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THE JURISPRUDENCE OF WRINGING HANDS: A BRIEF RESPONSE TO PROFESSOR SOIFER

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As I read it, the gist of Professor Soifer's essay is that the modern Supreme Court has not lived up to the promise of footnote four in the *Carolene Products* case.[1] In particular, according to Professor Soifer, the current members of the Court are insensitive to the interests of various involuntary groups and perhaps willfully ignorant of the relevant historical and contemporary contexts within which such groups exist. The thesis is apparently proved through Professor Soifer's treatment of several recent decisions indicative of this trend. The treatment of these cases is, however, superficial and misleading. The overall approach is one of hyperbole rather than of careful consideration. Although it is true that the current composition of the Court does not conform to Professor Soifer's version of judicial and political liberalism, it does not necessarily follow that the Court has descended to the abysmal depths suggested in Professor Soifer's strongly worded polemic. Certainly nothing said in his essay will convince anyone other than the previously anointed; indeed, the essay, which moves forward with a series interlocking generalizations, makes one dubious of one's own liberal proclivities, though I doubt this was the intended effect. Having read the piece several times, I am left perplexed. Aside from the academically fashionable criticism of a conservative Court, what was to be accomplished? What were we to learn? What strategies are available to counter the perceived ill-advised trends? Shall we gather together and bemoan the passing of the Warren Court? In short, beyond an exercise in verbal catharsis, what was the point? The essay is all the more perplexing, since it does not follow through on its promise to disclose the "profoundly ahistorical approach of judges today."[2] The notion seems to be that it is enough to state the accusations with cynical assurance and clever phrasing; truth apparently lies within the verbal candy which the reader is invited to ingest.

Before entering a more specific discussion, a few preliminary comments seem appropriate. To begin with, I have great reservations about the overall tone of Professor Soifer's essay, a tone I found both smug and intellectually arrogant. The topic is, generally speaking, equal protection. Surely an area of grave importance to our nation and one in which a myriad of solutions may be appropriate. But Professor Soifer's essay does not strike me as an

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1. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). The essay actually carries its thesis beyond the Supreme Court to Anglo-American judges in general. The main thrust, however, seems directed at the current composition of the United States Supreme Court.

2. Soifer, *On Being Overly Discrete and Insular: Involuntary Groups and the Anglo-American Judicial Tradition*, 48 WASH. & LEE L. REV. 381, 382 (1991).

invitation to enter into a discourse on this topic. Indeed, the impression is just the opposite. The effort seems to be toward silencing the opposition by rhetorical flourishes that deny any possibility of an intelligent, contrary view. The essay is also premised on the stuffy notion that Americans are "notoriously" ignorant of their past and that the current members of the Court are either too foolish or "willfully blind" to appreciate, for example, the long, pathetic and horrible history of racial discrimination in this country. I know that many people, and particularly those in academia, share this bleak and self-congratulatory view of their fellow citizens and of the Court. I am not, however, certain that this is anything more than a gross caricature. The public response to Ken Burns' series on the Civil War, for example, demonstrated a thirst for understanding our past. This may not prove that America is a stew of historical intellectualism, but it suggests a few more ingredients in the recipe than the empty pot suggested by Professor Soifer's offhanded remarks. I suppose this uni-dimensional caricature of the unwashed masses is one of the few remaining acceptable stereotypes of involuntary groups. I don't buy it. Finally, although I often find myself in disagreement with the decisions of the current Supreme Court, I think one errs fundamentally by assuming that the members of the Court are craven simpletons, in this case, simpletons who lack the ability or desire to appreciate history as it relates to the problems of race and other involuntary groupings. The long and short of this is the fact that the Supreme Court may be wrong in a particular case or line of cases, or, perhaps more accurately, the fact that one disagrees with the Court should be an occasion to enter upon a discourse not to post a broadside that assumes contrary views are premised in ignorance. The issues are simply too complicated to be understood or advanced by such generalities. The turn of a nice phrase is not a substitute for critical assessment. Nor is it a substitute for proposing some practical agenda to ameliorate the perceived evils. The communal wringing of hands simply gets us nowhere.

