merely stated "but cf. Labine v. Vincent, 401 U.S. 532 (1971)." See In re Hoffman, 53 App. Div. 2d 55, 65, 385 N.Y.S.2d 49, 56 (1st Dep't 1976). Labine held that where a statute regulating inheritance is in issue, it must be upheld so long as it is supported by a reasonable basis. See text accompanying notes 109-116 infra.
37. Id. at 5.
38. See text accompanying notes 45-46 infra.
in his will may be such a fact. Once this burden shifts to the illegitimate, it would be difficult to make the requisite showing if indeed the testator truly intended to provide for this illegitimate child exclusively through the specific will provision.

It is also possible, however, for a court to construe a specific will provision to an illegitimate in a contrary manner. That is, not as evidence that the illegitimate has been fully provided for, but rather as evidence of good will between the testator and the illegitimate which carried over to the testator’s other less explicit will provision.

Thus, there are two plausible and opposite interpretations that may be derived in this situation: (1) that the illegitimate has already been provided for fully without the provision “to issue,” or (2) that the specific provision is evidence of testator’s desire also to include this illegitimate in his provision “to issue.” Fraud on the estate of the ancestor will most probably not occur if such a special provision is construed in the former manner.

However, to preclude the greater potential for fraud inherent in the latter interpretation, courts should strictly limit Hoffman to prospective application only. In the future, such cases will undoubtedly arise because of the many questions unanswered by Hoffman. Prospective application, which would prevent clashes with true testamentary intent that might otherwise arise if long-closed estates were reopened, is justifiable on the authority of past decisions in this area.\(^\text{39}\) Moreover, provisions for prospective application only are common in statutory schemes; many statutes are written with an “effective date.”\(^\text{40}\) Other statutes deal with this problem by providing that a controversial term shall be defined in a new way as of a certain date, and expressly stipulating that the previous definitions govern cases prior to that date.\(^\text{41}\)

**The Impact of Hoffman**

It is uncertain whether the rules in Hoffman will apply when facts exist which exhibit the testator’s intent. Those opposing the


\(^{40}\) E.g., N.Y. Est., Powers & Trusts Law § 4-1.2 (McKinney 1967) provided an effective date, Sept. 1, 1967, for its section 4(b).

\(^{41}\) E.g., N.Y. Dom. Rel. Law § 117 (McKinney 1964).
application of Hoffman in such cases maintain that once facts are presented on either side of the controversy, the abolition of a presumption against illegitimates is no longer required by logic or reason. Once an illegitimate can present evidence exhibiting that the testator intended to include him, the abolition of such presumption is unnecessary. Gray and Rudovsky, leading commentators on equal protection and illegitimates' rights, have asserted this position, stating: "[I]f it can be shown that the presumption has a factual basis and if rebuttal is not made unreasonably difficult, this may be one classification based on illegitimacy which is still constitutional after Levy."4

Further justification for this reading of Hoffman may be found in the Hoffman opinion itself: "Certainly the automatic exclusion of illegitimates from a bequest to a category such as 'children' would not be permissible. On the other hand, a bequest to legitimate 'children' would cut off any claim an illegitimate child might assert."45 The commentators have urged, as the Hoffman court held, that the initial burden of coming forward to establish the testator's intent should be placed upon the illegitimate's opponent.46 Once the opponent meets this burden, the burden of coming forward would shift to the illegitimate. Thus far, this seems to be a logical reading of Hoffman.

It would be illogical, however, to extend this reading of Hoffman to keep the burden of persuasion on the illegitimate if evidence of the testator's intent exists. Such a reading would place an undue burden on illegitimates, contrary to the thrust of the Hoffman opinion. Gray and Rudovsky would consider any such permanent burden of persuasion on illegitimates "unreasonably difficult."47 A close examination of Hoffman indicates a strong policy favoring an illegitimate's right to inherit on an equal footing with legitimates.48 The court in Hoffman intended to shift the ultimate burden of persuasion to the illegitimate's opponent,
even when some factual data regarding testator's intent are available. Moreover, the above reading of Hoffman would pose serious problems for courts attempting to determine whether sufficient facts had been presented to shift this burden.

In sum, the Hoffman court abolished the traditional presumption that illegitimates are not included in a will provision “to issue,” thus shifting the burdens of production and persuasion to the illegitimate’s adversary. The presence of factual data concerning testator’s intent which is contrary to the illegitimate’s position will logically shift the burden of production back to the illegitimate. The burden of persuasion should nevertheless remain on the opponent.

To elucidate clearly the goals of the state in protecting illegitimates, a statutory formulation should be enacted.

Hoffman: Conflict or Harmony with Prior Legislative Policy?

The flexible proof of paternity permitted in Hoffman, which allowed an illegitimate to inherit absent an order of filiation, arguably conflicts with the stricter requirements of section 4-1.2 (a)(2) of New York’s Estates, Powers and Trusts Law (EPTL). Under this section, which governs inheritance through intestate succession by illegitimates, a court determination of paternity must have been entered during the father’s lifetime and within two years of the child’s birth to permit an illegitimate to inherit from his father.

It is logical to assume that the intestacy statute’s requirements for paternity proof will carry over to a will construction situation such as the one involved in Hoffman. The function of an intestacy statute is to provide a legislative presumption of the testamentary intent of the average person in the community.50

49. N.Y. Est., Powers & Trusts Law § 4-1.2(a)(2) (McKinney 1967) provides:
An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

See also N.Y. Est., Powers & Trusts Law § 4-1.2(a)(3) (McKinney 1967), declaring the insufficiency of support agreements as proof of paternity for inheritance, and N.Y. Fam. Ct. Act § 517 (McKinney 1967), reiterating the two-year statute of limitations on the institution of paternity proceedings in certain cases.

The *Hoffman* case similarly suggests a presumption regarding the testamentary intent of this average person. In a will construction proceeding, this presumption is judicially imposed. Both situations involve inferences drawn by the government regarding society's attitude toward illegitimates. The quantity and type of proof of paternity required should remain constant in both because the same policy considerations—prevention of fraud and added administrative burden—apply equally to the two situations.

Inquiry into the legislative history of this intestacy statute generates proof that the drafters expected its paternity proof requirements to carry over to will construction proceedings. The New York State Commission on the Modernization, Revision and Simplification of the Law of Estates was concerned with striking a proper balance between alleviating inheritance difficulties of illegitimates on the one hand and preventing spurious inheritance claims on the other. It recommended a compromise which was incorporated in section 4-1.2 of the EPTL. Evidencing its intent to effectuate this carryover, the Commission stated:

> The adoption of the recommendations proposed in this report will safeguard the interests of the illegitimate in the proceeds of a successful action for wrongful death, and estates passing by will or devise, as well as in estates descending and being distributed by operation of the law of intestate succession.

Further support for the proposition that courts look to the intestacy statute to define the meaning of the words "child" or "issue" in a will is found in this same Commission's report. The report discussed *Estate of Leo Levy* to illustrate this carryover. In *Leo Levy* the court determined that the phrase "her descendants" in a will did not include illegitimate descendants. The Commission attributed this result to the court's adoption of the intestacy statute's presumption against illegitimates where no...
evidence of the testator's intent is proffered.57

The antilapse provision of the New York EPTL58 affords further support for the proposition that the requirements for proof of paternity from the intestacy statute carry over to cases involving inheritance by will. The antilapse statute enables a testamentary beneficiary's next of kin to take in the event that the beneficiary predeceases the testator. For illegitimates, this inheritance through their father's kin is dependent upon the requirements of EPTL section 4-1.2.59 This section thus determines the circumstances in which an illegitimate will be included as issue in the interpretation of a will for purposes of the antilapse statute.

Similarly, statutory formulations in other states refer to and are guided by the statutes governing inheritance by or from illegitimates in intestacy in determining whether illegitimates should be included in testamentary gifts to a class such as "children" or "issue."60 Federal courts have used the intestacy statutes as guidelines in determining whether "children" includes illegitimates in contexts which are not directly related to inheritance.61

The following anomaly might occur as a result of the differing requirements for proof of paternity: Should a will provide a legacy to a brother who predeceases the testator, the New York antilapse statute would exclude illegitimate issue of that brother from the

57. The Commission stated: "This result is reached because the testator's intent is assumed to be in harmony with the statute governing descent and distribution of property to illegitimate children." Id. at 198.
58. N.Y. EST., POWERS & TRUSTS LAW § 3-3.3 (McKinney 1967) provides, in pertinent part:
   (a) Unless the will provides otherwise:
      (1) Whenever a testamentary disposition is made to the issue or to a brother or sister of the testator, and such beneficiary dies during the lifetime of the testator leaving issue surviving such testator, such disposition does not lapse but vests in such surviving issue . . . .
      (2) (b) As used in this section, the terms "issue", "surviving issue" and "issue surviving" include adopted children and illegitimate children; for this purpose, an illegitimate is the child of his mother and is the child of his father if he is entitled to inherit from his father under 4-1.2.
59. N.Y. EST., POWERS & TRUSTS LAW § 4-1.2 (McKinney 1967).
61. DeSylva v. Ballentine, 351 U.S. 570, 580-82 (1956), where the Court, faced with the question whether an illegitimate child should be included within the term "children" as used in a federal copyright statute, looked to the state laws governing the descent of property in the absence of a definition in the federal statute itself. See also Matthew v. Lucas, 427 U.S. 495, 498-99 (1976) (involving "children" and social security benefits); Grove v. Metropolitan Life Ins. Co., 271 F.2d 918 (4th Cir. 1959) (involving "children" and insurance).
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bequest unless an order of filiation had been entered;[62] under the holding in Hoffman, this order of filiation would be useful but not necessary to permit such illegitimate to take under a bequest “to issue.” The following example illustrates another inconsistency: Should a mother die intestate leaving only the illegitimate daughter of an intestate predeceased son, this illegitimate daughter would not be able to inherit from her father unless an order of filiation had been entered. Yet, under Hoffman, she could share in her father’s mother’s estate as “issue” of her father. She would be her father’s representative in the estate. Reading the applicable New York State provision, EPTL section 4-1.1,[63] together with Hoffman’s holding that “issue” includes illegitimates, this illegitimate may inherit through, but not from, her father.

