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Casenotes and Statute Notes

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ADmiralty — Death on the High Seas Act — DOHSA preempts application of substantive state law to wrongful death actions arising from deaths occurring on the high seas; but allows state courts to entertain DOHSA actions while applying the substantive rules of the Act. Offshore Logistics, Inc. v. Tallentire, 106 S. Ct. 2485 (1986).

James Tallentire and Michael Taylor worked on fixed drilling platforms off the coast of Louisiana. On August 6, 1980, both men were killed in a helicopter crash approximately 35 miles offshore while being transported from a platform to Houma, Louisiana. The helicopter was owned and operated by Air Logistics, Inc.

The wives of both men filed separate wrongful death actions in federal district court against Offshore Logistics raising claims under the Death on the High Seas Act (DOHSA), the Outer Continental Shelf Lands Act (OCSLA).

2 Id. The Death on the High Seas Act (DOHSA), the federal wrongful death statute for deaths on the high seas, provides a three mile limit in defining the extent of state territorial waters. 46 U.S.C. § 761 (1982). See infra note 41 for the relevant text of section 761. Since the crash occurred beyond this limit, the crash occurred on the "high seas" for purposes of DOHSA.
3 Tallentire, 106 S. Ct. at 2488. Air Logistics, Inc. is a division of Offshore Logistics, Inc. Id.
4 Plaintiff Tallentire initially filed her action in the Western District of Louisiana while Plaintiff Taylor filed her action in the Eastern District of Louisiana. These actions were later consolidated in the Eastern District. Id.
5 Id. The helicopter manufacturer, Bell Helicopter Textron, was initially a defendant in both plaintiffs' actions. However, the plaintiffs failed to introduce sufficient evidence of Bell's liability, and the district court entered judgment in Bell's favor. Neither party appealed that judgment. Id.
6 46 U.S.C. §§ 761-768 (1982). DOHSA provides a right of action to the personal representative of the spouse, parent, child, or dependent relative of any person killed on the high seas against the vessel, person, or corporation liable for the death. The death must be caused by a wrongful act on the high seas beyond a marine league, or three miles, from the shore of any state, the District of Columbia, or the territories or dependencies of the United States. M. Norris, The Law of Maritime Personal Injuries § 136 (3d ed. 1975) [hereinafter Maritime Personal Injuries].
SLA), and the Louisiana wrongful death statute. The district court held DOHSA provides the exclusive wrongful death remedy for non-seaman deaths which occur on the high seas and accordingly dismissed the OCSLA and state claims. This ruling effectively denied plaintiffs recovery for non-pecuniary damages because DOHSA provides only for pecuniary losses. Accordingly, the trial court award was limited to pecuniary damages.

The plaintiffs appealed the district court's dismissal of the OCSLA and state claims. The plaintiffs argued that the Louisiana wrongful death statute applied to the crash on the high seas in either of two ways: one, through its own force because its applicability is preserved in section 7 of DOHSA or, two, as a surrogate federal law acting

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7 43 U.S.C. §§ 1331-1356 (1982). OCSLA provides a tort remedy to persons injured or killed on "the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon." See id. § 1333(2)(A) which provides in relevant part:

(2)(A) To the extent that they are applicable and not inconsistent with this subchapter or other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State . . . are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon . . . .

8 LA. CIV. CODE ANN. art. 2315 (West Supp. 1986).
9 Tallentire, 106 S. Ct. at 2488.
10 Id. (quoting 46 U.S.C. § 762 (1982)). Section 2 of DOHSA (later codified as 46 U.S.C. § 762) provides:

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

11 Tallentire, 106 S. Ct. at 2488.
12 Id.

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within
through OCSLA. The United States Court of Appeals for the Fifth Circuit reversed the district court’s refusal to allow Louisiana law to supplement the DOHSA cause of action. The court of appeals first rejected OCSLA’s applicability to the action. However, the court held “[t]he plain words of section 7 of DOHSA prevent the preemption by DOHSA of the Louisiana state death act.” The court of appeals noted further that a literal interpretation of a statute is controlling unless the legislative history clearly expresses a contrary intent. The Supreme Court of the United States granted certiorari to prevent a possible “disunity in administration of wrongful death remedies” and because the court of appeals decision conflicted “with the prevailing view in other courts that DOHSA preempts state law wrongful death statutes in the area of its operation.” Held, reversed and remanded: DOHSA the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

Id.

14 See supra note 7 for a discussion of OCSLA.

15 Tallentire v. Offshore Logistics, Inc., 754 F.2d 1274 (5th Cir. 1985), rev’d, 106 S. Ct. 2485 (1986). Judge Davis wrote the opinion for the court. Judge Jolly concurred commenting that the result of the court’s decision “may create a mess in more than a few cases.” Id. at 1289. Judge Garza dissented stating that he believed the legislative history of DOHSA indicates section 7 was intended only to preserve existing state law remedies for deaths on territorial waters. Id.

16 See id. at 1279. “OCSLA adopts state laws as surrogate federal law only ‘to the extent that [the state laws] are . . . not inconsistent with . . . other federal laws’ . . . .” Id. (quoting 43 U.S.C. § 1333(a)(2)(A) (1982))(emphasis original). Because the non-pecuniary measure of damages provided by the Louisiana wrongful death statute substantially conflicted with the pecuniary damage provisions of DOHSA, the court concluded it could not apply Louisiana law through OCSLA. See id.

17 Id. at 1288. See supra note 13 for the full text of section 7.

18 Tallentire, 754 F.2d at 1282. After examining the legislative history of section 7, the court of appeals concluded it was “hopeless” to discern any clearly defined legislative intent sufficient to overturn the literal interpretation. Id. at 1279-84. For a discussion of the legislative history of section 7, see infra notes 79-85 and accompanying text.


20 Tallentire, 106 S. Ct. at 2489. For an examination of the circuit court treatment of this issue, compare Tallentire, 754 F.2d at 1274 (holding that section 7 of DOHSA prevents preemption of state wrongful death statutes), rev’d, 106 S. Ct. 2485 (1986) with Nygaard v. Peter Pan Seafoods, Inc., 701 F.2d 77 (9th Cir. 1983) (holding that DOHSA preempts application of state wrongful death statutes to
preempts application of substantive state law to wrongful death actions arising from deaths occurring on the high seas; but allows state courts to entertain DOHSA actions while applying the substantive rules of the Act. Offshore Logistics, Inc. v. Tallentire, 106 S. Ct. 2485 (1986).

I. LEGAL BACKGROUND

A. Prelude to DOHSA

The jurisprudence surrounding maritime wrongful death traces back to the Supreme Court’s 1886 decision in The Harrisburg.\textsuperscript{21} In The Harrisburg, the Court held no wrongful death action exists under general maritime law.\textsuperscript{22} Observing the general common law did not provide for a wrongful death remedy,\textsuperscript{23} the Court refused to conversely create such a remedy under maritime common law.\textsuperscript{24} If no statutory remedy applied to a given action, the common law thus granted no remedy whatsoever to the wrongful death plaintiff.\textsuperscript{25} Therefore, The Harrisburg required that a plaintiff look to a federal or state wrongful death on the high seas). See also Barbe v. Drummond, 507 F.2d 794 (1st Cir. 1974). In Barbe, the court of appeals stated in dicta that the “better authority” rejects the view that section 7 allows state wrongful death statutes to operate on the high seas. \textit{Id.} at 801 n.10. For a discussion of the case authority regarding the preemption issue, see infra notes 86-94 and accompanying text.

\textsuperscript{21} 119 U.S. 199 (1886). Prior to The Harrisburg, the Court had recognized the power of the state to confer a wrongful death remedy for maritime deaths occurring on its territorial waters. See Sherlock v. Alling, 93 U.S. 99 (1876); American Steamboat Co. v. Chase, 83 U.S. (16 Wall.) 522 (1872).

\textsuperscript{22} The Harrisburg, 119 U.S. 199.

\textsuperscript{23} \textit{Id.} at 204 (citing Insurance Co. v. Brame, 95 U.S. 754, 756 (1878) (“[B]y the common law no civil action lies for an injury which results in . . . death.”)).

\textsuperscript{24} The Harrisburg, 119 U.S. at 213. Rather than analyze the justification for the common law rule, the Court noted:

\textit{[W]e know of no country that has adopted a different rule on this subject for the sea from that which it maintains on the land. . . . Since, however, it is now established that [no wrongful death remedy exists] in the absence of a statute giving the right, and it has not been shown that the maritime law, . . . generally, has established a different rule [in admiralty from the rule at common law], we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law.}

\textit{Id.}

\textsuperscript{25} \textit{Id.}
death statute for a right of action. Accordingly, lower courts examined state and foreign statutes to determine whether they afforded a wrongful death remedy. This practice regarding deaths on territorial waters was explicitly upheld by the Supreme Court in *Western Fuel Co. v. Garcia*.

It is almost intuitive that courts should apply state death acts to territorial waters. However, it is not so plain that state acts should extraterritorially apply to the high seas. Nevertheless, in *The Hamilton*, the Supreme Court sanctioned the application of state wrongful death statutes to deaths on the high seas. The Court held that Delaware's wrongful death statute applied to the action arising from an accident between two Delaware ships, even though it occurred on the high seas. In that case, the court en-

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27 See, e.g., The City of Norwalk, 55 F. 98, 103-08 (S.D.N.Y. 1893) (applying state wrongful death statute to maritime death in territorial waters), aff'd, 61 F. 364 (2d Cir. 1894) (allowing application of state wrongful death statute to accident in state territorial waters in the absence of federal regulations).

28 257 U.S. 233 (1921). The Court cited Chase and Sherlock, see supra note 21, in support of the decision. *Id.* at 240-41. Earlier, in Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917), the Court emphasized the importance of uniformity in maritime law by stating:

>[No state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation at the least is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself.

*Id.* at 216. *Jensen* has subsequently been recognized as the father of the uniformity concept in the field of admiralty. See The Tungus v. Skovgaard, 358 U.S. 588, 594 (1959). The *Garcia* Court believed applying state statutes to territorial waters did not violate this principle because of the local nature of such waters. *Garcia*, 257 U.S. at 242.

29 207 U.S. 398 (1907).

30 *Id.* at 405. In *The Hamilton*, several persons were drowned when two Delaware ships collided. *Id.* at 402. Plaintiffs attempted to recover for the deaths under the Delaware wrongful death statute. *Id.* at 402-03. The issue, as framed by Justice Holmes, was "whether the Delaware statute applies to a claim for death on the high seas, arising purely from tort, in proceedings in admiralty." *Id.* at 403.