On the merits, the essay revolves around footnote four from *United States v. Carolene Products Co.*, a case in which the Court established the general principle that legislative acts are presumptively constitutional. I think we do well to remember that footnote four is a *footnote* and one that had no direct bearing on the issues before the *Carolene Products* Court. It is not a sacred text. But as far as footnotes go, I must admit that it's a pretty good one. What does it say? (Only parts of the footnote are actually quoted in the essay.) The footnote has three paragraphs:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more

> exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. [A number of such restrictions are then listed: right to vote; dissemination of information; interferences with political organizations; peaceful assembly].
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national, . . . or racial minorities, . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[3]

Reading this footnote in the context of the *Carolene Products* holding, namely, that legislation is normally entitled to a presumption of validity, the overall meaning seems to be that this presumption should not apply if legislation transgresses specific constitutional limitations, directly restricts the political process, discriminates against religious, national or racial minorities or if it can be shown that prejudice itself has in some way undermined the political process. This strikes me as a sensible and just formula, consistent with the separation of powers, federalism, the Bill of Rights, the Fourteenth Amendment and principles of representative democracy. I do not, as Professor Soifer apparently does, take this footnote to call for the application of special rules whenever the issue of race is injected into a legal controversy or whenever a member of an involuntary group is a party to a lawsuit. It certainly doesn't say that. At one point, Professor Soifer states, without any explanation or justification, "The [final] paragraph [in footnote four] suggested the need for judicial limits on permissible democratic action, *and even inaction, that perpetuated the burdens of past victimization of special groups.*"[4] The italicized portion of this quote is simply a figment of Professor Soifer's noncontextual, ahistorical and wishful reading of footnote four. Certainly these generous interpretations present a possible gloss upon the footnote, but a gloss that adds a new political dimension and specifically takes the footnote out of its intended context, a context that involves only the presumption of legislative validity. Nothing in Professor Soifer's essay comes close to suggesting the demise of footnote four within that specific context.

Professor Soifer's latitudinarian version of footnote four becomes apparent and transparent in his treatment of two recent civil rights decisions. The first is *Patterson v. McLean Credit Union*.[5] The plaintiff in *Patterson* claimed that her employer violated the Civil Rights Act of 1866, codified at 42 U.S.C. section 1981, by subjecting her to racial harassment. Such harassment clearly violates Title VII of the Civil Rights Act of 1964, but

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3. *Carolene Prods.*, 304 U.S. at 152 n.4 (citations omitted).
4. Soifer, *supra* note 2, at 392 (emphasis added).
5. 109 S. Ct. 2363 (1989).

the plaintiff in *Patterson* chose to rely upon section 1981 rather than the somewhat more elaborate procedures required for enforcement of a Title VII claim. Section 1981 was potentially available because of the Court's earlier decision in *Runyon v. McCrary*.[6] In *Runyon*, the Supreme Court held that section 1981 applied to the formation of private contracts; specifically, the Court ruled that section 1981 prohibited a private party from refusing to enter a contract due to the race of another party to the potential contract. The question in *Patterson* was whether the ruling in *Runyon* should be extended to claims of racial harassment. After the initial oral argument in *Patterson*, the Court asked the parties to brief the advisability of overruling *Runyon*. Professor Soifer notes that the Court's request "touched off a passionate public debate."[7] The passion, however, was largely the result of a Chicken Little panic created by overdrawn rhetoric that characterized the potential reconsideration of relatively narrow issue (particularly narrow considering the scope of Title VII and other modern civil rights statutes) as somehow presaging the demise of civil rights in America.