Nevertheless, it may be posited that Hoffman and its proof of paternity requirements are more in harmony with general New York statutory policy than is the EPTL intestacy provision, section 4-1.2 itself. For instance, the law of workmen’s compensation benefits is far more liberal regarding paternity proof requirements for the receipt of benefits by “issue.”[64] No court order entered within two years of the child’s birth is required. As statutory support for its decision, the Hoffman court cited New York’s wrongful death provision,[65] which makes an illegitimate child the distributee of his father in wrongful death actions regardless of whether an order of filiation has ever been entered. The court also noted the early liberalization of illegitimates’ inheritance rights by the legislative relabeling as “legitimate” of all children of “void” marriages as well as all illegitimates whose parents had

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62. N.Y. Est., Powers & Trusts Law § 3-3.3(2)(b) (McKinney 1967). For the full text of this provision, see note 58 supra.
63. N.Y. Est., Powers & Trusts Law § 4-1.1 (McKinney 1967). This section provides, in pertinent part:
The property of a decedent not disposed of by will, after payment of administration and funeral expenses, debts and taxes, shall be distributed as follows:
(a) If a decedent is survived by:

   (6) Issue, and no spouse, the whole to issue per stirpes.
64. N.Y. Work. Comp. Law § 2(11) (McKinney 1985) provides: “‘Child’ shall include a posthumous child, a child legally adopted prior to the injury of the employee, and a step-child or acknowledged illegitimate child dependent upon the deceased.”
65. N.Y. Est., Powers & Trusts Law § 5-4.5 (McKinney Supp. 1976-77) provides, in pertinent part: “For the purposes of this part [wrongful death action], an illegitimate child is the distributee of his father and the father of an illegitimate child is that child’s distributee.”
subsequently married.\textsuperscript{66} In addition, it is noteworthy that the New York statute, which requires paternity proof in order to obtain paternal support, provides a longer time period during which claims of paternity may be raised and proven by an illegitimate. It may be raised at any time in a support proceeding and may be inferred from a voluntary acknowledgment by the father.\textsuperscript{67}

The lesser standard of proof of paternity required by these other New York statutes has been justified as involving the unchangeable biological relationship between parent and child.\textsuperscript{68} The basis of wrongful death, workmen's compensation, and paternal support causes of action is the existence of this biological relationship, which cannot be undone by the subjective wishes of the parent. Inheritance rights, on the other hand, are deemed only an "inchoate expectancy" for the illegitimate because they depend on the subjective testamentary desires of each parent.\textsuperscript{69} This has been proposed as a justification for the stricter requirements for paternity proof in the inheritance area.

Nevertheless, the general legislative trend toward ameliorating the plight of illegitimates is manifest within EPTL section 4-1.2 itself. Despite this provision's strict paternity proof requirement for inheritance from the father, it is more liberal than the prior statutory formulation. The previous law precluded illegitimates from inheriting at all from the father or from the mother's kindred, and allowed them to inherit from the mother herself only in the absence of legitimate issue.\textsuperscript{70} Additionally, the antilapse

\textsuperscript{66} 53 App. Div. 2d 55, 59 n.3, 385 N.Y.S.2d 49, 52 n.3 (1st Dep't 1976). See also notes 19-20 supra and accompanying text.

\textsuperscript{67} See N.Y. Fam. Ct. Acct § 517 (Consol. Supp. 1975) and accompanying annotations. It has been held that the two-year statute of limitations contained in § 517 of the Family Court Act is inapplicable to a support proceeding under article 4 of the Family Court Act. It also has been held that a claim of paternity can be asserted at any time in a support proceeding under § 418 of the Family Court Act because the court has continuing jurisdiction over support proceedings under N.Y. Fam. Ct. Acct § 461 (Consol. 1974).


\textsuperscript{69} Id. at 88, 340 N.E.2d at 723, 378 N.Y.S.2d at 354.

\textsuperscript{70} See N.Y. Est., Powers & Trusts Law § 4-1.2 Practice Commentary (McKinney 1967), which states:

Subdivision 14 of section 83 [now EPTL § 4-1.2], dealing with the inheritance rights of the illegitimate or the legitimate descendants of a deceased illegitimate, restricted such rights to inheritance from the estate of the mother, and, then, only when there were no lawful issue; the illegitimate was not entitled, under the statute or otherwise, to inherit from the putative father or the father's kindred. The right of the illegitimate to inherit from the mother did not extend to the mother's kindred, although it has been held that an illegitimate
provision of the EPTL specifically includes illegitimates within the category of "issue.""

In light of this liberalizing trend, EPTL section 4-1.2 may itself conflict with the standards set forth in other contexts for illegitimates' inheritance rights. Hoffman may serve only to ferret out this preexistent inconsistency of EPTL section 4-1.2. The fact of this inconsistency has already been demonstrated in provisions outside the EPTL, and is also evident in the current dispute over the constitutionality of the strict paternity proof requirements. The determination in In re Estate of Lalli, which upheld the constitutionality of section 4-1.2's order of filiation requirement within the testator's lifetime, is not a final pronouncement on this issue, since this case is presently pending on the Supreme Court docket. An Illinois case presenting issues similar to those in Lalli also has been argued before the Supreme Court.

EPTL section 4-1.2(a)(2) arguably conflicts with the generalized descent and distribution provision, EPTL section 4-1.1(a)(6), which places no independent limit on those who are included as "issue" and thus take in intestacy per stirpes. EPTL

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71. N.Y. Est., Powers & Trusts Law § 3-3.3(2)(b) (McKinney 1967). For the text of this provision, see note 58 supra. But see N.Y. Est., Powers & Trusts Law § 3-3.3(2)(b) Practice Commentary (McKinney 1967), where it is stated: "It is extremely important to note that this extension of the rights of illegitimate children does not necessarily augur like extensions for other purposes of the Estates, Powers and Trusts Law."

72. See text accompanying notes 64-67 supra.


75. Trimble v. Gordon, No. 75-5952 (Ill. 1975), prob. juris. noted, 424 U.S. 964 (1976) (argued Dec. 7, 1976). The decision of the Illinois Supreme Court was stated from the bench as an affirmance of the Illinois intestacy statute, based on the principles set forth in In re Estate of Louis Karas, 61 Ill. 2d 40, 329 N.E.2d 234 (1975). In Karas the court held that the Illinois law permitting illegitimates to inherit from mother but not from father bears a rational relation to a valid governmental purpose and does not deny equal protection. The petitioner in that case had been acknowledged by her father. Nevertheless, the court concluded that expansion of inheritance rights of an illegitimate child in the estate of a father who died intestate must be left to legislative modification.

76. N.Y. Est., Powers & Trusts Law § 4-1.2(a)(2) (McKinney 1967). For the text of this provision, see note 49 supra. N.Y. Est., Powers & Trusts Law § 4-1.1(a)(6) (McKinney 1967). For the text of this provision, see note 63 supra.
section 1-2.10, the statutory definition of issue, provides that "issue" are the descendants in any degree from a common ancestor unless proof to the contrary is evident. It does not limit the scope of possible proof of paternity. There is no cross-reference in section 4-1.1(a)(6) to the paternity proof requirements of section 4-1.2(a)(2). This might suggest that these inconsistencies in paternity proof requirements have always existed in New York law, since the EPTL nowhere states that "issue" does not include illegitimates. *Hoffman* therefore serves to point out the already existing conflict between sections 4-1.2 and 4-1.1, the general descent and distribution provision. This conflict becomes evident when the general descent provision is interpreted in a manner in keeping with the general statutory trend toward expanding the inheritance rights of illegitimates.

The solution is not to reject the *Hoffman* holding, which is only symptomatic of a general relaxation in the requirements for proof of paternity. Rather, the optimal solution would include a statutory compromise between the strict proof requirements of EPTL section 4-1.2(a)(2) and *Hoffman*’s implied liberalization of the degree of proof required. Until this legislative clarification can be accomplished, the holding in *Hoffman* should be affirmed because it is the preferable approach in light of modern circumstances; it does not conflict with overall statutory policy toward illegitimates.