31 *Id.* at 405.
endorsed the power of a state to confer a remedy for deaths occurring on the high seas.\textsuperscript{32}

Although application of state law avoided the harsh \textit{Harrisburg} rule that no remedy exists at common law, it was not an ideal solution. The Courts were often presented with exceedingly difficult conflict of law problems, especially when an action arose from a collision between vessels incorporated in different states or between an American-flag vessel and one flying the flag of a foreign country.\textsuperscript{33} Typically, a court had to ascertain the existence of a state or foreign (for a foreign flag vessel) wrongful death statute.\textsuperscript{34} If a statute did exist, the court had to determine whether the statute purported to cover maritime accidents and, if so, whether the statute purported to apply to those state residents or state vessels outside the state boundaries.\textsuperscript{35} Finally, the court had to decide which law to apply to the case if more than one possibility existed.\textsuperscript{36} Of course, the validity of any statute's application depended on the extent of the particular

\textsuperscript{32} Id. at 403. However, it is not clear upon what theory the Supreme Court based its application of Delaware law to the high seas. The court of appeals based its application on the theory that a Delaware ship on the high seas is "in contemplation of law, within the territory of that state." \textit{The Hamilton}, 146 F. 724, 726 (2d Cir. 1906), aff'd, 207 U.S. 298 (1907). However, the Supreme Court seemed to base its conclusion on the theory that Delaware may exercise authority over its own corporations or citizens as a matter of personal jurisdiction. See \textit{The Hamilton}, 207 U.S. at 403. See also Magruder & Grout, \textit{Wrongful Death Within the Admiralty Jurisdiction}, 35 \textit{Yale L.J.} 395, 409-11 (1926).

\textsuperscript{33} See, e.g., \textit{The Sagamore}, 247 F. 743 (1st Cir. 1917) (Massachusetts schooner and British steamer); \textit{The James McGee}, 300 F. 93 (S.D.N.Y. 1924) (United States owned vessel and New Jersey vessel); \textit{The Middlesex}, 253 F. 142 (D. Mass. 1916) (New Jersey owned and Massachusetts based steamer colliding with Maine schooner). The \textit{Middlesex} court was so perplexed, recovery was denied under all of three possible statutes. \textit{The Middlesex}, 253 F. at 146. See generally Magruder & Grout, supra note 32, at 409-18 for a discussion of extraterritorial application of state death acts.


\textsuperscript{35} Id.

\textsuperscript{36} Id. at 376-77 (citing \textit{The Hamilton}, 207 U.S. 398 (1907) (applying the law of the vessel's domicile); \textit{La Bourgogne}, 210 U.S. 95 (1908) (applying French law); \textit{The Belgenland}, 114 U.S. 355 (1885) (holding that, where the vessels are of different countries, the law of the forum can be applied); \textit{The Scotland}, 105 U.S. 24 (1881) (applying U.S. law)).
state's legislative jurisdiction over the matter. 37

At this point, it was clear that the labyrinth of common law and state statutes was an unsatisfactory vehicle for providing a maritime wrongful death remedy. 38 It was equally clear that this vehicle did little to promote the uniformity objectives espoused by the Supreme Court. 39

B. DOHSA and Its Aftermath

The inequities and confusion often resulting from the absence of any general maritime or federal wrongful death remedy eventually led Congress to enact the Death on the High Seas Act in 1920. 40 DOHSA invalidated application of the Harrisburg rule to the high seas by providing a federal wrongful death remedy for the death of any person caused by any "wrongful act" occurring on the high seas. 41

37 See Wilson v. Transocean Airlines, 121 F. Supp. 85, 88 (N.D. Cal. 1954). Legislative jurisdiction is the power of a governmental body to create or affect legal interests through application of its laws. See generally Reese, Legislative Jurisdiction, 78 Colum. L. Rev. 1587 (1978). Regarding legislative jurisdiction at sea, the Wilson court stated:

Legislative jurisdiction to impose a liability for a wrongful act at sea beyond the boundaries of the state had to rest upon one of two theories: Either (1) that the vessel upon which the wrongful act occurred was constructively part of the territory of the state; or (2) that the wrongdoer was a vessel or citizen of the state subject to its jurisdiction even when beyond its territorial limits.

Wilson, 121 F. Supp. at 88.

38 See Day, Maritime Wrongful Death and Survival Recovery: The Need for Legislative Reform, 64 Colum. L. Rev. 648, 650-51 (1964); see also Magruder & Grout, supra note 32, at 409-18 (discussing extraterritorial application of state death acts).

39 See Jensen, 244 U.S. at 216. See supra note 28 for a discussion of Jensen.


41 See Moragne v. State Marine Lines, Inc., 398 U.S. 375, 394-97 (1970); 46 U.S.C. § 761 (1982). Section 761, defining the right of action as well as by whom and where the action may be brought, provides:

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas . . . , the personal representative of the decedent may maintain a suit for damages . . . in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

46 U.S.C. § 761. Section 762 limits damages recoverable under the statute to "fair and just compensation for the pecuniary loss sustained" by the beneficiaries
While DOHSA provided a remedy for wrongful deaths on the high seas, state law was the exclusive remedy for non-seaman deaths occurring on territorial waters, because no general maritime wrongful death remedy existed. Thus, if no state statute applied, there was a complete absence of remedies in keeping with The Harrisburg.

1. Reversing The Harrisburg - Moragne

The Supreme Court examined the wisdom of this absence in Moragne v. States Marine Lines, Inc. In Moragne, the Court overruled the The Harrisburg by holding that an action for wrongful death lies under general maritime law for death caused by violation of maritime duties. The Court first observed that the The Harrisburg rule had no justification in the modern world, and that the federal and

of the decedent. See supra note 10 for the full text of section 2. That same year, Congress additionally enacted the Jones Act. See supra note 10 for a discussion of the Jones Act. By extending to "seamen" the protections of the Federal Employers Liability Act, provided a right of recovery of pecuniary losses against their employers for negligence resulting in injury or death, regardless of where the negligence occurs. Ker- nan v. American Dredging Co., 335 U.S. 426, 429 (1958).

See 46 U.S.C. § 688 (1982). Since the Jones Act provided a remedy to seamen regardless of the situs of the accident, that act provided a remedy to seamen on both territorial waters and the high seas. See supra note 41 for a discussion of the Jones Act. As for non-seamen, DOHSA is unavailable for deaths occurring on territorial waters because its application is explicitly restricted to wrongful acts occurring on the high seas. 46 U.S.C. § 761 (1982).

See supra notes 22-26 and accompanying text for a discussion of The Harrisburg.


Id. at 409. In Moragne, a longshoreman was killed while working aboard a ship in Florida territorial waters. Id. at 376. His widow sued the owner of the vessel for wrongful death based on theories of negligence and unseaworthiness. Id. The United States district court dismissed the unseaworthiness claim after the Florida Supreme Court certified that no cause of action for unseaworthiness exists under Florida law. Id. at 376-77. The United States Supreme Court, relying on the Harrisburg rule that there is no general maritime cause of action for wrongful death, had previously held that there is no federal cause of action for unseaworthiness. The Tungas v. Skovgaard, 358 U.S. 588 (1959). Since neither Florida law, the applicable state law, nor the general maritime law allowed a cause of action for unseaworthiness, the court of appeals dismissed that claim. Moragne, 398 U.S. at 376-77.

Moragne, 398 U.S. at 379-88. The Court stated that legal historians have con-
state legislatures had evinced no policy against allowing recovery for wrongful death. In reaching that conclusion, the Court noted that even the *Harrisburg* Court did not attempt to justify its result beyond blind adherence to the old common law rule. The Court concluded that no countervailing considerations overshadowed the hardship imposed by the absence of a general maritime wrongful death remedy when no state remedy was available. In overruling *The Harrisburg*, the Court recited arguments presented by the United States, participating as *amicus curiae*, that DOHSA should be the primary guide in fashion-

cluded that the only substantial basis for the old common law rule was the long obsolete felony-merger doctrine. *Id.* at 382. Under that doctrine, the tort was preempted by the offense against the Crown. Smith v. Sykes, 89 Eng. Rep. 61 (K.B. 1677); Higgins v. Butcher, 80 Eng. Rep. 61 (K.B. 1606). Under the feudal law system, the goods and estate of the felon were forfeited to the Crown leaving nothing to satisfy a private demand. M. Norris, *The Law of Seamen* § 29.1 n.1 (4th ed. 1985) [hereinafter *The Law of Seamen*]. Other reasons advanced to justify the old rule included the beliefs that human life transcended monetary valuation and that an injury which resulted in death was a public injury thereby excluding private redress. *Id.*

*Moragne*, 398 U.S. at 388-93. The Court specifically cited the existence of a wrongful death statute in all 50 states and of several federal wrongful death statutes. *Id.* at 390.

*Moragne*, 398 U.S. at 393-405. The Court described three anomalies presented by the present situation. First, wrongful conduct on the high seas creating an injury results in liability, but none where the same conduct causes death. *Id.* at 395. Second, breaches of the duty to provide a seaworthy ship outside the three mile limit provided by DOHSA produce liability under that statute, while none follows within the territorial waters of a state whose local statute excludes unseaworthiness claims. *Id.* Third, a "true seaman" covered by the Jones Act, *supra* note 41, has no remedy for death caused by unseaworthiness within territorial waters, while a longshoreman does have such a remedy when provided by a state statute. (The Court held in *Gillispie v. United States Steel Corp.*, 379 U.S. 148 (1964) that the Jones Act preempts state wrongful death statutes on territorial waters). *Id.* at 395-96.

The Court also concluded that Congress, when it enacted DOHSA, did not intend to preclude application of a federal remedy to territorial waters when it excluded territorial waters from DOHSA's jurisdiction. See *id.* at 397-98; see also 46 U.S.C. § 761 (1982) (Section 1 of DOHSA limiting that statute's application to wrongful acts occurring on the high seas beyond a marine league, or three miles, from shore).

*Moragne*, 398 U.S. at 403-05. Specifically, the Court concluded that the principle of *stare decisis* did not militate against overruling *The Harrisburg*. *Id.* The Court stated, "We do not regard the rule of *The Harrisburg* as a closely arguable proposition . . . . The rule has had a long opportunity to prove its acceptability, and instead has suffered universal criticism and wide repudiation." *Id.* at 404.
ing the elements of the new cause of action created in Moragne. However, the Court withheld judgment on that issue by stating that "its final resolution should await further sifting through the lower courts in future litigation."