A piece of the sky apparently fell on Professor Soifer's tail. In his essay, he roundly and passionately criticizes the Court for daring to reconsider a prior civil rights ruling. He quotes the language from the Court's order and takes particular umbrage with the Court's insistence that in deciding whether to reconsider a point of law it must treat all litigants equally. In particular, the Court insisted that the decision to reconsider a prior ruling should be applied without regard to the race or status of the parties. The precise question was whether an interpretation of a civil rights statute should be entitled to greater *stare decisis* weight than that accorded other statutes. Professor Soifer seems to say yes; there should be a special judicial deference to those litigants who raise protected group rights or who are members of a protected group.[8] Respectfully, I do not agree. I do not believe that procedural rules, e.g., burdens of proof, sentencing guidelines, rules regarding jurisdiction or notice, etc., should vary from one litigant to another depending on race or status. It is one thing to say, as suggested by *Carolene Products* footnote four, that courts ought to be suspicious of statutes that classify according to race; it is quite another thing to say that courts must take race into account in applying otherwise neutral procedural

6. 427 U.S. 160 (1976).

7. Soifer, *supra* note 2, at 393.

8. The overblown rhetoric contained in this section of Professor Soifer's essay is particularly unenlightening. A simple request to reconsider a point of law is transformed into a bludgeon against the "downtrodden" and proof that judges will be "blind to what they know as women and men." By asking for reargument on neutral terms the Court has adopted a policy that will treat all litigants as "interchangeable ciphers." The Court "aggressively presume[s]" with an attitude of "willed obliviousness" and so forth. This rhetoric violates the very principle Professor Soifer asks the Court to consider in deciding a case: consideration of context. From the narrow context of a decision to reconsider a point of law, Soifer creates a scenario of blind, evil and uncompromising justice that rivals the most overdrawn caricatures one can imagine.

rules such as those above or such as the generally neutral considerations applicable to the doctrine of *stare decisis*. Professor Soifer's contrary view is an invitation to a muddled, never ending and increasingly destructive quagmire of racial preferences.

Of course, one response to my position is that the so-called neutral rules are not neutral at all. They are stacked against involuntary groups. This may be Professor Soifer's view. At one point he observes, "Majoritarian politics obviously long has been—and still is—manipulated through explicit or encoded racism."[9] If by this he means that the political process is inherently racist, the conclusion may follow that one simply cannot rely upon the neutrality of the playing field created through that process. This line of thinking strikes me as fundamentally flawed and based not on reason but, to paraphrase Professor Soifer, on liberal academic machismo. Rules having no obvious bearing on race, for example, the Federal Rules of Civil Procedure, cannot be categorically dismissed as racist in the absence of some showing of a connection between those rules and specific racial attitudes, effects or the like. The same can be said for the doctrine of *stare decisis*. There is no doubt that the doctrine can be used in a racist manner, but in the absence of further cogent commentary, I would be reluctant to conclude that the doctrine was itself "encoded" with racism. Simply calling the system racist does not strike me as a particularly productive way to address real problems of race in our society.

One additional point. The rather harsh criticism of the Court's posing of a question seems to fall into that new category of questions we are no longer able to ask. I reject that category. In a representative democracy there should be no political subjects beyond the realm of discourse. All laws are subject to challenge and revision, even those deemed most fundamental. And from a judicial perspective, no matter how uncomfortable it may make us feel, questions of constitutional law, common law and statutory construction are open to reinterpretation. *Brown v. Board of Education* was a reinterpretation of the law; *New York Times v. Sullivan* was a reinterpretation of the law; *Roe v. Wade* was a reinterpretation of the law; and so on. Certainly the Anglo-American system of jurisprudence has long operated under the presumption that judicial decisions are subject to review and so long as the liberal model of judicial activism remains a part of our jurisprudence, one can expect swings in both directions. That is simply a part of the process, a process tempered by the doctrine of *stare decisis*.