DIFFICULTIES OF PATERNITY PROOF UNEXPLORED BY *Hoffman* — FRAUD AND ADMINISTRATIVE BURdens

One related problem unexplored by *Hoffman* is that this decision may lead to a multitude of fraudulent inheritance claims. It has been contended that total equality for illegitimates would present an undue burden on the probate of wills. It has also been asserted that presumptions favoring illegitimates will

77. N.Y. EST., POWERS & TRUSTS LAW § 1-2.10 (McKinney Supp. 1976-77) provides:
(a) Unless a contrary intention is indicated:
   (1) Issue are the descendants in any degree from a common ancestor.
   (2) The terms "issue" and "descendants", in subparagraph (1), include adopted children.
78. See text accompanying notes 161-164 infra.
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often allow fraudulent claimants unjustly to share in bequests rightfully belonging only to testators' legitimate heirs.80

First, it must be noted that even the most fervent advocates of equal treatment for illegitimates have agreed that the problems in ascertaining paternity will maintain illegitimacy as a relevant consideration. Paternity can never be established with scientific accuracy.81 However, the claim that such administrative difficulties justify a blanket denial to illegitimates has generally been repudiated. The Court in Gomez v. Perez82 stated: "We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination."83 Such a denial of rights was condemned in Gomez because the law has never required scientifically precise accuracy, and courts make legally binding determinations in paternity proceedings with an accuracy not unlike that obtained in other civil actions. To preclude illegitimates from inheriting due to inconclusive paternity proof is to elevate procedural and evidentiary difficulties to the level of total substantive barriers to recovery. The mere possibility of these problems of fraud and administrative burden does not justify a conclusive presumption that they will always outweigh the state's interest in providing a legal benefit to illegitimate children.84 The problem of fraud is greatly exaggerated by opponents of equality. As argued by appellants in Hoffman, more often than not the existence of an illegitimate child is known to the family, and the fact of paternity is undisputed. "The product of somebody's youthful indiscretion who surfaces unexpectedly to claim a share of the

81. H. Krause, Illegitimacy: Law and Social Policy (1971). "[W]e may conclude that even if blood typing cannot establish paternity positively in medical terms, the positive proof of paternity may reach a level of probability which is entirely acceptable in legal terms." Id. at 128.

The problem of ascertaining paternity will always remain the irreducible minimum relevance of birth out of wedlock and it may be stipulated that "equal protection" must be limited to those illegitimates whose paternity has been established with the same degree of probability as the paternity of a legitimate child is established by his birth in wedlock.

Id. at 82.
family fortune is more likely to remain a figure of melodrama than to become a substantial threat to the orderly settlement of estates." Often, paternity has been voluntarily acknowledged and thus an adversary proceeding, with inherent difficulties of proof, is not necessary to settle every inheritance claim brought by an illegitimate. Furthermore, paternity is no more difficult to prove or disprove than many other types of claims with which courts deal daily. The illegitimate is given every opportunity to prove paternity, and the factfinder is faced with similar issues, during support proceedings. It is the function of the factfinder to resolve difficult factual issues. This function should not easily be shirked.

Equal inheritance rights for illegitimates may cause a hardship on the accounting trustee. It might be argued that under Hoffman he must now serve all illegitimate, as well as legitimate, heirs with process in each case where the will includes a provision "to issue." Further complications flowing from this service of process requirement are articulated in In re Will of Flemm. In that case, a purported illegitimate child filed a notice of appearance in the probate proceeding involving the will of the putative father. The preliminary executors of the will moved to strike this intervention. Surrogate Sobel granted the motion to strike because of the severe burden on the trustee in serving all illegitimates. The court stated: "How does one cite and serve an illegitimate of whose existence neither family nor personal representative may be aware?" This same court discussed other potential problems, noting:

And of greatest concern [is] how [to] achieve finality of decree

86. See, e.g., H. Krause, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971), where the author states:

Even if, on the average it is more difficult to trace illegitimate than legitimate descent and even if it is easier to prove illegitimate maternity than paternity, the courts do not deal with averages. The fact that uncertainty may exist in one illegitimate paternity case is not to say that uncertainty exists in another case.

Id. at 82.
87. See note 67 supra.
88. E.g., in New York the statute requires service of process on all probate claimants.
N.Y. SURR. CT. PROC. ACT § 1403 (McKinney 1967).
90. Id. at 859, 381 N.Y.S.2d at 575.
91. Id.
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in any estate when there always exists the possibility however remote of a secret illegitimate lurking in the buried past of a parent or an ancestor of a class of beneficiaries. It might be feared that a further implication of this case is that once one illegitimate claims trust fund assets, others will follow in his wake, creating insecurity and lack of finality in any court's probate decree. This problem, combined with the ramifications of process serving requirements, may thus lead to large scale instability in the entire estate administration process.

The severity of this administrative burden, like that of paternity determination, is overstated. First, an executor's or administrator's duty is generally limited to serving those of whom he is or may be expected to become aware. The relatively rare occurrence of an illegitimate who suddenly "crawls out of the woodwork" certainly falls outside this category. In the everyday situation involving known illegitimates, these claimants should be no more difficult to cite and serve than known legitimates. The scope of this added burden can be narrowed even further to include only those instances where the probate proceedings involve wills which create interests in favor of "issue." The severity of this burden can be lessened by the accounting trustee himself by, for example, giving constructive notice to all potential claimants by publishing a "citation against unknown persons" in a newspaper in the county in which the will is probated. Ease of administration of the estate has never been an overriding goal in the construction of wills. Where the intent of the testator is ambigu-

92. Id., 381 N.Y.S.2d at 575-76.
93. It should be noted that states may provide statutes of limitation in order to deal with this issue. See, e.g., ILL. ANN. STAT. ch. 3, § 90 (Smith-Hurd Supp. 1977). See also 3 BOWE-PARKER: PAGE ON WILLS § 26.46 (Supp. 1976). This type of provision, which sets a time limit for inheritance claims, would be equally applicable to claims by illegitimates under the proposed statutory scheme. If a similar provision is not currently in effect in a state adopting this scheme, the state may choose to incorporate one into the general statute proposed herein.
95. A "citation against unknown persons" is a writ issued out of a court of competent jurisdiction, commanding interested persons to appear on a day named to show cause why a will should not be probated without their presence. See, e.g., Surrogate's Notices, N.Y.L.J., Nov. 5, 1976, at 24, col. 3.
96. See text accompanying notes 82-83 supra. See generally Stanley v. Illinois, 405 U.S. 645 (1972): "But the Constitution recognizes higher values than speed and efficiency." Id. at 656 (White, J.).
ous with respect to the inclusion of illegitimates under a provision "to issue," the courts have used traditional guidelines relating to community standards to determine the testator's most likely intent.\textsuperscript{97}

The problems involved in establishing standards of paternity proof can best be minimized by the promulgation of a statute which includes a uniform requirement for proof of paternity.\textsuperscript{98} This would reduce the possibilities of fraudulent intrusion into the bounty of legitimate heirs and would facilitate the trustee's work. Such statutory pronouncement would set the level of proof at a point between the strict paternity proof requirements of New York's intestate inheritance statute for illegitimates\textsuperscript{99} and the implied liberalization suggested in Hoffman. In this way, fraudulent claimants would be deterred from bringing suit because they would be unable to carry this burden.

In sum, procedural problems exist in ferreting out fraud and in accounting for illegitimates in the implementation of Hoffman's holding. The extent of these problems, however, has been greatly exaggerated. They may be minimized by appropriate actions by the trustee and may be nearly obviated by a rational, definitive statutory standard pertaining to the level of paternity proof required.

\textbf{E}QUAL \textbf{P}ROTECTION \textbf{A}ND \textbf{THE I}NHERITANCE \textbf{R}IGHTS \textbf{O}F \textbf{I}LLEGITIMATES

A major justification for the Hoffman court's departure from traditional common law dogma\textsuperscript{100} regarding illegitimates is its perception of an expansion of the scope of the equal protection clause to include illegitimates. However, the court does not fully explain the relationship between will construction proceedings, which ascribe an intent to a testator, and equal protection of the laws. The Hoffman opinion should have dealt with specific pronouncements of the United States Supreme Court and the New York Court of Appeals on equal protection and illegitimates' rights in an analytical fashion. The poorly substantiated conclusion proffered in Hoffman, that the Constitution mandates a decision which treats illegitimates with equality, seems out-of-hand and hence unconvincing. The Hoffman court failed even to men-

\begin{itemize}
  \item \textsuperscript{97} See note 50 \textit{supra} and accompanying text.
  \item \textsuperscript{98} See text accompanying notes 154-164 \textit{infra}.
  \item \textsuperscript{99} N.Y. Est., Powers & Trusts Law § 4-1.2(a)(2) (McKinney 1967). For the text of this provision, see note 49 \textit{supra}.
  \item \textsuperscript{100} See note 3 \textit{supra}.
\end{itemize}
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In re Estate of Lalli and did no more than cite Labine v. Vincent, two cases which reach contrary conclusions on this issue. The unconstitutionality of a will construction against illegitimates in the absence of factual data was one of the two justifications for the outcome in Hoffman. This line of reasoning warrants further examination and clarification.