2. Damages under Moragne

One issue left open in Moragne was the measure of damages - specifically, whether damages under such a claim must be limited to the pecuniary standard of DOHSA and the Jones Act. In Sea-Land Services, Inc. v. Gaudet, the Court took an expansive view of the damages issue, holding that plaintiffs bringing a Moragne wrongful death action may recover, in addition to pecuniary damages, certain non-pecuniary damages not available under DOHSA. The Court conceded that its decision was inconsistent with the pecuniary damages standard of DOHSA. However, it further noted that Congress has

51 Id. at 407-08.
52 Id. at 408. Regarding the elements of the new cause of action, the Court stated further: "If still other subsidiary issues should require resolution, such as particular questions of the measure of damages, the courts will not be without persuasive analogy for guidance. Both the Death on the High Seas Act and the numerous state wrongful-death acts have been implemented with success for decades." Id.
53 See supra notes 10 and 41 for a discussion of DOHSA and the Jones Act, respectively, and their standard of recovery.
55 Id. at 584. The Court specifically held that funeral expenses as well as loss of support, services, and society were recoverable. Id. at 584, 591. Writing for the 5-4 majority, Justice Brennan stated that loss of society "embraces a broad range of mutual benefits ... including love, affection, care, attention, companionship, comfort, and protection." Id. at 585. DOHSA has been interpreted to exclude recovery for loss of society. See, e.g., First Nat'l Bank in Greenwich v. National Airlines, Inc., 288 F.2d 621, 624 (2d Cir.), cert. denied, 368 U.S. 869 (1961); Middleton v. Luckenbach S.S. Co., 70 F.2d 326, 330 (2d Cir.), cert. denied, 293 U.S. 577 (1934). There is a conflict over whether funeral expenses are compensable under DOHSA. Compare The Culberson, 61 F.2d 194 (3d Cir. 1932) (funeral expenses not part of pecuniary loss) with Moore v. O/S Fram, 226 F. Supp. 816 (S.D. Tex. 1963) (allowing funeral expenses), aff'd sub nom per curiam, Wilhelm Seafoods, Inc. v. Moore, 328 F.2d 868 (5th Cir. 1964).
56 Gaudet, 414 U.S. at 588 n.22. "We recognize, of course, that our decision permits recovery not generally available under the Death on the High Seas Act. Traditionally, however, 'Congress has largely left to this court the responsibility
Given the courts wide discretion in fashioning the controlling rules of admiralty. Given that discretion, the Court concluded it had the authority to allow non-pecuniary damages because, in the Court's view, nothing in DOHSA's legislative history suggests that Congress intended to preclude the Court from fashioning non-statutory remedies which the Court deemed appropriate to effectuate the policies of the general maritime law. The Court cited two bases for its conclusion that permitting recovery for loss of society furthers the policies of admiralty. First, the Court noted that a "clear majority" of states permit such a recovery. Second, the Court stated that its decision was necessary in order to "comport with the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction." The Court made no distinction between Gaudet's application to territorial waters and the high seas.

Justice Powell, speaking for the minority, sharply criticized the Court's liberal approach to the damages issue. Powell accused the majority of contradicting Congress' clear intent, as expressed in DOHSA and the Jones Act, to exclude non-pecuniary damages such as loss of society from maritime wrongful death actions.

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57 Id. (quoting Fitzgerald v. United States Lines Co., 374 U.S. 16, 20 (1963)).
58 Id.
59 The Court stated further that DOHSA's exclusion from territorial waters demonstrated Congress' lack of concern for a uniform measure of damages because many state wrongful death statutes extending to territorial waters provided a measure of damages more liberal than that of DOHSA. Id.
60 The Court used similar reasoning in its holding that funeral expenses are also recoverable. Id. at 591.
61 Id. at 587.
62 Id. at 588.
63 See id. at 588-91. This silence led at least one court to interpret Gaudet to allow non-pecuniary damages in actions arising on the high seas - the jurisdictional waters of DOHSA. See Law v. Sea Drilling Corp., 523 F.2d 793 (5th Cir. 1975). See infra notes 67-68 and accompanying text for a discussion of Sea Drilling.
64 Gaudet, 414 U.S. at 605-06.
65 Id. Justice Powell stated: "[T]he Court's holding that loss of society may be
3. Reconciling DOHSA and Moragne

The *Moragne* and *Gaudet* decisions led some lower courts and commentators to state that DOHSA was obsolete.65 This conclusion followed from the fact that, after *Moragne* and *Gaudet*, the general maritime wrongful death remedy was more comprehensive and provided for a greater recovery than had been available under the federal and most state death statutes.66 This speculation regarding DOHSA's demise materialized to a certain extent when the Fifth Circuit held that non-pecuniary damages permitted in *Gaudet* are recoverable under *Moragne* even in actions arising on the jurisdictional waters of DOHSA.67 In doing so, the court of appeals clearly indicated its belief that the *Moragne* remedy had replaced DOHSA.68 However, rumors of the death of DOHSA were greatly exaggerated as evidenced by *Mobil Oil Corp. v. Higginbotham*.69

In *Higginbotham*, a helicopter carrying passengers from an oil drilling platform crashed 100 miles at sea while returning to the Louisiana coast.70 Survivors of the pilot


[67] *Sea Drilling*, 523 F.2d at 793. In an action arising on the high seas, the court of appeals specifically allowed recovery for conscious pain and suffering and loss of society - neither of which is recoverable under DOHSA. *Id.* In justifying its holding, the court of appeals pointed out that *Gaudet* was not limited to territorial waters. *Id.* at 796. *But see* Barbe *v. Drummond*, 507 F.2d 794, 800-01 (1st Cir. 1974) (holding that, where the action arises within the jurisdiction of DOHSA, the pecuniary loss standard controls).

[68] *See Sea Drilling*, 523 F.2d at 795-98 (“No longer does one need . . . DOHSA as a remedy.”).


[70] *Id.* at 619.
and passengers sought to recover, in addition to the DOHSA measure of damages, damages recognized in *Gaudet* for actions brought under general maritime law. Thus, the issue before the Court was whether the measure of damages in *Moragne* actions arising on the high seas are determined by reference to *Gaudet* or to DOHSA. Stating that "DOHSA should be the courts' primary guide as they refine the nonstatutory remedy," the Court rejected the plaintiff's approach, and held that, because DOHSA governs the measure of damages recoverable for deaths on the high seas, supplemental damages recoverable under general maritime law are not available. The Court concluded that, although it is sometimes necessary to supplement maritime statutes, Congress had definitively spoken on the issue of damages when it enacted DOHSA. Since Congress had spoken on the damages issue, the Court determined it was "not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless.'

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71 Id. at 618. See supra notes 54-64 and accompanying text for a discussion of *Gaudet*.

72 *Higginbotham*, 436 U.S. at 623. The Court noted that *Sea Drilling*, supra notes 67-68 and accompanying text, read *Gaudet* as a replacement for DOHSA. *Id.* However, in framing the issue before it, the *Higginbotham* Court stated that *Gaudet* applied only to coastal waters. *Id.*

73 *Id.* at 625.

74 See *id.* at 624-26. The Court acknowledged that this conclusion would create a discrepancy between the measure of damages available under the general maritime law on territorial waters and on the high seas. *Id.* at 624. However, the Court stated that a desire for uniformity cannot override the statutory effect of DOHSA. *Id.*

75 See *id.* at 625. The Court agreed that "because Congress has never enacted a comprehensive maritime code," admiralty courts would find it necessary to supplement maritime statutes on issues which were not addressed by Congress. *Id.*

76 *Id.*

77 *Id.* The Court distinguished *Moragne*, which created a wrongful death remedy that supplemented federal statutory remedies, on the ground that such a remedy was created in the absence of federal legislation regarding territorial waters. *Id.* The Court further pointed out that:

Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of non-pecuniary supplements. There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it would
4. Section 7 of DOHSA

While the Court in *Higginbotham* refused to supplement DOHSA's damage provisions with damages provided by the general maritime law, the Court did not indicate whether applicable state statutes may supplement the Act.\(^7^8\) This uncertainty focused on section 7 of DOHSA which provides, *inter alia*, that "[t]he provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this Act."\(^7^9\) A literal reading of this section arguably conveys the intent that, where state statutes were competent to remedy or regulate accidents on the high seas before DOHSA, that competence remained viable after DOHSA.\(^8^0\) However, appreciation of the historical background of section 7 exposes the latent controversy facing the *Tallentire* court.\(^8^1\)

The genesis of this controversy is the somewhat infamous "Mann Amendment" to section 7 of DOHSA which was adopted prior to DOHSA's passage.\(^8^2\) Section 7, in its original form, provided in relevant part that "the provisions of any State statute giving or regulating rights of action or remedies shall not be affected by this Act as to causes of action accruing within the territorial limits of any state."\(^8^3\) However, the Mann Amendment deleted the last

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be no more appropriate to prescribe a different statute of limitations, or a different class of beneficiaries.

*Id.* (citations omitted).

\(^7^8\) See *supra* notes 70-77 and accompanying text for a discussion of *Higginbotham*. The distinction between the general maritime law and state statutory law is significant because the general maritime law is a product of federal, as opposed to state, authority. U.S. CONSTR. art. III, § 2, cl. 1. "The judicial power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . ." *Id.* Thus, the effect of section 7 of DOHSA on state authority to legislate on the high seas remained to be addressed. See *infra* notes 79-96 and accompanying text for a discussion of section 7.


\(^8^0\) See *Alexander v. United Technologies Corp.*, 548 F. Supp. 139, 142 (D. Conn. 1982).

\(^8^1\) *Tallentire*, 106 S. Ct. at 2489.

\(^8^2\) 59 CONG. REC. 4484-87 (1920).

\(^8^3\) *Id.* at 4482 (emphasis added). For section 7 in its present form, see *supra* note 13. Comments by several of the original bill's proponents confirm the apparent intent of section 7's language that DOHSA would provide the exclusive
clause of section 7, leaving the provision in its present form. Unfortunately, the legislative history of the amendment does not clearly reveal the intended effect of the deletion.

Lower courts disagree on section 7’s effect on the abil-

remedy over the high seas. *Id.* (remarks of Rep. Volstead) (“beyond [the three mile limit provided by the act] the state law does not apply, but this cause of action does apply”). By the same token, the states would provide the exclusive remedy over territorial waters. *See id.* at 4483 (remarks of Rep. Montague) (“the territorial waters of the States shall be retained within the jurisdiction and sovereignty of the states and their courts”) (“this section is put in out of abundant caution, to calm the minds of those who think that rights within territorial waters will be usurped by the national law”).

*Id.* at 4484-87. From his statements, Representative Mann, offeror of the amendment, apparently (but not unambiguously) intended to preserve state power to confer death remedies for deaths on the high seas. *See id.* at 4484 (“If the amendment which I have suggested should be agreed to, the bill would not interfere in any way with rights now granted by any State statute, whether the cause of action accrued within the territorial limits of the State or not.”).