The *Patterson* Court did not, however, overrule the precedent. In fact, the Court unanimously reaffirmed *Runyon v. McCrary*; the majority's affirmance was based on long accepted principles of *stare decisis*. (One might ask, "Why the continuing fuss?") I believe the Court was correct in so doing; although, having spent some considerable time with the legislative history of the Civil Rights Act of 1866, I believe as well that *Runyon* was

9. Soifer, *supra* note 2, at 391.

most assuredly wrongly decided. With almost remarkable clarity, that legislative history strongly supports the view that the 1866 Act was designed precisely to attack the infamous Black Codes and nothing more. Although that legislative history does refer to private acts of discrimination in descriptive passages regarding life in the post-Civil War South, there is not a single statement in that history that directly supports the view that the Act was designed to cover those private discriminations. There is no debate on the point. Yet there is an abundance of debate directly supporting the proposition that the sole purpose of the Act was to address government sponsored discrimination. Considering the nature of our governmental system at that time, it would be quite surprising for Congress to directly regulate private conduct without any debate on the point. On this issue, I commend the reader to the lucid and exhaustive opinion of Justice Harlan in *Jones v. Alfred H. Mayer Co.*[10] After describing the legislative history of the Civil Rights Act of 1866 in considerable detail, Justice Harlan concludes:

> The foregoing analysis of the language, structure, and legislative history of the 1866 Civil Rights Act shows, I believe, that the Court's thesis that the Act was meant to extend to purely private action is open to the most serious doubt, if indeed it does not render that thesis wholly untenable.[11]

I think he was right and I believe the Court in *Jones* and *Runyon*, in an effort to "do the right thing," simply ignored that legislative history. But again, I agree that the time to overhaul *Runyon* had long since passed.[12]

Having reaffirmed *Runyon*'s application of section 1981 to private contracts, the *Patterson* Court went on to determine if section 1981 also

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10. 392 U.S. 409, 449-80 (1968) (Harlan, J., dissenting).

11. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 473 (1968).

12. At the colloquium at which Professor Soifer's paper was presented, Professor Soifer responded to the above comments by stating that Justice Harlan's opinion in *Jones v. Alfred H. Mayer Co.* was premised upon a historical mistake. Professor Soifer further indicated that this mistake was exposed and discussed in an earlier article written by him. Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979). In preparing this commentary, I read the earlier article. It is a vitriolic critique of Raoul Berger's *Government by Judiciary*, and, although the essay criticizes Berger's historical techniques, there is not a word about Justice Harlan's opinion in *Jones v. Alfred H. Mayer* other than a citation in a footnote. Since Harlan's opinion involved the meaning of a statute—the Civil Rights Act of 1866—and since Berger's book involved an interpretation of the scope of the Fourteenth Amendment, it would seem that a critique of Berger's work would have no necessary bearing on Harlan's opinion. Also, since Harlan's opinion predated Berger's work, there is no reason to suppose that Harlan was influenced by Berger. Moreover, a reading of Soifer's earlier article does not make the connection clear. If Harlan did make a historical mistake, it just isn't clear at this point what that mistake was. In addition, the earlier article, like the current Soifer article, is replete with overstatements, oversimplifications and errors of logic that, taken together, do not generate confidence in the professor's historical abilities. *See* Berger, *Soifer to the Rescue of History*, 32 SOUTH CAROLINA L. REV. 427 (1981). In the absence of further elucidation, I'll place my bet with Justice Harlan.

covered claims of racial harassment. The Court concluded that such claims were not actionable under section 1981. According to the Court, the statutory language encompassed only the formation and enforcement of contracts; its coverage did not include post formation behavior other than actual judicial enforcement. Professor Soifer describes the Court's statutory interpretation as formalistic and as a "remarkably pinched lexicographic approach."[13] I think he means that the Court interpreted the language of the statute strictly. If so, I agree. The Court did adhere tightly to the text of the statute, but the reason lies not in the Court's insensitivity to race or history as Professor Soifer would have it.[14] There are two more plausible explanations. First, the Court was saddled with construing a statute which on its face was evidently limited to regulating government action but which had been generously interpreted to include private conduct within its ambit. The Court wisely chose not to reinterpret the statute, but at the same time it chose equally wisely to circumscribe the scope of the statute's application to this already unintended realm of private contractual relations. Second, the Court recognized that Title VII of the Civil Rights Act of 1964 specifically covered the type of conduct at issue in this case and chose to leave redress of such conduct to the congressional scheme most clearly designed for that purpose.