Many courts and commentators have grappled with the problem of applying equal protection concepts to discrimination against illegitimates. The impetus for this relatively new awareness of the plight of illegitimates is a line of United States Supreme Court cases. In 1968, Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co. significantly undermined the rules of construction that had discriminated against illegitimates. Four attacks were made between 1968 and 1972 on Louisiana court decisions which had held that only legiti mates were included within the words "child" or "children" in statutes concerning wrongful death, workmen's compensation, and descent and distribution. It is noteworthy that the Court

102. 401 U.S. 532 (1971).
104. 391 U.S. 68 (1968). In Levy five illegitimate children brought an action for the wrongful death of their mother. The state court held that the word "child" in the Louisiana wrongful death statute meant legitimate child only. The United States Supreme Court held that illegitimates are persons within the meaning of the equal protection clause of the fourteenth amendment and thus this statutory interpretation denying them recovery creates an invidious discrimination. Id. at 70-71. A state may have broad powers in promulgating classifications, but it cannot, consistently with the equal protection clause of the fourteenth amendment, delineate groupings if this causes irrational discrimination against a particular class. The response of the Court was partially due to its belief that the state is precluded from denying rights to persons on the basis of a condition over which they have no control. Id. at 72.
105. 391 U.S. 73 (1968). In Glona, decided the same day as Levy, the Court held that Louisiana's wrongful death statute, which barred recovery to the parents of an illegitimate child, violated the equal protection clause of the fourteenth amendment. Id. at 76. This decision rejected a traditionally espoused state interest — that of deterring the "sin" of birth out of wedlock.
in *Glona* explicitly rejected the traditional state interest typically used to justify discrimination against illegitimates: the state's interest in maintaining family unity through deterrence of birth out of wedlock.\(^8\) Thus, *Levy* and *Glona* marked the emergence of a new right to equal protection.

A sharp reversal of this trend, however, occurred three years later in *Labine v. Vincent*.\(^9\) The Supreme Court, in a five-four decision, affirmed a Louisiana state court decision denying an illegitimate her inheritance rights. This illegitimate had lived with and had been supported by her mother and father within their family unit, had been formally acknowledged by them, and was the only child of her father. The court approved a state statutory scheme which deprived illegitimates of the right to inherit from their fathers through intestate succession.\(^10\) Mr. Justice Black, writing for the majority, deferred to Louisiana's interest in promoting family life, directing the disposition of property, and securing the stability of land titles within the state.\(^11\) The illegitimate claimant had argued that *Levy* and *Glona* supported her right to inherit. The Supreme Court distinguished these prior cases, noting that *Levy* and *Glona* sounded in tort while *Labine* involved property rights.\(^12\)

The Court further justified its holding in *Labine* by suggesting that parents have the option to devise their property through will provisions which specifically name the beneficiaries.\(^13\) In addition, parents have the option to marry and thereby legitimize their children, enabling them to take through intestate succession.\(^14\) Thus, reasoned the Court, this interpretation of the intestacy statute did not present an "insurmountable barrier"\(^15\) to the illegitimate's recovery. Mr. Justice Black asserted that statutory discrimination in favor of legitimates and against illegitimates was analogous to discrimination in favor of wives and against concubines. He stated: "One set of relationships is socially sanc-
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mountable in *Levy*, where recovery was permitted, since the illegitimate there could have been acknowledged by his parents to meet the statutory requirements.\footnote{Id.} The dissent further did not agree that the state interest in protecting the family unit justified requiring formalities, such as the marriage of the parents, to allow the children to recover. The dissenting Justice asserted that the need for these formalities to insure family unity was lacking where the child had been acknowledged by his parents.\footnote{Id. at 555-56.} He proposed that any state interest in promoting the marital union should focus on the parents who, unlike the children, are capable of entering into this union and who alone are capable of agreeing to assume its attendant responsibilities. Mr. Justice Brennan stated that the state interest in promoting marriage "can obviously be attained far more directly by focusing on the parents, whose actions the State seeks to influence."\footnote{Id. at 558.}

Finding further justification for his position in the facts of *Labine*, Justice Brennan declared that when paternity has been formally acknowledged, the state's interest in eliminating complicated questions of paternity proof is vitiated.\footnote{Id. at 552.} He also pointed out that one purported state interest, the promotion of marriage and family life, is at odds with another purported state interest, implementation of the average testator's desire to exclude illegitimates. To encourage marriage by a denial of rights to children born out of wedlock, it must be assumed that parents ordinarily desire to leave property to their illegitimate children. This is wholly contrary to the intestacy statute's presumption concerning the average testator's intent.\footnote{Id. at 555-56.} One district court\footnote{Id. at 556.} doubted the continuing vitality of the *Labine* decision, suggesting that the four-Justice\footnote{Id. at 558.} dissenting opinion is more persuasive and more consonant with the Court's current stance.

In *Weber v. Aetna Casualty & Surety Co.*,\footnote{Norton v. Weinberger, 364 F. Supp. 1117, 1124 (D. Md. 1973) (dictum). This decision involved an illegitimate's claim for benefits under the Social Security Act. The court upheld the requirement of proof of prior support or dependency, which was the basis of the denial of this claim below.} the Supreme Court invalidated a section of Louisiana's workmen's compensa-
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tion law which denied dependent, unacknowledged illegitimates the right to share equally with acknowledged illegitimate children and legitimate children. The Court in Weber followed Levy's proscription of discrimination against illegitimate dependent children, and found no rational basis for this discrimination. At the same time, the Court in Weber affirmed the general principle of equality for illegitimates set forth in Levy while upholding discrimination against illegitimates in the specific area of inheritance rights. This case also clarified the nature of the equal protection inquiry into discrimination against illegitimates. Mr. Justice Powell, writing the majority opinion, articulated a standard of constitutionality involving a comparison of the harms engendered by each of the competing interests and a balancing of those interests. This Court sought to reject the proposition that categorization of and discrimination against illegitimates is rational because the "illegitimacy" label incorporates within it rational bases for discrimination. Here, the rational bases included the closeness of family ties and the dependency of the illegitimate on his father. If dependency and closeness of ties are indeed rational bases for differential treatment, these core factors should not be obscured by the overinclusive "illegitimacy" label. The Court in Weber also echoed Glona's rejection of the priority of the state interest in deterring illicit unions over providing benefits to illegitimates.

The New York Court of Appeals in In re Estate of Lalli responded to this sequence of Supreme Court cases by upholding

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130. See note 104 supra and accompanying text.
131. This distinction between inheritance rights and the right to bring a wrongful death action was first set forth by the majority in Labine v. Vincent, 401 U.S. 532, 535-36. See text accompanying note 112 supra.
133. See id. The Court in Weber indicated that in a workmen's compensation scheme, where dependency on the deceased is a prerequisite to recovery, it is irrelevant whether legitimates are more likely to be within the ambit of familial care and affection. Id.
134. The Weber majority stated: "It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death." Nor can it be thought here that persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation." 406 U.S. 164, 173 (1972) (quoting Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 75 (1968)).
a New York statutory restriction on illegitimates' inheritance rights regarding paternity proof requirements. This statute, strict in comparison with those of other states, requires a court order of filiation which often bars claims by "issue" who could otherwise convincingly document paternity. Furthermore, this section's strict paternity proof requirement penalizes the illegitimate children of those fathers who do not dispute paternity and who willingly provide child support during their lifetimes. Paternity suits which result in orders of filiation are invariably instituted only when the father refuses to support the child. The Lalli court repudiated appellant's equal protection claim under state and federal constitutions, drawing a distinction between the rights accruing by virtue of the biological relationship to the parent and the rights arising by virtue of the subjective desires of the parents. The court reasoned that claims based on wrongful death, on the right to parental support, and on workmen's compensation laws belong in the former category, and thus merit considerable protection. It reasoned that inheritance claims, on the other hand, need not be examined with strict scrutiny because they fall within the latter category. This category is comprised of claims

136. N.Y. EST., POWERS & TRUSTS LAW § 4-1.2(a)(2) (McKinney 1967). For the full text of this provision, see note 49 supra.

137. Three states go so far as to grant illegitimates equal rights of inheritance from the father regardless of acknowledgment: ARIZ. REV. STAT. § 14-2109 (1973); N.D. CENT. CODE § 30.1-04-09 (1975); OR. REV. STAT. §§ 112.105, 109.060 (1963). Numerous states allow acknowledged illegitimate children to inherit equally from their fathers without requiring an order of filiation. E.g., CAL. PROB. CODE § 255 (West Supp. 1975); COLO. REV. STAT. §§ 15-11-611, 15-11-109 (1973); WIS. STAT. ANN. § 852.05 (West 1971); OKLA. STAT. ANN. tit. 84, § 215 (1976); IOWA CODE ANN. § 633-222 (West 1964); IDAHO CODE § 14-104 (1976); KAN. STAT. § 59-501 (1975); WASH. REV. CODE § 11.04.081 (1967); S.D. COMPILED LAWS ANN. § 29-1-15 (1976); FLA. STAT. ANN. § 732.108 (West 1975). A small number of states expressly provide that the illegitimate child may not inherit from his father. E.g., HAW. REV. STAT. § 577-14 (1968); KY. REV. STAT. § 391-090 (1972) (providing for no inheritance from the father unless he has married the mother); 20 PA. CONS. STAT. ANN. § 2107 (Purdon 1975).