*Id.* at 4484-86. Even if Representative Mann did intend the amendment to allow states to confer remedies for deaths on the high seas, there is evidence that, in passing the amendment, other members of the House did not believe the amendment would have such an effect. *See id.* at 4483-85. At least some of the representatives felt that, even in the absence of the deleted language, the background and purpose of the Act would implicitly command that DOHSA have exclusive jurisdiction over the high seas. *Id.* at 4483. Representative Montague commented:

In reply to the statement of my colleague [Mr. Moore] I will say that jurisdiction upon this subject is found in the Constitution of the United States, and it has been held over and over again by our courts that when the Congress legislates in pursuance of constitutional authority such a law is exclusive. It requires no asseveration in the bill to make it exclusive. It is exclusive by virtue of its superior jurisdiction; therefore, I submit, it is needless to amend this bill now and raise the chance of its defeat by adding a mere adjective when by the very force of the Constitution and the law in pursuance thereof it is inherently and necessarily exclusive.

*Id.* Other members were apparently under the impression that federal legislation in the area would supercede any state law competence to regulate or remedy accidents on the high seas. *Id.* at 4485. Representative Volstead expressed this view:

The view taken by the parties who drew this bill is that it is exclusive, because, as the gentleman from Virginia [Mr. Montague] pointed out, the power to pass laws on this subject is conferred on Congress in the Constitution, and whenever Congress acts I have no doubt it excludes the power on the part of the State to pass laws on the same subject.

*Id.* In sum, there is some evidence that at least a portion of the House, in passing the amendment, believed the meaning of section 7 in its final form was no different from its original import that DOHSA remedies be exclusive on the high seas.
ity of state statutes to confer a wrongful death remedy in actions arising on the high seas. Many courts interpret section 7 to preserve state remedies only on territorial waters. However, other courts have reached the opposite conclusion, viz., that Congress intended section 7 to preserve state remedies on the high seas as well as on territorial waters.

Some courts and commentators have taken the issue a step further. According to this view, although state substantive remedies are preempted on the high seas, DOHSA confers concurrent jurisdiction between federal and state courts. Under this scheme, the state courts

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81 See infra notes 87-91 and accompanying text for a discussion of the case law regarding section 7.
84 See Safir v. Compagnie Generale Transatlantique, 241 F. Supp. 501 (E.D.N.Y. 1965). In Safir, the court held that a New York state court was competent to entertain a wrongful death suit arising on the high seas. Id. at 507-09. The court concluded that the state wrongful death statutes were the source of jurisdiction, but DOHSA was the governing rule of law. Id. at 507-08. Disagreeing with the conclusion reached in Devlin and Jennings, see supra note 87 and accompanying text, the court concluded that the "modest language" of section 7 was insufficient to confine all wrongful death suitors to admiralty claims in federal court. Safir, 241 F. Supp. at 508-09. Instead, a wrongful death suit of this kind is one "‘saved to suitors' by the ancient exception of 28 U.S.C.A. § 1333(1) [the saving to suitors clause]." Id. at 509. See infra note 117 for a discussion of the saving to suitors clause. See also Ledet v. United Aircraft Corp., 10 N.Y.2d 258, 176 N.E. 2d 280, 219 N.Y.S.2d 245 (1961) (holding section 7 allows recourse to state procedure to enforce substantive rights provided by DOHSA). Cf. Moragne, 398 U.S. at 400 n.14 (section 7 of DOHSA does not confer exclusive jurisdiction to the admiralty
may entertain wrongful death actions arising on the high seas, as a matter of procedure, while applying the substantive provisions of DOHSA.90

Apparently, Nygaard v. Peter Pan Seafoods, Inc.91 is the only previous court of appeals decision to directly confront the issue of whether DOHSA preempts state wrongful death statutes. In Nygaard, the court of appeals held that DOHSA preempts application of state statutes to the high seas without mentioning section 7.92 Instead, the court of appeals concluded that maritime uniformity required that DOHSA be the exclusive remedy.93 Nygaard expressed no view on the state court's ability to entertain DOHSA actions.94

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90 See supra note 89.
91 701 F.2d 77 (9th Cir. 1983).
92 Id. at 80. In Nygaard, survivors of a seaman lost at sea appealed the trial court's refusal to award damages for loss of society - a non-pecuniary loss - under either the Jones Act or the Alaska wrongful death statute. Id. at 78-79. After holding that the Jones Act denies recovery for non-pecuniary losses, the court of appeals held that DOHSA preempts applicability of the Alaska death act. Id. at 80.
93 Id. The court of appeals stated that its holding that maritime uniformity requires preemption of state statute by DOHSA was based on "the logical import" of its earlier holding in Nelson v. United States, 639 F.2d 469, 473 (9th Cir. 1980) (holding general maritime law preempts state wrongful death statutes because of the need for uniformity in maritime wrongful death actions) and the Fifth Circuit's decision in In re S.S. Helena, 529 F.2d 744, 753 (5th Cir. 1976) (holding wrongful death remedy provided in Moragne precludes recognition in admiralty of state wrongful death statutes). Id. The court further stated: "If the federal remedial scheme for death within state territorial waters takes precedence over state remedies, then certainly the federal remedial scheme for death on the high seas where the primacy of federal interests is far clearer, should also take precedence." Id.
95 Nygaard, 702 F.2d 77.
II. Offshore Logistics, Inc. v. Tallentire — The Court's Analysis

The issue presented before the Tallentire court was "whether the DOHSA measure of recovery may be supplemented by the remedies provided by state law, through either OCSLA or § 7 of DOHSA."95

A. OCSLA Not Applicable to Admiralty Cases

The Tallentire Court unanimously rejected the plaintiffs' argument that Louisiana law should apply as a surrogate federal law through OCSLA.96 In doing so, the Court stated that while DOHSA was enacted to provide a maritime remedy for wrongful death on the high seas, "OCSLA, by contrast, provides an essentially nonmaritime remedy and controls only on 'the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures' erected thereon.'"97 Accordingly, DOHSA and OCSLA have completely different applications — the former to admiralty actions and the latter to actions arising from the artificial structures covered by the Act.98 In this interpretation, the Court referred back to its earlier analysis of OCSLA in Rodrigue v. Aetna Casualty & Surety Co.99 In Rodrigue, the Court noted that accidents on the artificial islands covered by OCSLA "had no more connection with the ordinary stuff of admiralty than do accidents on piers."100

95 Tallentire, 106 S. Ct. at 2492.
96 See id. at 2492-94. Under OCSLA, state law is adopted by the courts and applied as federal law (i.e., "surrogate" federal law) to the extent that it is not inconsistent with applicable federal law. See Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352, 355-56 (1969). For a discussion and the relevant text of OCSLA, see supra note 7.
98 Id.
100 Id. at 360. In Rodrigue, the Court held that an admiralty action does not apply to accidents actually occurring on the artificial islands covered by OCSLA. Id. Therefore, DOHSA does not preclude the application of state law as adopted federal law through OCSLA to wrongful death actions arising from accidents on offshore platforms which are located on the high seas. Id.
Given the mutually exclusive application of DOHSA and OCSLA, the Tallentire Court held that the plaintiffs' cause of action was in admiralty, therefore precluding application of OCSLA. The Court rejected the plaintiffs' argument that facts such as the decedents' status as platform workers and that they were killed while commuting from their platform to Louisiana brought them within OCSLA's jurisdiction. The Court held applicability of OCSLA is decisively determined by the locale of the accident, not the status of the decedents. Since the crash occurred at sea, miles from the platform, the cause of action was in admiralty. In reaching its conclusion, the Court also dismissed as insignificant the fact that the decedents were killed while riding in a helicopter instead of a more traditional maritime conveyance. The Court held admiralty jurisdiction was properly invoked because the accident occurred on the high seas and the helicopter was engaged in an activity bearing a significant relationship to a maritime activity.

In sum, the Court held that OCSLA and admiralty have

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101 See Tallentire, 106 S. Ct. at 2493.
102 Id. "The character of the decedents as platform workers who have a special relationship with the shore community simply has no special relevance to the resolution of the question of the application of OCSLA to this case." Id.
103 Id.
104 Id.
105 Id.
106 Id. In reaching the conclusion that the helicopter crash was within admiralty jurisdiction, the Court referred back to its decision in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972). In Executive Jet Aviation, the Court held that the fact that an aircraft crashes on navigable waters or that the negligence occurs while the aircraft was flying over such waters is insufficient to confer federal admiralty jurisdiction. Executive Jet Aviation, 409 U.S. at 261. Such jurisdiction is properly invoked only when there is a significant relationship to a traditional maritime activity. Id. at 268. The Tallentire Court held that the "traditional maritime activity" requirement was satisfied because the helicopter was performing the traditional maritime function of ferrying passengers from an "island" to shore. Tallentire, 106 S. Ct. at 2493. Jurisdiction under DOHSA was also properly invoked because the accident occurred on the high seas. Id. See also supra note 41 for the relevant text of section 1 of DOHSA (codified as 46 U.S.C. § 761 (1982)) which defines the statute's jurisdiction.
mutually exclusive jurisdictions.\textsuperscript{107} OCSLA had no relevance to the action because this is an admiralty case.\textsuperscript{108}

B. **DOHSA Precludes State Remedies**

The Court next turned to the issue of whether non-pecuniary damages provided by state statute may supplement the DOHSA remedies.\textsuperscript{109} The Court interpreted section 7 of DOHSA as a jurisdictional saving clause, intended only to confer upon states: (1) exclusive jurisdiction over wrongful death actions arising from territorial waters; and (2) concurrent jurisdiction over actions brought under DOHSA, i.e., those arising on the high seas.\textsuperscript{110} The effect of the concurrent jurisdiction is to grant to states the right to entertain such actions while applying the DOHSA provisions.\textsuperscript{111} The Court cited four considerations in reaching its conclusions: “[1] [T]he language of the Act as a whole, [2] the legislative history of section 7, [3] the congressional purposes underlying the Act, and [4] the importance of uniformity of admiralty law.”\textsuperscript{112}

1. **Language of DOHSA**

First, the Court stated that Congress would have explicitly preserved the states’ power to apply their substantive law to the high seas if that was its intention.\textsuperscript{113} Section 4 of DOHSA\textsuperscript{114} explicitly preserves applicability of foreign jurisdiction substantive law to DOHSA actions under the

\textsuperscript{107} Tallentire, 106 S. Ct. at 2493. See supra text accompanying notes 97-100 for a discussion of the jurisdiction of DOHSA and OCSLA.

\textsuperscript{108} Tallentire, 106 S. Ct. at 2493.

\textsuperscript{109} Id. at 2492.

\textsuperscript{110} Id.

\textsuperscript{111} See id. For a discussion of courts and commentators endorsing this conclusion, see supra note 89.