Thus, I see very little merit in Professor Soifer's suggestion that the author of the opinion, Justice Kennedy, failed to heed and even belittled the historic context of the 1866 Act. Quite the contrary, Justice Kennedy's opinion actually took a more precise and, I believe, more accurate view of the legislative history of the Act and also placed the current codification of the Act into the modern enforcement context endorsed by Congress. One could certainly disagree with Justice Kennedy's conclusions, but it strikes me as wild overstatement to suggest that those conclusions are not within the realm of reasonable discourse in a society committed to civil rights. Professor Soifer's description of this decision as a "rout" on civil rights simply doesn't survive even the most modest scrutiny. I would only add that just this term in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Johnson Controls, Inc.*,[15] the Court unanimously struck down a fetal protection policy as violative of Title VII's proscription against sex discrimination. Such a decision hardly strikes me as an indication of a retreat from civil rights. Rather, *Johnson Controls*, like *Patterson*, represents a careful effort to attempt to ascertain the intended scope of congressional enactments in the sphere of civil rights. Curious that Professor Soifer did not test his thesis against the *Johnson Controls* decision.

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13. Soifer, *supra* note 2, at 396 n.50.

14. *See supra* note 11. In fact, Professor Soifer's cryptic references to the legislative history of the Act strike me as a prime example of an ahistorical approach. Overall, Professor Soifer's approach to historical analysis seems to be premised more upon bold statement than upon a careful study of facts.

15. 111 S. Ct. 1196 (1991).

Finally, I would like to mention Professor Soifer's snide treatment of a recent affirmative action decision, *City of Richmond v. J.A. Croson Co.*[16] In that case the Court struck down a minority set aside program for the letting of public contracts. The Court held that such programs would run afoul of the equal protection clause in the absence of a showing that the governmental institution involved was attempting to remedy past discriminations within its specific jurisdiction. The Court was concerned that any other approach would keep politics on a never ending treadmill of special preferences. Professor Soifer reacts to this conclusion as follows, "Thus, the history of Richmond, the capital of the Confederacy and a leading site in resistance to school integration, was quarantined, then ignored."[17] I'm not sure of the logical connection between the Court's holding and Professor Soifer's observation; nor is it clear how these particular historic facts were actually relevant other than symbolically. What Richmond was over one hundred years ago is certainly less important than what it was at the time the set aside program was adopted. But Professor Soifer apparently agrees with Justice Marshall that it was "insulting" for Justice O'Connor to even note that the population of Richmond was 50% black and that 5 of the 9 city council members were black at the time the set aside program was adopted.[18] How one is to introduce race into the equation without considering race is not explained. Apparently some contexts are to be considered (the stereotype of bigoted Southern communities, for example) and others may be ignored (political reality, for example). As he does so many times in this essay, Professor Soifer turns to the clever phrase in lieu of a reasoned discussion. The reader is expected to leap onto the bandwagon and join the chorus bemoaning the Court's "willingness to operate in a vacuum" when in fact the only apparent vacuum is the void beneath Professor Soifer's rhetoric. I guess I would like to know what precise facts and reasons make O'Connor's judgment wrong or even suspect.[19]

There is certainly a legitimate argument to be made that affirmative action programs are suspect within the meaning of equal protection jurisprudence, and one making such an argument need not be racist or historically illiterate or even conservative. The argument is also quite consistent with footnote four's express suspicion of factors that may pervert the

16. 109 S. Ct. 706 (1989).