138. In re Estate of Lalli, 38 N.Y.2d 77, 340 N.E.2d 721, 378 N.Y.S.2d 351 (1975), presented a claimant who could convincingly document paternity by means other than a court order of filiation. The decedent had provided financial support for the illegitimate and had given parental consent for the illegitimate's marriage, thereby acknowledging his son before a notary public. Nevertheless, the New York Court of Appeals rejected this claim because an order of filiation had not been entered. Id. at 79, 340 N.E.2d at 722, 378 N.Y.S.2d at 352. Accord, Burnett v. Camden, 254 N.E.2d 199 (Ind.), cert. denied, 399 U.S. 901 (1970); In re Estate of Pakarinen, 178 N.W.2d 714 (Minn. 1970).


based solely on an illegitimate's "inchoate expectancy." The latter category requires greater deference to state interests in its review of the means chosen to accomplish a state objective. Once the *Lalli* court established this categorization of rights and corresponding levels of scrutiny, based in large part on *Labine v. Vincent*, it then had no difficulty finding a rational relationship between the order of filiation requirement and the valid state objective of minimizing fraud and administrative burdens.

Various other courts have interpreted *Labine* very differently. There is no consensus as to the standard to be applied in reviewing the constitutionality of classifications based on illegitimacy in the inheritance area. One commentator has posited that in nearly all instances, classifications based on legitimacy alone are either unrelated to any proper legislative purpose, or, if related, are grossly over or underinclusive. This is a fair characterization of the rationality of classifications based solely on the happenstance of birth. The argument that discrimination is justified because of the state's interests in fostering family unity and in deterring illicit unions is a weak one today. In fact, the Supreme Court has rejected this rationale.

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141. *Id.* at 81, 340 N.E.2d at 723, 378 N.Y.S.2d at 354.
142. 401 U.S. 532 (1971).
143. See, e.g., *Green v. Woodard*, 40 Ohio App. 2d 101, 318 N.E.2d 397 (Ct. App. Cuyahoga County 1974), where the court decided, after *Labine v. Vincent*, that when Ohio's descent and distribution statute was expanded to include inheritance by illegitimates from and through their mothers, inheritance from their fathers was mandated by the equal protection clause. *Id.* at 113-14, 318 N.E.2d at 406. The court distinguished *Labine*, noting that Ohio's statutory scheme involved discrimination within the class of illegitimates, whereas the Louisiana statute at issue in *Labine* involved total discrimination against all inheritance by illegitimates, both through the mother and through the father. *Id.* at 112-13, 318 N.E.2d at 405-06. This same distinguishing factor may be present in *In re Estate of Lalli*. The court in *Green* declared that the paternity proof problem can be overcome by requiring clear and convincing evidence, which is not necessarily limited to an order of filiation. *Id.* at 116, 318 N.E.2d at 407. Compare *Green with Moore v. Dague*, 46 Ohio App. 2d 75, 345 N.E.2d 449 (Ct. App. Franklin County 1975), which required a higher standard of paternity proof under the same Ohio statute and under facts similar to those of *Green v. Woodard*. The court in *Moore* rejected the standard set forth in its neighboring county in *Green*, because it rejected the concept of two classes of children created by the Ohio statute. *Id.* at 80, 345 N.E.2d at 452. *Moore* found that intra-class discrimination had existed in the Louisiana statute involved in *Labine v. Vincent* and thus could not distinguish *Labine* on that basis. *Id.* at 80-81, 345 N.E.2d at 452-53.
145. See note 134 *supra* and accompanying text.
to punish children for the acts of their parents, and the deterrent effect on the parents is at best remote. Such deterrence is made more remote today by the widespread availability of birth control information and devices which have tended to sever, or at least weaken, the once inextricable link between sexual relations and procreation.

The justification that illegitimacy is a rational classification because it embraces factors reasonably related to illegitimates' inheritance rights has been criticized. The rational bases for differential treatment themselves, rather than the classification by an overinclusive term such as "illegitimates," are superior indicia of the nature of each particular parent-child relationship. These bases include dependency upon parental support and habitation of the child in the parents' household.

Doubt has already been cast upon the importance of the state interest in the property and security of land titles within its borders by the dissent in Labine. This purportedly crucial state interest in land has its roots in an earlier feudal society. Land was then the primary source of wealth and the basis of the entire feudal economy and hierarchical structure. By necessity, the governmental interest in protecting this basic source of wealth in that era overrode the interest in protecting the rights of illegitimates. Today, the primary emphasis of our economy is divorced from the physical land. The power structure of society is no longer based entirely upon the level of control over parcels of land. Hence, the importance of a state's interest in the land within its borders has proportionately decreased. Moreover, not all wills with provisions "to issue" nor all dispositions of property through intestate succession involve dispositions of interests in land. Therefore, to override an illegitimate's compelling personal interest in favor of a blanket rule, rooted in outdated notions concerning land disposition, would be a most unsatisfactory weighing of the modern competing interests involved.

146. See text accompanying note 133 supra.
147. See note 119 supra and accompanying text.
150. Id.
151. Id. The authors state that today land in the United States plays the role of a basic commodity of commerce. Our land is not and never has been tied up in families on a large scale. No longer is tenure between lord and tenant a dominant institution as it was in feudal times.
Assuming that discrimination against illegitimates in inheritance is less pernicious than discrimination against illegitimates in other areas, a distinction must nevertheless be made between inheritance through intestacy and inheritance through a will provision “to issue.” The majority in Labine espoused one rationale to justify preclusion of the illegitimate’s inheritance by intestate succession: Illegitimacy did not present an “insurmountable barrier” to inheritance. The Court reasoned that the decedent could have provided for this illegitimate by will. In the case of a will construction proceeding, a decedent has already exercised his prerogative by making a will. He may think that by leaving property “to issue” he has fully provided for all heirs, both legitimate and illegitimate. It would be unfair to impose retroactively a duty of explicit specificity on the testator regarding the type of issue designated to inherit. The testator might well have assumed that changing societal attitudes toward illegitimates would serve automatically to include illegitimates in a general provision “to issue.” Therefore, the imposition of this retroactive duty may be so unfair as to constitute an “insurmountable barrier” to inheritance.

PROPOSED REMEDY

In analyzing the importance of the various state interests asserted to justify discrimination against illegitimates, it seems fair to conclude that the only interest bearing a logical, direct relationship to a basic characteristic of illegitimacy is the state interest in preventing fraud and undue probate burden and uncertainty. This state interest is significant where the complex issue of proof of paternity is present; this justification is lacking, however, where paternity has been satisfactorily established. Therefore, our aim should be to facilitate proof of paternity, thus permitting illegitimates to claim their due share of inheritances while maintaining an adequate standard of proof to deter fraudulent claims. The Hoffman court left the requirement for proof of paternity in this situation completely unclear.

The optimal solution to the problems raised by Hoffman, therefore, is the formulation of an inheritance law which creates a uniform paternity proof requirement. Such a statute should also

152. 401 U.S. 532, 539 (1971).
153. Id.
set an effective date when all illegitimates, whose paternity has been sufficiently proven, will inherit on a par with legitimates. Further, the statute should lessen the administrator’s burden by requiring him to publish, when reasonably necessary, a “citation against unknown persons” as constructive notice to all claimants thereafter. This would strengthen the vulnerable precedent of Hoffman and would speed the amelioration of the illegitimates’ plight. This type of broad, coordinated legislation would indeed be superior to the present piecemeal approach of judicial action, which, as exemplified by Hoffman, can only solve the illegitimate’s inheritance problems in small, precarious steps. While decisions will vary from court to court, statutes are more uniformly applied. Moreover, this subject matter is too complex to be amenable to patchwork treatment. Judicial liberalization is also inferior because it may clash with prior statutory pronouncements. Further, it is simpler to mandate only prospective application with a statute.

The most efficient mode of implementing the equality which the Constitution and Hoffman demand would be through federal legislation. As one commentator asserts, however, this is “a political improbability.” Hence, the following proposed statute, which combines the clearest and most progressive equality provisions of state enactments and the Uniform Probate Code, is offered to the states to solve the difficult problems raised by Hoffman. It is suggested that the following standard for ascertainment of paternity will minimize the potential for fraudulent claims while accommodating valid inheritance claims in cases in which no order of filiation has been entered.

156. See note 143 supra and accompanying text.
157. See text accompanying notes 49-63 supra.
158. See notes 40-41 supra and accompanying text.
160. Id.
163. See text accompanying note 99 supra.
Proposed Uniform Act on Legitimacy and Inheritance Rights

1. Legitimacy of children or issue; power to inherit

Pursuant to the requirements of section 2 herein, every child shall be deemed issue of his natural parents and will inherit from them and their kindred heir, lineal and collateral, in the same manner as children born in lawful wedlock.