\textsuperscript{112} Id. To justify application of such an analysis, the Court cited Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285 (1956) (quoting United States v. Heirs of Bois-doré, 49 U.S. (1 How.) 113, 122 (1849) which stated: “In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”).

\textsuperscript{113} See id. at 2494-95.

appropriate circumstances. In the Court’s view, Congress would have been similarly explicit if it intended section 7 to have the same effect as section 4 with regard to the states.

Additionally, the Court relied upon the “marked similarity” of section 7 to the “saving to suitors” clause which allows litigants to bring in personam maritime actions in state courts. The Court held that section 7’s similarity to the saving to suitors clause, which grants non-substantive concurrent jurisdiction to the states, supported a reading of section 7 to that same effect. Stated simply, section 7 grants to the states the right to merely entertain the action without invoking the states’ substantive law.

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115 Id. Section 4 of DOHSA (later codified at 46 U.S.C. § 764) provides:
Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

Id.

116 Tallentire, 106 S. Ct. at 2494-95.

117 Originally part of the Federal Judiciary Act of 1789, the “saving to suitors” clause is now codified as 28 U.S.C. § 1333 (1982) which reads in part as follows:
“The district courts shall have original jurisdiction exclusive of the courts of the States, of:
(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled . . . .”

This clause allows a suitor asserting an in personam admiralty claim to elect to sue in “common law” state court through an ordinary civil action. In such actions, the state courts must apply the same substantive law as would be applied had the suit been instituted in admiralty in a federal court. Shannon v. City of Anchorage, 478 P.2d 815 (Alaska 1970).

118 Tallentire, 106 S. Ct. at 2495.

119 Id.

120 Id. Specifically, the Court stated:
Thus, a natural reading of § 7 is that a state statute providing a wrongful death right of action traditionally unavailable at common law, would not be “affected” by DOHSA in the sense of being rendered an incompetent means of invoking state jurisdiction, but the state statute’s substantive provisions would not, by virtue of the saving provision, “extend as a conduct-governing enactment on the high seas” in conflict with DOHSA’s provisions.

Id. (citing Safir v. Compagnie Generale Transatlantique, 241 F. Supp. 501, 508 (E.D.N.Y. 1965)).
2. Legislative History of Section 7

The Court cited the legislative history of section 7 before and after the Mann Amendment to support its conclusion that section 7 is a jurisdictional saving clause.\(^{121}\) The Court noted that DOHSA's original drafters, the Maritime Law Association (MLA), intended section 7 to be a jurisdictional saving clause which would create concurrent jurisdiction for the states.\(^{122}\) The MLA believed such a clause was required to achieve the concurrent jurisdiction effect because of the 1917 Supreme Court decision in *Southern Pacific Co. v. Jensen*.\(^{123}\) *Jensen* denied availability of a state statutory remedy in an admiralty action because it was not a common law remedy saved to suitors from the grant of exclusive jurisdiction to federal courts over matters in admiralty.\(^{124}\)

In the Court's view, the legislative history of section 7 demonstrated an intent to preserve the state's power to confer remedies for wrongful deaths arising from accidents on territorial waters.\(^{125}\) Moreover, section 7 had the incidental effect of allowing a state, in the exercise of its concurrent jurisdiction, to apply state remedies not inconsistent with substantive maritime law.\(^{126}\) Since a state had

\(^{121}\) See id. at 2496-97.

\(^{122}\) Id. at 2495.

\(^{123}\) 244 U.S. 205 (1917).

\(^{124}\) See id. at 218. *Jensen* held that, because a state workmen's compensation remedy was unknown at common law, such action was not "saved to suitors" when the jurisdiction was in admiralty. See id. Consequently, the states were incompetent to confer such a remedy where the action was in admiralty. Id. Allowing states to do so, the Court reasoned, would contravene the Constitution's exclusive grant of admiralty jurisdiction to the federal judiciary. Id.

The *Tallentire* Court pointed out that, as discussed in *Jensen*, wrongful death remedies, as well as worker's compensation remedies, were unknown at common law. *Tallentire*, 106 S. Ct. at 2496. Thus, the MLA believed an explicit jurisdictional saving clause might be needed to ensure state jurisdiction over wrongful death actions arising from territorial waters. Id. at 2495-96. For further discussion of *Jensen*, see supra note 28.

\(^{125}\) *Tallentire*, 106 S. Ct. at 2496. "[T]he remarks of the proponents of [DOHSA] amply support the theory that § 7 originally was intended to preserve the state courts' jurisdiction to provide wrongful death remedies under state law for fatalities on territorial waters." Id.

\(^{126}\) Id.
the power to provide remedies for wrongful deaths on its territorial waters\textsuperscript{127} and DOHSA was explicitly limited to wrongful deaths occurring beyond territorial waters, section 7, as originally proposed, ensured that the states retained the power to confer territorial water remedies.\textsuperscript{128}

Next, the Court determined whether the Mann Amendment to section 7 was intended to allow state wrongful death statutes to operate on the high seas. After citing remarks of various representatives during the House debate, the Court stated that DOHSA's proponents clearly intended the Act to confer exclusive federal jurisdiction over the high seas.\textsuperscript{129} Regarding the effect of the Mann Amendment, the Court held that it allowed states to serve as a forum for wrongful death actions arising on the high seas in which they must apply the substantive rules of DOHSA.\textsuperscript{130} However, the Court further stated that the amendment "did not implicitly sanction the operation of state wrongful death statutes on the high seas in the same manner as the saving clause did in territorial waters."\textsuperscript{131}

Finally, the Court buttressed this conclusion with more ambiguous indications of Congress' intent when it passed DOHSA in its final form. First, some of the representatives' comments expressed a belief that, under Jensen,\textsuperscript{132} federal legislation regarding the high seas would preempt application of conflicting state legislation to the high seas.\textsuperscript{133} Second, there was doubt about the extent of Con-

\begin{footnotes}
\item[$127$] See American Steamboat Co. v. Chase, 83 U.S. (16 Wall.) 522 (1872).
\item[$128$] Tallentire, 106 S. Ct. at 2496.
\item[$129$] \textit{Id.} "[DOHSA's proponents] stated their firm intent to make exclusive federal jurisdiction over wrongful death actions arising on the high seas by restricting the scope of § 7 to territorial waters." \textit{Id.}
\item[$130$] \textit{Id.} at 2497. The Court stated: "By suggesting the deletion of the language limiting the jurisdictional saving clause's scope only to territorial waters, Representative Mann intended to ensure that state courts could also serve as a forum for the adjudication of wrongful death actions arising out of accidents on the high seas." \textit{Id.}
\item[$131$] \textit{Id.}
\item[$128$] See supra notes 123-124 and accompanying text for a discussion of Jensen.
\item[$132$] Tallentire, 106 S. Ct. at 2497; see supra note 85 for the comments of Rep. Volstead. In Jensen, the Court stated, "no [state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress." Jensen, 244 U.S. at
\end{footnotes}
gress' ability to constitutionally delegate its jurisdiction over maritime activities to the states. In sum, the Court held that if Congress intended section 7 to require enforcement of substantive state law on the high seas, it would have done so explicitly. Further, the Court stated that its conclusion is supported by section 7's legislative history and is consistent with the prevailing view of the law at the time of its passage.

3. Purposes Underlying DOHSA

Next, the Court held that Congressional purposes behind DOHSA mandates the Court's interpretation of section 7. In the Court's view, DOHSA was enacted with two purposes in mind. The first was to provide a wrongful death remedy where previously there had been none. Second, DOHSA was intended to achieve a uniform provision of a maritime wrongful death remedy. Given the Act's uniformity objectives, the Court held it is "hardly conceivable" that Congress intended widely divergent state wrongful death statutes to apply on the high seas. Further, the Court noted that the majority of cases and

216. For further discussion of Jensen, see supra note 28, notes 123-124 and accompanying text.

134 Tallentire, 106 S. Ct. at 2498. The Court cited Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) in which the Court held that Congress, in seeking to authorize the states to prescribe and enforce maritime workmen's compensation rights and remedies, unconstitutionally delegated its legislative power concerning maritime and admiralty jurisdiction. Id. The Court reasoned that such a delegation would defeat the object of the constitutional grant of authority - namely the achievement of harmonious and uniform maritime law. See id.

135 Tallentire, 106 S. Ct. at 2498.

136 Id. at 2499. Specifically, the Court stated: "In sum, we believe that our reading of section 7, while not free from doubt, gives the proper meaning to the language of the section, is supported by its legislative history, and is consistent with the law governing at the time of its passage." Id.

137 Id. Under The Harrisburg, 119 U.S. 199, there was no action for wrongful death under the general maritime law. See supra notes 22-27 and accompanying text for a discussion of The Harrisburg.

138 Tallentire, 106 S. Ct. at 2499. "Congress acted in 1920 . . . to achieve uniformity in the provision of such a remedy." Id. See also H.R. REP. No. 674, 66th Cong., 2d Sess. 3-4 (1920); S. REP. No. 216, 66th Cong., 1st Sess. 3-4 (1919) (emphasizing importance of uniformity on the high seas).

139 Tallentire, 106 S. Ct. at 2499. For a discussion of the application of state
commentators have reached the same conclusion.\textsuperscript{140}

4. Importance of Uniformity

Lastly, the Court held that uniformity of wrongful death remedies facilitates "the effective and just administration of those remedies."\textsuperscript{141} The Court cited two examples to support this contention. First, recognition of concurrent state jurisdiction to hear DOHSA actions provides a convenient forum to the parties.\textsuperscript{142} Second, the holding that states have concurrent jurisdiction to hear DOHSA actions is consistent with the concurrent jurisdiction granted to the states in Jones Act\textsuperscript{143} and OCSLA\textsuperscript{144} actions. Jurisdictional uniformity between these acts will allow survivors of those killed on the high seas, who each present claims under different acts, to bring their action in the same forum.\textsuperscript{145}

Thus, the Court held these four considerations required it to interpret section 7 as a jurisdictional saving clause and not a statement that state substantive law ap-

\begin{footnotes}
\textsuperscript{140} Id. For a list of authority supporting the proposition that state statutes may not be applied to the high seas, see supra notes 30-39 and accompanying text.

\textsuperscript{141} Id. For a list of authority supporting the proposition that state statutes may not be applied to the high seas, see supra note 87. The Court also noted that many courts and commentators support the Court's holding that section 7 is a jurisdictional saving clause. Tallentire, 106 S. Ct. at 2499. For discussion of the authority supporting this position, see supra note 89.

\textsuperscript{142} Id. The Court further stated that state courts are competent to hear DOHSA actions because resolution of such claims does not generally require the expertise that admiralty courts provide. Id.