17. Soifer, *supra* note 2, at 397.

18. Soifer, *supra* note 2, at 397 n.55.

19. I must admit that my first reaction to the *City of Richmond* decision was negative, and some of my doubts about the opinion linger. Why shouldn't the City of Richmond be free to solve its problems of race in a manner it deems fit? But upon reflection, Justice O'Connor's opinion seems to steer a sensible middle course between remedying actual past wrongs to living individuals and measures that merely pay obeisance to the politics of preference. It is a tough course, but probably the one most fair to all persons who will be effected. After all, past acts of discrimination are only relevant today to the extent they injure real, living people. The abstraction of past wrongs should not serve as the basis for determining present day legal rights. I can see how one could differ with this view, but I find it difficult to accept the desparate criticism that paints *City of Richmond* as a grim reaper of equal protection.

political process. Race may pervert the political process in many guises, affirmative action being one of them. For example, in the context of a law school admissions policy the argument against affirmative action goes something like this:

> The consideration of race as a measure of an applicant's qualification normally introduces a capricious and irrelevant factor working an invidious discrimination. . . .
> The key to the problem is the consideration of each application *in a racially neutral way*. . . .
> . . . .
> There is no constitutional right for any race to be preferred. The years of slavery did more than retard the progress of blacks. Even a greater wrong was done the whites by creating arrogance instead of humility and by encouraging the growth of the fiction of a superior race. There is no superior person by constitutional standards. A [student] who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he ha[s] a constitutional right to have his application considered on its individual merits in a racially neutral manner.
> . . . .
> . . . The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. . . . A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions. One other assumption must be clearly disapproved: that blacks or browns cannot make it on their individual merit. That is a stamp of inferiority that a State is not permitted to place on any lawyer.[20]

These are the words of Justice William O. Douglas in *DuFunis v. Odegaard*.[21] Certainly Justice Douglas was no enemy of civil rights. Moreover, his career did more to advance the policies of footnote four than perhaps any other Justice. If Justice Douglas can make such an argument, perhaps, despite the decision in *City of Richmond*, the death of footnote four and the demise of civil rights have been greatly exaggerated. Perhaps *Croson* is merely an example of the Court's good faith effort to grapple with a controversial issue over which reasonable people could and do disagree.

All of this leads to Professor Soifer's ultimate objection: The approach of the Court today wrongly emphasizes the importance of individualism over group rights.[22] He writes as if there is no need to explain this critique.

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20. DeFunis v. Odegaard, 416 U.S. 312, 333-43 (1974) (Douglas, J., dissenting) (citations omitted, emphasis in original).

21. *Id.*

22. Soifer, *supra* note 2, at 391 n.35, 392-93, 394 n.47, 395, and 415-18.

Rather, Soifer simply bemoans the "recrudescence of an extreme, abstract individualistic ethos in American courts today."[23] Since "recrudescence" means the "renewing of a disease or dangerous activity,"[24] I take it that Professor Soifer assumes that there is something patently or dangerously wrong with individualism. I recognize that this attitude is the current fashion in liberal academia, but I hope that Professor Soifer's knowledge of history at least includes some space for the importance of individualism within our constitutional system. After all, the first paragraph of footnote four speaks directly to individual rights such as those found in the Bill of Rights. I would hate to see that paragraph inverted by an academic insistence upon a communitarian ethos that overlooks the individual.

In any event, Professor Soifer concludes that the combination of *Patterson* and *Croson* illustrates a "complete rejection of the footnote four approach." *Patterson* clearly does not do this since it addresses problems of statutory construction having nothing to do with the scope of footnote four. *Croson* addresses an issue—affirmative action—that was not within the realm of the Court's imagination in 1938, and nothing in Professor Soifer's verbal assault upon that opinion supports his view that the Court has retreated from civil rights. In short, Professor Soifer, at least in this section of his essay, completely misses the mark. Instead of a reasoned discussion of two decisions over which reasonable minds could differ, the reader is served with an exaggerated and rhetorically overdrawn attack on the Court, an attack that will do little to further any serious effort to solve problems of race in our society.

23. Soifer, *supra* note 2, at 393.

24. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1899 (1971).