2. Requisite Proof of Parentage

If, for purposes of intestate succession and taking by will, a relationship between parent and child must be established to determine succession by, through, or from a person,

(a) A person born out of wedlock is the child of the mother. That person is also a child of the father, providing

(1) The natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or

(2) The paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof. Such proof may include, but is not limited to, the following elements:

(1) dependency upon the father during the father’s lifetime
(2) voluntary acknowledgment of the child during the father’s lifetime.
(3) habitation by the child in the father’s household during the father’s lifetime

(B) The paternity established under subparagraph (A) is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his own and has not refused to support the child.

3. Will Construction — Testator’s Intent

The definition of issue in section 1 shall be presumed to

164. The inheritance statute is the author’s own; however, a comprehensive, uniform proposal dealing with all facets of illegitimates’ rights may be the most advisable course of action. See Krause, Bringing The Bastard Into The Great Society—A Proposed Uniform Act On Legitimacy, 44 Tex. L. Rev. 829 (1966). The proposal contains detailed provisions regarding parental support, id. at 834, workmen’s compensation and wrongful death recovery, id. at 836, standards of proof of paternity, id. at 837, effect of acknowledgement by the parent and the right of inheritance, id. at 835. However, a statute focusing only upon
apply in the construction of testator’s intent, absent factual evidence indicating the contrary, when testator has created an interest in favor of such relative.

4. **Constructive Notice to Possible Claimants**

   When facts exist which would reasonably cause the accounting trustee, estate executor, or estate administrator to believe that unknown illegitimates share an interest in the estate in controversy, he/she shall be required to publish a citation against unknown persons in a newspaper in the county in which the will is being probated or give other equivalent constructive notice to possible claimants.

5. **Effective Date**

   The provisions of this Act will take effect on (date). This Act shall not apply to wills already probated nor property already taken by intestate succession. Prior provisions of law shall apply to wills probated or estates administered prior to the effective date of this statute.

**CONCLUSION**

The **Hoffman** opinion should be upheld by the courts because of the importance of the principles set forth within it. The crucial related questions unanswered by **Hoffman** may be dealt with and guidelines may be formulated by later, more comprehensive judicial treatment. However, the superior resolution of the problems and inconsistencies arising from **Hoffman** is legislation that will operate in coordination with other existing statutes to treat illegitimates and legitimates with equality. It is strongly urged that legislatures take the initiative in this meritorious pursuit by adopting a statute similar to the one proposed in this note.

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the crucial area of inheritance rights is most immediately necessary because of the problems raised and unanswered by **Hoffman**. This holds true not only for New York, but for most other jurisdictions as well because of the ambiguity or regressiveness of the law regarding illegitimates' inheritance rights.

165. As this note went to press, the Supreme Court held that Illinois' intestary statutes unconstitutionally precludes illegitimates from inheriting from their fathers. **Trimble v. Gordon**, 45 U.S.L.W. 4395 (U.S. Apr. 26, 1977) (No. 75-5952). This decision further discredits other state inheritance statutes, including New York's which similarly discriminates.
IN RE FLYING MAILMEN SERVICE, INC.

Secured Transactions—Corporate Stock Repurchases—A secured selling stockholder does not have priority over subsequent creditors unless the U.C.C. § 9-402 financing statement expressly recites the nature of the underlying transaction. 539 F.2d 866 (2d Cir. 1976).

The Court of Appeals for the Second Circuit, in deciding In re Flying Mailmen Service, Inc., has added a new qualification to the U.C.C. § 9-402 notice filing provision. Now an Article 9 financing statement does not constitute sufficient notice to subsequent creditors if the underlying transaction is a stock repurchase agreement.

Flying Mailmen Service, Inc. was a closely held corporation which, while solvent, had contracted with appellant, a shareholder, to repurchase his stock in return for a settlement of appellant's claims against the corporation. The corporation paid a substantial amount upon the execution of the agreement. The balance was to be paid in installments over a three-year period. Pursuant to this transaction, appellant acquired a security interest in the corporation's assets to secure the installment payments. Appellant then perfected the security interest by filing

1. 539 F.2d 866 (2d Cir. 1976).
2. U.C.C. § 9-402 (1) provides in relevant part:
   A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral.

It must be noted that New York has not yet adopted the 1972 revisions to the Official Text of Article 9, U.C.C. § 9-402 (62-1/2 McKinney 1964). Because the same result and analysis would apply had the 1972 revision been adopted in New York, the 1972 Official Text of Article 9 is used herein.

3. In re Flying Mailmen Serv., Inc., 539 F.2d 866 (2d Cir. 1976). Appellant was a 49% stockholder, who received a stock repurchase agreement and security interest in the corporate assets in return for diminution of his claims for dissolution of the company.
4. Id. at 868.
5. There are two crucial steps in a secured transaction: attachment and perfection. Attachment (U.C.C. § 9-203) occurs when there is either a written security agreement or possession of the collateral by the secured party pursuant to agreement, value is given to the debtor, and the debtor obtains rights in the collateral. When a security interest attaches it becomes enforceable against the debtor with respect to the collateral. Under the 1962 version of the U.C.C. it is possible to have an attached security interest which is not enforceable. This is not possible in those states that have adopted the 1972 Official Text of Article 9, wherein both attachment and enforceability are combined within U.C.C. § 9-203. Perfection is the process by which the secured party gains priority over third party
a U.C.C. § 9-402 financing statement. After appellant received slightly over fifty percent of the agreed purchase price, the corporation filed a petition under Chapter XI of the Bankruptcy Act. Appellant then instituted an action in bankruptcy court for enforcement of the security agreement upon default by the corporation.

The controlling statutes concerning stock repurchases in New York clearly indicate that a corporation can lawfully purchase its own shares provided such a transaction would not render the corporation insolvent or cause a net worth deficit. Thus, although it was initially valid, the stock repurchase agreement became invalid at the time of the corporation’s insolvency.

The court of appeals interpreted the holding of the bankruptcy court and the subsequent decision of the district court on review to be that a security interest “given to secure an unenforceable obligation, is likewise unenforceable.” Appellant contended, and the court of appeals agreed, that under New York case law the rights of creditors who extend credit subsequent to the execution of a stock repurchase agreement are not superior to the selling stockholder if the subsequent creditors had “notice” of the prior stock repurchase. Nevertheless, the majority, in subordinating appellant’s claim to that of subsequent creditors, held

claimants in the same collateral, most commonly subsequent lien creditors including the trustee in bankruptcy. A common method of perfection is the filing of a financing statement pursuant to U.C.C. § 9-402. Part 4 of Article 9 deals with the Code’s filing provisions. Perfection can also be accomplished in certain instances by taking possession of the collateral as provided in U.C.C. §§ 9-304 and 9-305. Finally, the Code provides for automatic perfection in certain cases; the most significant of which is the automatic perfection of a purchase money security interest in consumer goods pursuant to U.C.C. § 9-302(1)(d).


7. The current controlling statutes concerning stock repurchases in New York are N.Y. Bus. Corp. Law § 513(a) (McKinney 1963), which states: “A corporation, subject to any restrictions contained in its certificate of incorporation, may purchase its own shares, or redeem its redeemable shares, out of surplus except when currently the corporation is insolvent or would thereby be made insolvent”; and N.Y. Penal Law § 190.35(1)(e) (McKinney 1975), which states: “A person is guilty of misconduct by corporate official when: 1. Being a director of a stock corporation, he knowingly concurs in any vote . . . by which it is intended: . . . (e) [To apply any portion of the funds of such corporation, directly or indirectly, to the purchase of shares of its own stock, except in the manner provided by law . . . .]”

8. In re Flying Mailmen Serv., Inc., 539 F.2d 866, 869 (2d Cir. 1976). Unenforceable, as used by the court, was obviously not meant in the Article 9 sense. See note 5 supra.