\textsuperscript{143} See Engel v. Davenport, 271 U.S. 33, 46 (1926) (state and federal courts have concurrent jurisdiction over Jones Act claims). See supra note 42 for a discussion of the Jones Act.

\textsuperscript{144} See Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981) (recognizing state courts' concurrent jurisdiction over OCSLA claims). See supra note 7, notes 96-100 and accompanying text for a discussion of OCSLA.

\textsuperscript{145} Tallentire, 106 S. Ct. at 2500.

\textsuperscript{146} See supra note 143, the unavailability of such jurisdiction for DOHSA (seaman or non-seaman) claims might require survivors of persons killed in the same accident to bring their action in separate forums, depending upon which Act their actions are based. See supra note 41 for a discussion of the Jones Act.
\end{footnotes}
plies to wrongful deaths on the high seas.\textsuperscript{147} Therefore, the Court concluded, DOHSA preempts application of state wrongful death statutes to the high seas.\textsuperscript{148}

The Court admitted that the resulting denial of non-pecuniary damages in wrongful death actions arising from the high seas is inconsistent with the availability of such damages in \textit{Moragne} actions arising from territorial waters.\textsuperscript{149} However, this consideration was "overshadowed by the potential for serious conflicts between DOHSA and state substantive law in such areas as limitations periods, classes of beneficiaries, and the definition of potential defenses."\textsuperscript{150}

Justice Powell, joined by Brennan, Marshall, and Stevens, dissented on the grounds that the plain language of section 7 and its legislative history clearly indicate that the Mann Amendment was intended to preserve state remedies on the high seas.\textsuperscript{151} However, all justices agreed that OCSLA was inapplicable to the action.\textsuperscript{152} In Justice Powell's view, the language of section 7 clearly preserved all state remedies for wrongful death at sea without territorial qualification.\textsuperscript{153} Beyond the language of section 7, the dissent viewed its legislative history as representing Congress' intent, in passing the Mann Amendment, to accomplish that same end.\textsuperscript{154} Finally, the dissent stated that the

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\textsuperscript{147} Tallentire, 106 S. Ct. at 2494.
\textsuperscript{148} Id. at 2500.
\textsuperscript{149} Id. See supra notes 45-52 and accompanying text for a discussion of \textit{Moragne}. In \textit{Gaudet}, 414 U.S. 573, the Court allowed recovery of non-pecuniary damages in \textit{Moragne} actions. See supra notes 55-64 and accompanying text for a discussion of \textit{Gaudet}.
\textsuperscript{150} Tallentire, 106 S. Ct. at 2500.
\textsuperscript{151} See id. at 2501.
\textsuperscript{152} Id. at n.1.
\textsuperscript{153} Id. at 2502. "[A]lthough the original § 7 preserved state-law rights of action within territorial waters, the ultimately enacted § 7 preserved these rights of action without geographic qualification. [Section] 7 is plainly intended to save state remedies for death on the high seas." Id. See supra note 13 for the full text of section 7.
\textsuperscript{154} Id. at 2502-04. "Despite the confusion of the debate, it is clear that the Mann Amendment removed the clause that expressly limited state remedies 'to causes of action accruing within the territorial limits of any State.'" Id. at 2503 (emphasis original).
\end{flushleft}
majority’s goal of uniformity of result was not a ground by which the Court could ignore Congress’ decision to allow states to provide a remedy for wrongful deaths on the high seas.\footnote{Id. at 2504.}

III. PRACTICAL IMPLICATIONS

*Tallentire* holds unequivocally that DOHSA preempts application of substantive state wrongful death statutes to actions arising on the high seas; but section 7 of DOHSA, acting as a jurisdictional “saving clause,” allows state courts to entertain DOHSA actions while applying the substantive rules of the Act.\footnote{See supra notes 110-111 and accompanying text for further discussion of the Court’s holding.} This scheme will allow beneficiaries to bring their actions in the admiralty side or civil side of federal court, or in a civil action in state court.\footnote{See AMERICAN LAW INSTITUTE, supra note 89, at 236-38; Forde, supra note 89, at 29, 36. Federal jurisdiction on the admiralty side is proper under section 1 of DOHSA which provides, *inter alia*, that DOHSA beneficiaries “may maintain a suit for damages . . . in admiralty.” 46 U.S.C. § 761 (1982). State courts have jurisdiction to entertain civil actions under the provisions of DOHSA pursuant to the holding in *Tallentire*. See supra notes 110-111 and accompanying text for a discussion of the Court’s holding. Accordingly, such civil actions involving diversity of citizenship can invoke diversity jurisdiction on the civil side of federal court. See 28 U.S.C. § 1332(a) (1982).} Being able to bring suits in state courts and federal courts on the civil side, DOHSA parties now have the right to a jury trial.\footnote{See supra note 41 for a discussion of the Jones Act.} This is analogous to the rules regarding where a Jones Act\footnote{See The Law of Seamen, supra note 47, at 413.} suit may be brought.\footnote{See supra note 41 for a discussion of the Jones Act.}

Preemption of state statutes on the high seas will contribute to a more uniform provision of wrongful death remedies in actions arising on the high seas. Wrongful death remedies can not be mixed and matched to suit the plaintiff. All survivors of non-seamen killed on the high seas will look to a single statute, DOHSA, for a remedy.
Regarding the measure of damages, all wrongful death remedies awarded in actions arising on the high seas are limited to pecuniary losses.\(^1\) However, *Moragne* actions arising on territorial waters will allow non-pecuniary damages.\(^2\) In spite of this discrepancy, other elements of wrongful death actions under DOHSA will be uniform on the high seas. These include the statute of limitations, the designated beneficiaries, and potential defenses.\(^3\) Preemption of state statutes also avoids the often detailed choice of law analyses which faced courts in the pre-DOHSA era.\(^4\)

Contrary to the predictions of some commentators and courts,\(^5\) DOHSA is now the most prominent wrongful death remedy for deaths on the high seas. Most states allow non-pecuniary damages in wrongful death actions.\(^6\) An opposite conclusion in *Tallentire* regarding the preemption issue would encourage beneficiaries of persons killed on high seas to pursue the more generous state statutes. The result would have greatly diminished the role of DOHSA in the field of wrongful death remedies.

*Tallentire* also avoids certain anomalous possibilities. The Fifth and Ninth Circuits have held that the *Moragne* general maritime remedy for wrongful death preempts state wrongful death statutes when death occurs within territorial waters.\(^7\) If *Tallentire* allowed state statutes to operate on the high seas, the Fifth and Ninth Circuits would allow states to confer remedies on the high seas but not within territorial waters bordering their own shores.

\(^1\) See supra note 10 and accompanying text for a discussion of the damages provided by DOHSA.

\(^2\) See supra notes 53-64 and accompanying text for a discussion of the recoverability of non-pecuniary damages in *Moragne* actions.

\(^3\) See *Tallentire*, 106 S. Ct. at 2500.

\(^4\) See supra notes 33-37 and accompanying text for a discussion of the choice of law analysis necessary when multiple wrongful death statutes may be applicable.

\(^5\) See supra notes 65-68 and accompanying text for a discussion of the view that DOHSA had become obsolete.

\(^6\) See *Gaudet*, 414 U.S. at 587.

\(^7\) See supra notes 45-52 and accompanying text for a discussion of *Moragne*.

\(^8\) See *Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980); *In re S.S. Helena*, 529 F.2d 744, 753 (5th Cir. 1976).
Other undesirable situations are avoided by Tallentire's holding that states have concurrent jurisdiction to entertain DOHSA actions. If, for example, an aircraft crashed on the high seas, killing 20 passengers, and injuring 20 more, the survivors of the persons killed would have to bring their actions under DOHSA in federal court if states did not have concurrent jurisdiction to entertain such actions.\textsuperscript{169} However, the injured passengers would have the opportunity, or possibly be required, to sue in state court since DOHSA provides a remedy only for wrongful death.\textsuperscript{170} Additionally, the passengers in state court would probably be entitled to a jury trial, while no such right exists for the plaintiffs in the admiralty side of federal court.\textsuperscript{171}

IV. Conclusions

As evidenced by the long list of conflicting opinions regarding the meaning and effect of section 7,\textsuperscript{172} any attempt to derive a definitive interpretation from that provision's language and legislative history is hopeless.\textsuperscript{173} Even the Tallentire Court conceded the possibility of error on this point.\textsuperscript{174} However, the Court's decision is the correct one for a number of reasons. First, the Court avoided a holding that would have judicially repealed the significance of DOHSA.\textsuperscript{175} Such a result can not be consistent with Congress' intent when it passed DOHSA. Addi-

\begin{itemize}
\item \textsuperscript{169} See Forde, \textit{supra} note 89, at 34.
\item \textsuperscript{170} Id.
\item \textsuperscript{171} Id. As an action in admiralty, there is no right to trial by jury in a DOHSA action. \textit{FED. R. CIV. P.} 38(e).
\item \textsuperscript{172} See \textit{supra} notes 87-90 and accompanying text for a discussion of the conflicting interpretations of section 7.
\item \textsuperscript{173} For a discussion of the language and legislative history of section 7, see \textit{supra} notes 78-90 and accompanying text. Quoting the Fifth Circuit opinion in his dissent, Justice Powell stated: "[A]n attempt to discern the congressional intent from the conflicting statements by participants in the debate [over DOHSA and the Mann amendment] is hopeless?" Tallentire, 106 S. Ct. at 2503 (quoting Tallentire, 754 F.2d at 1280-82).
\item \textsuperscript{174} See Tallentire, 106 S. Ct. at 2499.
\item \textsuperscript{175} See \textit{supra} notes 65-68 and accompanying text for a discussion of the view that DOHSA had become obsolete.
\end{itemize}
tionally, by adopting a uniform approach to remedies for deaths on the high seas, the Court spared lower courts the often difficult task of selecting an appropriate death statute under conflict of law analysis.\textsuperscript{176} Finally, the Court's attention to this need for uniformity in the field of admirality and the overall purposes of DOHSA seems to be a wiser approach than an apparently futile attempt to untangle the twisted history and ambiguous language of section 7.

Regardless of the approach taken by the Supreme Court, the best solution to this controversy is for Congress to amend the Act in order to decisively express its view on the matter. Since the controversy arises from uncertainty about Congressional intent, it certainly seems most appropriate that Congress settle the issue.

Zachary W. Allen

\textsuperscript{176} See supra notes 34-38 and accompanying text for a discussion of the conflict of law analyses which were typically employed before DOHSA's passage.
CRIMINAL PROCEDURE — SEARCH AND SEIZURE —
The warrantless, naked-eye police observation of a fenced-in backyard of a home from an airplane operating in public airspace at an altitude of one thousand feet did not violate the fourth amendment. California v. Ciraolo, 106 S. Ct. 1809 (1986).