9. The rights of subsequent creditors with notice of the prior stock repurchase were in fact subordinated to that of the selling stockholder. See Huron Milling Co. v. Hedges,
that the U.C.C. § 9-402 notice filing provision was intended to cover only “normal valid commercial transactions.”10 Because a stock repurchase depletes corporate assets without any valuable consideration to the corporation,11 the court reasoned that the repurchase was not a normal commercial transaction. Accordingly, the court held that subsequent creditors had not been given sufficient notice,12 notwithstanding that appellant had complied fully with U.C.C. § 9-402. In so holding, the Second Circuit has imposed an additional requirement to the filing of a financing statement: If the underlying transaction is a stock repurchase agreement, it must be disclosed in the financing statement in order to constitute sufficient notice to subsequent creditors.13

Present statutory limitations14 on the repurchase of stock by a corporation evolved from the common law “no prejudice” rule.15 This rule provided, in essence, that once a corporation became insolvent, a repurchase of its shares was no longer permissible because such a transaction would prejudice the rights of creditors.16 Stock repurchases by insolvent corporations, considered fraudulent conveyances of assets, were thus voidable.17 The “no prejudice” rule, however, did not provide for deferred payment situations. It was not resolved whether the repurchasing corporation had to be solvent as of the date of the repurchase agreement or as of the date of each installment payment.18 A majority of decisions19 insisted on solvency at the time of each payment. If a corporation became insolvent at the time an installment payment was due, the selling stockholder could not require further payment by the corporation.20

10. In re Flying Mailmen Serv., Inc., 539 F.2d 866, 870 (2d Cir. 1976).
11. Id.
12. Id. at 871. See text accompanying note 39 infra and note 40 infra.
14. See note 7 supra.
16. Id. at 306.
19. See McConnell v. Estate of Butler, 402 F.2d 362 (9th Cir. 1968); In re Trimble Co., 339 F.2d 838 (3d Cir. 1964); Robinson v. Wangemann, 75 F.2d 756 (5th Cir. 1935); In re Peoples Loan & Inv. Co., 316 F. Supp. 13 (1970).
20. Robinson v. Wangemann, 75 F.2d 756 (5th Cir. 1935).
Illustrative of this approach is Robinson v. Wangemann, a Fifth Circuit decision in which the court subordinated a claim against a bankrupt corporation on a note given by the corporation for the repurchase of some of its stock. The contrary viewpoint, best expressed in Wolff v. Heidritter Lumber Co., was that if a corporation was fully able to repurchase its shares at the outset and instead gave a note, the selling stockholder was in effect a general creditor and should be given creditor status. The Wolff approach was adopted by few jurisdictions. Most courts accepted the logic of Robinson, and the "insolvency cutoff" rule of that case is firmly entrenched in decisional law today.

It is against this common law background that statutory limitations on corporate stock repurchases developed. The problems that arose with respect to deferred purchase price and installment payment obligations in the statutorily regulated area were similar to those which had arisen in common law insolvency. It was necessary to determine whether an adequate surplus must exist at the time of executing the repurchase agreement or at the time of each installment payment. Current statutes typically limit the corporation’s ability to repurchase shares by requiring that such repurchases be made from some form of surplus.

New York courts have paralleled the insolvency cutoff reasoning of Robinson in the construction of statutory surplus requirements. In re Fechheimer Fishel Co. is illustrative. In that case the court, pointing out that the capital of a corporation is a trust fund for the benefit of creditors, held that a surplus must exist at the time of each installment payment.

In Flying Mailmen the parties did not dispute the validity of the initial agreement. In fact, it was understood that if the surplus degenerated into a deficit or if the corporation became insolvent, the agreement would become invalid and the corporation would not be required to pay the agreed installments. Indeed, to
do so would be unlawful. Appellant, however, did not claim a cause of action against Flying Mailmen Service, Inc., but instead sought enforcement of the security interest upon default. Flying Mailmen thus presented a question which was an extension of the deferred payment dilemma encountered in the construction of surplus limitation statutes. The Second Circuit, then, confronted the problem of a security interest arising from a stock repurchase agreement at a point when the repurchase agreement itself was rendered invalid because of a subsequent insolvency.

Commentators have noted that a mortgage given in connection with a stock repurchase agreement will not validate the agreement in the case of insolvency. The reason for this insolvency cutoff rule is to prevent injury to creditors by giving them priority status in relation to stockholders. Accordingly, courts have been inclined to invalidate security interests securing payment of stock repurchases where an installment payment would be unlawful. The reasoning is simply an extension of the insolvency cutoff logic.

New York courts nevertheless have carved out an exception to the priority status afforded creditors over selling stockholders. Where subsequent creditors have notice of the underlying stock repurchase contract, they cannot claim priority over the selling stockholder. The apparent rationale for this rule is that subsequent creditors will not be prejudiced provided they have notice. Notice enables subsequent creditors to ascertain the nature of the underlying transaction prior to any extension of credit.

Appellant, in Flying Mailmen, claimed that subsequent creditors had such notice by the filing of a U.C.C. § 9-402 financing statement. Thus, the real issue was not the validity of a corporate stock repurchase agreement but, rather, the enforceability of a perfected security interest. In this regard appellant relied on Cross v. Beguelin, in which the New York Court of Appeals stated:

28. Herwitz, supra note 15, at 325. For the few subscribers to the Wolff view this may not be the case, because the validity of the repurchase agreement would be determined at the outset. In Tracy v. Perkins-Tracy Printing Co., 278 Minn. 159, 153 N.W.2d 241 (1967), the court, in construing a surplus statute, followed the reasoning in Wolff. Priority was given to a recorded chattel mortgage which secured a deferred payment on a stock repurchase agreement.

29. Robinson v. Wangemann, 76 F.2d 756 (5th Cir. 1935).

30. See note 9 supra.

This claim is not against the corporation. It is directed against assets in possession of a creditors committee. The corporation, for all that the submission shows, is still a going concern with the ownership of all the stock in the possession of [a subsequent purchaser]. The corporation appears to have no interest in this controversy.22

The majority in *Flying Mailmen* first observed33 that this passage may not be valid since the enactment of section 513(a) of the New York Business Corporation Law. Section 513(a),34 however, only regulates a corporation's repurchase of its own shares. The section does not deal with the validity of underlying security interests, nor does it purport to resolve priority problems. In light of *In re Fechheimer Fishel Co.*,35 the court further determined that the above quoted language from *Cross* is inapplicable to a trustee in bankruptcy. *Fechheimer*36 was a bankruptcy case involving a sham debenture bond which was issued by the corporation to one of its officers. The court held that the bond had the characteristic features of preferred stock and treated it as such.37 The bond was surrendered to the corporation in exchange for a note, apparently to evade a provision of the bond making it subordinate to the rights of general creditors. The original debenture bond was preferred stock for all practical purposes and, therefore, the characteristics of preferred stock attached to the note. The court concluded that the creditors had priority under the provisions of section 664 of the New York Penal Law,38 which made it a misdemeanor for a director of a corporation to apply any funds, except surplus, to purchase shares of its own stock.

The governing statute at that time was N.Y. PENAL LAW § 664 (McKinney 1909) (repealed 1967):

A director of a stock corporation, who concurs in any vote or act of the directors of such corporation, or any of them, by which it is intended . . . (5) To apply any portion of the funds of such corporation, except surplus, directly or indirectly, to the purchase of shares of its own stock, . . . is guilty of a misdemeanor.

33. *In re Flying Mailmen Serv., Inc.*, 539 F.2d 865, 870 (2d Cir. 1976).
34. See note 7 supra.
35. 212 F. 357 (2d Cir.), cert. denied, 234 U.S. 760 (1914).
36. It must be noted that this case was decided prior to *Cross v. Beguelin*. The New York Court of Appeals in *Cross* cited *Fechheimer* with approval only for the proposition that a stock repurchase agreement becomes unenforceable as against the corporation if the corporation lacks the required surplus. *Cross v. Beguelin*, 252 N.Y. 262, 265, 169 N.E. 378, 379 (1929). The *Cross* court did not read *Fechheimer* as the majority in *Flying Mailmen* did. See text accompanying notes 39-40 infra.
37. *In re Fechheimer Fishel Co.*, 212 F. 357, 360 (2d Cir. 1914).
38. See note 31 supra.
There was no contention in *Fechheimer* that the creditors had either actual or constructive notice of the stock repurchase. Since the obligation was not secured, there was no filing as in *Flying Mailmen*. *Cross* reverses the priority status of subsequent creditors; when they have notice of the stock repurchase, their interests are subordinated to those of the selling stockholder. On the issue of notice, appellant relied on another passage in *Cross*, wherein the New York Court of Appeals stated that

the real issue now is between Ferdinand Cross, as a prior creditor, and the Beguelin estate, as a subsequent creditor for salary arrears and also as a holder of preferred stock. The rights of creditors are, of course, superior to those of stockholders. *The rights of the seller of the stock appear to be superior to those of subsequent creditors of the corporation who became such with notice of the purchase by the corporation of its own stock.*

Thus, the majority in *Flying Mailmen* seemingly read *Fechheimer* out of context and concluded that selling stockholders can never have a cause of action against assets in the hands of a creditors’ committee. *Fechheimer* should apply only in situations outside the *Cross* notice exception. It is therefore difficult to see how *Fechheimer* relates to an action such as that in *Flying Mailmen*, where a selling stockholder brought an action against subsequent creditors who had notice.

In *Flying Mailmen* appellant contended that the notice provided by the filing of a financing statement pursuant to U.C.C. § 9-402 constituted adequate notice to subsequent creditors within the meaning of *Cross*. Appellant, in consideration for the diminution of his claims to dissolve the corporation as well as the transfer of all rights and title to his stock to the corporation, entered into a stock repurchase agreement and received a security interest in all assets owned by the corporation. This is clearly a consensual security interest within the province of Article 9.

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39. See note 40 infra and accompanying text.


41. See note 5 supra.
Article 9 is applicable "to any transaction, regardless of its form, which is intended to create a security interest in personal property . . . ." A security interest is defined by the U.C.C. as "an interest in personal property or fixtures which secures payment or performance of an obligation." Thus, it seems beyond dispute that Article 9 must apply to the secured sales aspect of this case. Yet the majority considered the U.C.C. "inapplicable and insufficient" in the context of the case.

The court reasoned that a stock repurchase was not the type of transaction for which the notice filing provisions of the U.C.C. were drafted:

In contrast to the normal valid commercial transactions for which UCC's innovation of notice filing was devised, a repurchase of stock depletes a corporation's assets without any consideration of value to creditors moving to the corporation in return. Such cases as there are reflect a recognition of the unusual character of such transactions and hence suggest a distinction between the notice required to prevent subsequent creditors from challenging a security created in connection with an obligation that was and remains valid and the notice required to subordinate subsequent creditors to a lien securing an obligation that is no longer enforceable against the corporation.

The court, however, did not adequately define what constitutes a "normal valid commercial transaction." Whether the underlying transaction is valid as against the corporation should not be determinative. The majority was of the opinion that the U.C.C. applies to valid claims as against an obligor, but Flying Mailmen presented a Cross-type situation, that is, one in which a claim has become invalid and thus a special exception operates in favor of the obligee. To have priority, the selling stockholder must, among other things, give some form of notice to subsequent creditors. Whether the underlying transaction is itself valid should not affect the security interest in this type of situation.

In Cross, where the subsequent creditor had actual notice of

42. U.C.C. § 9-102.
43. U.C.C. § 1-201 (37).
44. In re Flying Mailmen Serv., Inc., 539 F.2d 866, 871 (2d Cir. 1976).
45. Id. at 870 (emphasis added).
46. Id. at 871.
47. See note 5 supra.
48. The validity of the underlying transaction is determined by statute. See note 7 supra.
the stock repurchase contract, the court relied on First Trust Co. v. Illinois Central R.R. for the notice proposition. In First Trust Co. a recorded mortgage specifically stated that the underlying transaction was a stock repurchase agreement. The case did not deal with a financing statement because the U.C.C. was not in effect at the time. According to the majority in Flying Mailmen, it would not have mattered if the U.C.C. had been in effect, for the court read the decision in First Trust Co. as turning on the fact that the mortgage specifically recited that the underlying transaction was a stock repurchase contract.

The court in Flying Mailmen cited two other cases which dealt with the effect of a recorded instrument. In the first of these, In re Dawson Brothers Construction Co., a selling stockholder relied on the fact that the bankrupt corporation had filed the required documents to reduce its capital. The documents, however, did not give creditors notice of the outstanding obligation contemporaneously created. That situation is inapposite to the facts of Flying Mailmen, where notice of the obligation was given. The second case, In re Bay Ridge Inn, Inc., can also be distinguished from the present case in several respects. In Bay Ridge a chattel mortgage was given by a corporation to secure the purchase price of its stock. The mortgage, however, was misleading in that it falsely recited that it was given to secure loans by the stockholders. The court therefore held that the mortgage was not sufficient notice to subsequent creditors. It does not necessarily follow that in general the filing of a mortgage should not serve as constructive notice to subsequent creditors, although the Flying Mailmen majority seemed to infer this from the case. There may have been other reasons why the court in Bay Ridge rejected the mortgage. First, the stock was purchased by a third party. Thus, there was no consideration moving to the corporation because it was not even getting its stock back. In addition,

50. 256 F. 830 (8th Cir.), cert. denied, 249 U.S. 615 (1919).
51. Id. at 831.
52. In re Flying Mailmen Serv., Inc., 539 F.2d 866, 870 (2d Cir. 1976).
54. Id. at 413.
55. Id.
56. 98 F.2d 85 (2d Cir. 1938).
57. Id. at 86.
58. Id.
59. Id.
at the time the notes and chattel mortgage were delivered by the
corporation, it did not have the required surplus to make the
purchase.\(^6\) This differs from the facts in \textit{Flying Mailmen}.\(^4\)

The foregoing cases were offered by the majority to illustrate
that the notice requirement will vary with the type of transaction.
Specifically, the court relied on these cases for the principle that
U.C.C. Article 9 notice is insufficient in a stock repurchase situa-
tion.\(^6\) These cases fail, however, to demonstrate that U.C.C. Arti-
cle 9 is "inadequate and inapplicable"\(^5\) to a stock repurchase
transaction.

Appellant's claim is against a subsequent creditor, herein the
trustee in bankruptcy. Thus, compliance with Article 9 is all that
should be required. Appellant had perfected by filing a financing
statement pursuant to U.C.C. § 9-402.\(^6\) This, the majority deter-
mined, was not sufficient: The underlying nature of the
transaction must be disclosed in the case of a stock repurchase.
In a vigorous dissent, Judge Mulligan stated: "There is no such
requirement in the Uniform Commercial Code and there is no

\(^6\) Id.

\(^{61}\) \textit{Id.} at 871.

\(^{62}\) \textit{Id.} at 871.

\(^{63}\) \textit{Id.}

\(^{64}\) See note 2 supra. See also Mahon, \textit{U.C.C. and the Courts}, N.Y.L.J., Sept. 23,
1976, at 1, col. 1. Professor Mahon has noted that the financing statement upon which the
entire case turned mistakenly identified a wholly owned subsidiary rather than the parent
corporation as the principal debtor. A puzzling consequence of this situation is that the
trustee waived this defect. The record indicates that a correct financing statement was
subsequently filed. However, the date of this filing did not appear. Professor Mahon has
suggested that the decision might have been made on narrower grounds without infringing
on the province of Article 9:

Whatever the actual, unstated facts, one wishes that a decision which
"recognize[s] the importance of not embroidering qualifications on the UCC's
scheme of notice filing" had not at the same time itself suggested but failed to
dispel the possibility that the carefully thought-out existing requirements were
not satisfied.

\textit{Id.} at 3, col. 1 (quoting \textit{In re Flying Mailmen Serv., Inc.}, 539 F.2d 866, 871 (2d Cir. 1976)).
See also \textit{In re Flying Mailmen Serv., Inc.}, 539 F.2d 866, 868 n.1. (2d Cir. 1976). U.C.C. §
9-402(8) provides relief for "minor errors which are not seriously misleading." In the
instant case, the court might have determined that appellants' misidentification of the
debtor was not a "minor" error. The consequence of such a determination might have been
failure of appellant to become perfected before the date of bankruptcy. Then, according to
U.C.C. § 9-301 and § 70(c) of the Bankruptcy Act, 11 U.S.C. § 110(c)(1953), the trustee
in bankruptcy would take priority. If the correct financing statement was filed within four
months of the bankruptcy, a voidable preference may have existed pursuant to Bank-
ruptcy Act § 60, 11 U.S.C. § 96 (1968), again giving the trustee priority. Thus the court
might have reached the same ultimate decision without altering the existing Article 9
filing requirements. These possibilities, however, were not discussed by the court.
authority in any decision construing Article 9 which would even suggest that such additional information be included."

The theory of notice filing is that it permits subsequent creditors to determine from the financing statement whether certain assets are encumbered. This simply puts the searcher on notice and instructs him where to look for further information. The potential creditor can then make a rational decision whether to extend credit.

The whole thrust of Article 9 is to "provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty." Many courts have emphasized the underlying purpose and intent of the U.C.C. notice filing requirement. They have consistently stressed simplicity, flexibility, and certainty. As Judge Mulligan so aptly articulated in his dissent: "Any subsequent creditor was clearly alerted to the . . . stock repurchase agreement giving rise to the security interest. It was an obvious lead to the underlying transaction which would hardly require the investigative talents of a Sherlock Holmes or Inspector Maigret to unearth." The majority opinion leads one to speculate what future courts will view as "normal valid com-

65. In re Flying Mailmen Serv., Inc., 539 F.2d 866, 872 (2d Cir. 1976).
68. See note 66 supra.
70. In re Flying Mailmen Serv., Inc., 539 F.2d 866, 873 (2d Cir. 1976).
mercial transactions” and hence what further filing requirements will be engrafted on Article 9.

To reach a result in harmony with the policies underlying the Uniform Commercial Code, the majority in *Flying Mailmen* should have examined several other considerations. For example, the purpose of restricting corporate stock repurchases is to prevent fraudulent conveyances of assets which would defeat the rights of creditors. This has been an established principle since the inception of the common law “no prejudice” rule. There was not even a hint of fraud in *Flying Mailmen*. The subsequent creditors had every opportunity to ascertain the nature of the underlying transaction. Appellant should not have been penalized for the carelessness of the subsequent creditors. Furthermore, the court should not have ignored appellant’s good faith reliance on Article 9. The majority, however, found “no policy reason to strain to hold that the mere filing of a financing statement affording no indication that the agreement secured is a stock repurchase agreement will suffice.”

The notice parameter should have been left to Article 9. There is no authority in the U.C.C. or in any decision to justify the *Flying Mailmen* aberration of section 9-402. Moreover, considering appellant’s reasonable reliance on the Code, the court’s decision is patently unjust. There are many ways that a secured creditor can fail to become perfected. This case adds one more.

*Bruce R. Thaw*

71. Id. at 870.
72. See text accompanying notes 14-17 supra.
73. *In re Flying Mailmen Serv., Inc.*, 539 F.2d 866, 870 (2d Cir. 1976).