In September 1982 the Santa Clara police received an anonymous telephone tip regarding marijuana growing in the defendant's backyard. Police officer Shutz conducted a ground level investigation but could not see into the yard because a six-foot outer fence and a ten-foot inner fence completely enclosed it. Shutz secured a private plane, flew over the defendant's house at an altitude of one thousand feet, and identified marijuana plants growing in the fenced-in yard. Shutz obtained a search warrant based on an affidavit describing the anonymous tip and the aerial observation. When the police executed the warrant the next day, they seized seventy-three marijuana plants and arrested the defendant for cultivating marijuana.

The defendant moved to suppress the evidence on the ground that the aerial surveillance constituted an unreasonable search in violation of the fourth amendment to

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2 Id.
3 Id. Shutz flew within public navigable airspace. Public navigable airspace is defined as "airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter." 49 U.S.C. § 1301(29) (1982).
4 Ciraolo, 106 S. Ct. at 1810. Shutz made a naked-eye observation of the marijuana plants which were eight to ten feet in height growing in a fifteen-by-twenty-five foot plot in the defendant's yard. Id. Shutz photographed the area with a standard 35mm camera. Id. at 1810-11.
5 Id. at 1811. Shutz attached the photograph depicting the defendant's house, backyard, and neighboring homes to the affidavit as an exhibit. Id.
6 Id.
the United States Constitution. The trial court denied the defendant's motion to suppress the evidence, so the defendant pled guilty to a charge of cultivation of marijuana. The California Court of Appeals reversed the trial court on the ground that the warrantless aerial observation of the defendant's backyard constituted an unreasonable search in violation of the fourth amendment. The California Supreme Court denied the State's petition for review, and the United States Supreme Court subsequently granted the State's petition for certiorari. Held, reversed: The warrantless naked-eye observation of a fenced-in backyard of a home from an airplane operating in public airspace at an altitude of one thousand feet did not violate the fourth amendment. California v. Ciraolo, 106 S. Ct. 1809 (1986).

I. The United States Supreme Court and the Fourth Amendment

The fourth amendment to the United States Constitution safeguards "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In early cases

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7 Id. See infra note 11 for the text of the fourth amendment.
8 Ciraolo, 106 S. Ct. at 1811.
9 People v. Ciraolo, 161 Cal. App. 3d 1081, 1090, 208 Cal. Rptr. 93, 98 (1984). In reaching this conclusion, the California Court of Appeals deemed it significant that the aerial police surveillance of the defendant's backyard did not result from a routine patrol but was undertaken for the specific purpose of observing the defendant's backyard. Id. at 1089, 208 Cal. Rptr. at 97. By holding that this purposeful police observation violated the defendant's reasonable expectation of privacy, the court implied that if a policeman on a routine aerial patrol had identified the marijuana, the court would have upheld the search. Ciraolo, 106 S. Ct. at 1813 n.2. The United States Supreme Court found it difficult to understand how the defendant's expectations of privacy from aerial observation might differ when two airplanes pass overhead at the same altitude but for different purposes. Id.
10 Ciraolo, 106 S. Ct. at 1811.
11 U.S. Const. amend. IV. The full text of the amendment reads: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
volving the scope of the fourth amendment protection from unreasonable searches and seizures, the United States Supreme Court used real property concepts, i.e., the "house," the "curtilage,"\textsuperscript{12} and the "open fields," to

\textsuperscript{12} The Oxford English Dictionary defines the curtilage as "a small court, yard, girth, or piece of ground attached to a dwelling house, and forming one enclosure with it, or so regarded by law; the area attached to and containing a dwelling house and its out-buildings." 2 \textit{OXFORD ENGLISH DICTIONARY} 1278 (1933). See Dow Chem. Co. v. United States, 106 S. Ct. 1819, 1826 n.3 (1986) (for most homes, the boundaries of the curtilage will be clearly marked; and the concept defining the curtilage — as the area around the home to which the activity of home life extends — is a familiar one easily understood from our daily experience); United States v. Van Dyke, 643 F.2d 992, 993 (1st Cir. 1981) (officers within the fenced-in area surrounding the home were within the curtilage); United States v. Williams, 581 F.2d 451, 453-54 (5th Cir. 1978) (curtilage does not extend beyond the most remote building).

The curtilage has been afforded the same fourth amendment protection from unreasonable searches and seizures as the home. \textit{Ciraolo}, 106 S. Ct. at 1812, 1816 (quoting Oliver v. United States, 466 U.S. 170, 180 (1984)). Courts have considered several factors when determining whether the area searched was located within the curtilage. Relevant factors include: 1) the distance between the area
define the reach of the fourth amendment.\textsuperscript{13} Because the amendment expressly enumerates "houses," the Supreme Court has consistently afforded the highest level of protection to the home\textsuperscript{14} and other dwellings.\textsuperscript{15} The prop-


\textsuperscript{14} The fourth amendment has drawn a firm line at the entrance to the house. Payton, 445 U.S. at 590. "We have consistently held that the entry into a home to conduct a search... is unreasonable under the Fourth Amendment unless done pursuant to a warrant." Steagald, 451 U.S. at 211. See Payton, 445 U.S. at 586 n.25; Coolidge v. New Hampshire, 403 U.S. 443, 474-75, 477-78 (1971); Jones v. United States, 357 U.S. 493, 497-98 (1958). "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Silverman v. United States, 365 U.S. 505, 511 (1960).

\textsuperscript{15} The fourth amendment protection of the house has been extended to other residential premises. See, e.g., Camara v. Municipal Court, 387 U.S. 529, 540 (1967)(search of apartment invaded interests protected by the fourth amend-
erty-oriented concepts of the "curtilage" and the "open fields," each developed and defined by case law, have also played a significant role in the Supreme Court's fourth amendment analysis.

In *Hester v. United States* the Supreme Court first considered whether the protection afforded by the fourth amendment extended beyond the home. *Hester* involved a warrantless search of a field by federal agents to locate two jugs of illegal whiskey. The Supreme Court upheld the search as constitutional, declaring that "the special protection accorded by the fourth amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields." Thus, the Supreme Court placed all areas located in the "open fields" completely outside the scope of the fourth amendment.

The full scope of the open fields doctrine enunciated in *Hester* remained unclear until *Olmstead v. United States*. In *Olmstead* the Supreme Court stated that a fourth amendment search did not occur without "an actual physical invasion of [the] house 'or curtilage'" (emphasis added). Thus, the Court included the curtilage, the private land immediately surrounding the house, within the fourth amendment protection from unreasonable searches and

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16 265 U.S. 57 (1924).
17 *Id.* In *Hester* the defendant was involved in selling bootleg whiskey. *Id.* When the defendant realized he was being watched by federal agents as he made a sale to a customer, he threw two jugs of whiskey into a nearby field. *Id.* at 58. The agents conducted a warrantless search of the field to locate the jugs. *Id.*
18 *Id.* at 59.
19 277 U.S. 438 (1928). *Olmstead* involved a conspiracy to import, possess and sell liquor unlawfully. *Id.* at 455-56. Prohibition officers obtained evidence of the conspiracy by tapping the phone lines of the conspirators. *Id.* The Court found it important that "the insertions were made without trespass upon any property of the defendants." *Id.* at 457.
20 *Id.* at 466.
seizures previously afforded only the "house." When the Court brought the curtilage within the protection of the fourth amendment, it impliedly limited the scope of the open fields doctrine introduced in Hester. After Olmstead, the open fields doctrine placed only areas completely outside the curtilage of a house beyond the protection of the fourth amendment.

Olmstead also introduced the tort-oriented concept that a fourth amendment "search" required an actual physical trespass into a "constitutionally protected area" such as a house or its curtilage. In Olmstead the Supreme Court found that the fourth amendment did not prohibit the warrantless wiretapping of the defendants' phones, because no actual physical entry of the defendants' homes or

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21 Id. See Note, Expectations of Privacy in the Open Fields and an Evolving Fourth Amendment Standard of Legitimacy: Oliver v. United States, 16 N.M.L. REV. 129, 139 (1986); see also Fixel v. Wainwright, 492 F.2d 480, 483 (5th Cir. 1974) ("curtilage" is also entitled to fourth amendment protection); United States v. Molkenbur, 430 F.2d 563, 566 (8th Cir.) (the curtilage is entitled to the same protection as the home against search and seizure), cert. denied, 400 U.S. 952 (1970); Wattenburg, 388 F.2d at 857 (protection afforded by the fourth amendment extends to open areas immediately adjacent to the house); United States ex rel. Boyance v. Myers, 398 F.2d 896, 899 (3d Cir. 1968)(protection extends beyond the walls of a home to the "curtilage"); Fullbright v. United States, 392 F.2d 432, 435 (10th Cir. 1968) ("houses" in the fourth amendment includes the curtilage); Rosencranz v. United States, 356 F.2d 310, 313 (1st Cir. 1966)("houses" has been enlarged to include "curtilage"); Care, 231 F.2d at 25 (protection of the fourth amendment applies to the curtilage).

22 Note, supra note 21, at 139 n.87. See Oliver v. United States, 104 S. Ct. 1735, 1741 (1984)(an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home); United States v. Freie, 545 F.2d 1217, 1223 (9th Cir. 1976)(protection provided by the fourth amendment is not extended to the open fields), cert. denied, 430 U.S. 956 (1977); United States v. Brown, 473 F.2d 952, 954 (5th Cir. 1973)(search of an open field without a search warrant is constitutionally permissible); United States v. Capps, 435 F.2d 637, 640 (9th Cir. 1970)(the fourth amendment protections do not extend to the open fields surrounding a dwelling and its immediately adjacent curtilage); United States v. Romano, 350 F.2d 566, 569 (2d Cir. 1964) (protection accorded by the fourth amendment does not extend to the open fields), cert. denied, 380 U.S. 942 (1965); Janney v. United States, 206 F.2d 601, 604 (4th Cir. 1953) (the fourth amendment does not extend to the open fields).

23 Olmstead, 277 U.S. at 464-66. See Silverman, 365 U.S. at 510 ("The absence of a physical invasion of the petitioner's premises was . . . a vital factor in the Court's decision in Olmstead."). See generally LAFAVE, supra note 13, at § 2.3.
offices occurred. As a result of the trespass doctrine of *Olmstead*, a warrantless search of land would be judged unconstitutional only if the area searched was located within the constitutionally protected curtilage of a house, and a government agent physically trespassed onto the land.

In *United States v. Katz* the Supreme Court rejected the property and tort concepts it adhered to in *Hester* and *Olmstead* and laid the basis for the "reasonable expectation" test as the method for determining the reach of the fourth amendment. In *Katz*, the defendant, a Los Angeles bookmaker, was convicted for transmitting wagering information by telephone across state lines. FBI agents obtained the evidence necessary to convict the defendant by attaching an electronic listening device to the telephone booth from which he placed calls. The Ninth Circuit affirmed the defendant's conviction. Applying

*Olmstead*, 277 U.S. at 464. The Supreme Court instructed that a violation of the fourth amendment must involve an official search and seizure of the person, a seizure of his papers or his tangible material effects, or an actual physical invasion of his house or curtilage. *Id.* at 466.

*Note, supra note 21, at 135-36.*


*Katz*, 389 U.S. at 360 (Harlan J., concurring). The touchstone of the fourth amendment analysis is now the reasonable expectation test introduced by Justice Harlan in *Katz*. *Ciraolo*, 106 S. Ct. at 1811. The test posits a two-part inquiry. First, has the individual manifested a subjective expectation of privacy from the challenged search. Second, is society willing to recognize that expectation as reasonable? *Id.* Whether a person has exhibited a subjective expectation of privacy in the area searched is determined by whether he "took normal precautions to maintain his privacy." *Id.* at 1812. Such precautions include "No Trespassing" signs, fences, and remote locations. Whether the individual's subjective expectation of privacy is one society will recognize as reasonable turns on "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Id.*

While Justice Harlan did not label his "twofold requirement" the "reasonable expectation" test, his concurrence is credited with the creation of the test. J. HALL, *SEARCH AND SEIZURE* § 2.4 (1982). The Supreme Court first used the "reasonable expectation" terminology in the majority opinion in *Terry v. Ohio*, 392 U.S. 1, 9 (1967).

*Katz*, 389 U.S. at 348.

*Id.*
Olmstead's trespass doctrine, the Ninth Circuit found that no fourth amendment search had occurred since the FBI did not physically enter the telephone booth occupied by the defendant.\textsuperscript{31}

Announcing that the reach of the fourth amendment no longer turned on the presence or absence of a physical trespass into a constitutionally protected area,\textsuperscript{32} the Supreme Court reversed the conviction by declaring that the fourth amendment "protects people, not places."\textsuperscript{33} The Court's new fourth amendment analysis focused on whether a person maintained a "constitutionally protected reasonable expectation of privacy" from the warrantless search.\textsuperscript{34} Justice Harlan introduced the two-part inquiry fundamental to this analysis.\textsuperscript{35} The first part of the inquiry asks whether the individual has manifested a subjective expectation of privacy from the challenged search.\textsuperscript{36} The second half of the inquiry questions whether society will find the individual's privacy expectation objectively reasonable.\textsuperscript{37} An individual alleging that a warrantless search violated his reasonable expectation of privacy must satisfy both prongs of the reasonable expectation text.\textsuperscript{38} Thus, \textit{Katz} shifted the focus of the fourth amendment inquiry from whether a government agent physically trespassed into a constitutionally protected area to whether an agent observed an area in which an individual displayed a reasonable expectation of privacy.\textsuperscript{39}

\textit{Katz} rejected the rigid application of property and tort law concepts in the fourth amendment analysis. However, many courts continued to consider the place being searched in determining whether an individual manifested

\begin{footnotes}
\item[31] Id.
\item[32] Id. at 348-49.
\item[33] Id. at 353.
\item[34] Id. at 351.
\item[35] Id. at 360 (Harlan J., concurring).
\item[36] See supra note 28 for Harlan's two-part test.
\item[37] Katz, 389 U.S. at 360.
\item[38] Id.
\item[39] Note, supra note 21, at 137.
\end{footnotes}
a "constitutionally protected reasonable expectation of privacy." The Supreme Court upheld this approach in *Oliver v. United States* by reaffirming the open fields doctrine established in *Hester*. In *Oliver* a warrantless search conducted by narcotics agents uncovered a field of marijuana over one mile from the defendant's home. The Supreme Court held that the government's intrusion upon the open field did not constitute an unreasonable search proscribed by the amendment.

The Court reconciled *Hester's* absolute exclusion of the open fields from constitutional protection with *Katz's* reasonable expectation test by phrasing its reaffirmation of the open fields doctrine using *Katz* terminology. The Court stated, "No expectation of privacy legitimately attaches to open fields." As a result, the Court declared

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40. Id.

41. Justice Harlan, who first articulated the reasonable expectation test observed that although the fourth amendment focuses on "people, not places," the analysis still requires "reference to a 'place.'" *Katz*, 389 U.S. at 361. The inquiry into whether an expectation of privacy is reasonable must consider the area to which the expectation attaches. See *United States v. Jackson*, 588 F.2d 1046, 1053 (5th Cir.) (whenever government agents enter the curtilage they intrude upon individual's reasonable expectation of privacy), *cert. denied*, 442 U.S. 941 (1979); *Williams*, 581 F.2d at 453 (the distinction between the open fields and the curtilage is still helpful in determining reasonable privacy expectations); *Capps*, 435 F.2d at 640 (fourth amendment protections do not extend beyond the curtilage); *Wattenburg*, 388 F.2d at 858 (in placing pile of trees within the curtilage, individual demonstrated a reasonable expectation of privacy); *Skipper v. State*, 387 So. 2d 261, 267 (Ala. Crim. App. 1980) (marijuana 200 feet from house was outside the curtilage and thus outside reasonable expectations of privacy); Comment, *Katz in Open Fields*, 20 AM. CRIM. L. REV. 485, 490-91 (1983). See generally Note, A Reconsideration of the Katz Expectation of Privacy Test, 76 Mich. L. Rev. 154, 177-79 (1977).

44. Id. at 1740. "We conclude, as did the Court in deciding *Hester v. United States*, that the government's intrusion upon the open fields is not one of those 'unreasonable searches' proscribed by the text of the Fourth Amendment." Id. In upholding searches of open fields as constitutional per se, the Court rejected the suggestion that these circumstances deserved a case-by-case analysis. Id. at 1742. It reasoned that an *ad hoc* approach would only make it difficult to balance the interests of law enforcement officers and the interests protected by the fourth amendment. Id.

45. Id. at 1737. The defendant argued that the secluded location of the marijuana patch coupled with his "No Trespassing" signs evinced a reasonable expectation of privacy. Id.

46. Id. at 1742. In answering the question whether a warrantless intrusion of an
that all warrantless searches of the open fields were *per se* constitutional.\textsuperscript{46}

**II. Federal Courts, the Fourth Amendment, and Aerial Surveillance**

During the period between the first aerial search case in 1973 and the Supreme Court's ruling on the constitutionality of aerial surveillance in *Ciraolo*, many state and federal courts addressed the constitutionality of warrantless aerial observations.\textsuperscript{47} Their responses varied due to the lack of specific guidelines from the United States Supreme Court.\textsuperscript{48} The courts generally recognized the need for constitutional standards for warrantless aerial surveillance situations.\textsuperscript{49} The following discussion focuses chronologically on a few federal court opinions that represent the various approaches taken by the numerous federal and state courts confronting this issue.\textsuperscript{50} These cases shed light on the factors repeatedly considered by the courts.

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\textsuperscript{46} Note, *supra* note 21, at 148. If the area searched was located outside the curtilage, the search was valid *per se*. If the area searched was within the curtilage, a reasonable expectation of privacy had to be found to invalidate the search. *Id.* at 146-47.

\textsuperscript{47} Comment, *supra* note 13, at 275.

\textsuperscript{48} *Id.* at 259.


\textsuperscript{50} For a list of early state court decisions on the validity of aerial surveillance, see Comment, *supra* note 27, at 474 n.84. For a discussion of more recent state court cases dealing with aerial surveillance, see Comment, *supra* note 13, at 275 n.134.
applying the fourth amendment analysis to aerial observations.

In *United States v. DeBacker* the defendant contended that a warrantless aerial search for marijuana on his farm in rural Michigan violated his fourth amendment rights. This controversy was one of first impression in the federal courts.

The *DeBacker* court refused to declare that certain areas fell completely outside the scope of the fourth amendment. Instead, the court, following the rationale in *Katz*, reasoned that traditionally an individual could not reasonably expect privacy in an open field, especially when low-altitude flights frequently occurred over the area. The court rejected the defendant's argument that steps taken to insure privacy from ground level observation resulted in a reasonable expectation of privacy from the aerial search.

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52 *Id.* at 1079. The government countered that the flight occurred over open fields to which fourth amendment rights do not attach. *Id.*

53 *Id.* at 1080. State courts, however, had been debating the constitutionality of warrantless aerial observations for years. Comment, *supra* note 13, at 275.

54 *DeBacker*, 493 F. Supp. at 1081.

55 *Id.* In making this determination the court remarked that any pilot or passenger of a commercial or pleasure craft could have spotted the marijuana since low-altitude flights over farms in that area were not infrequent. *Id.*

The court also relied on the fact that the police were "in a place they had a right to be," and from which they could easily observe the defendant's fields. *Id.* This frequent justification for upholding the constitutionality of aerial observations stems from oft-quoted language in *Katz* emphasizing, "[w]hat a person knowingly exposes to the public, even in his own home or office is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351. Justice Harlan expounded on this point in his concurring opinion stating

Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

*Id.* at 361 (Harlan, J., concurring).

56 *DeBacker*, 493 F. Supp. at 1081. All of the fields were located some distance from the home, and the defendant had fenced the property and posted signs forbidding trespassing. *Id.* at 1079. The court stated, "Defendant's relatively minor
Soon after the *DeBacker* decision, a federal district court again faced the question whether a warrantless aerial surveillance constituted an unreasonable search in *United States v. Mullinex*. In *Mullinex* the police arrested the defendant for cultivating marijuana based on evidence obtained during a warrantless police overflight of his farm. The defendant moved to suppress the evidence arguing that the aerial surveillance violated his reasonable expectation of privacy from such observation.

The *Mullinex* court followed the *DeBacker* analysis and declared that while open fields were not *per se* beyond constitutional protection, the defendant's expectation of privacy in an open field must be an expectation that society recognizes as reasonable before the fourth amendment will protect that expectation. Despite the fact that the defendant's efforts to conceal the marijuana from public view manifested a subjective expectation of privacy, the court found that the frequency of airplane flights over the farm precluded the defendant from maintaining a reasonable expectation of privacy from aerial surveillance.

In *United States v. Allen* the appellants challenged their convictions for possession of marijuana with the intent to distribute and for conspiracy to import marijuana, arguing that warrantless Coast Guard overflights of Allen’s

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expectations of privacy do not outweigh the value to society in permitting such nonintrusive surveillance.” *Id.* at 1081.


58 *Id.* at 512. The Kentucky State Police conducted the aerial overflight of the defendant’s farm after receiving a tip from an informant who had purchased marijuana there. *Id.* The flight over the farm lasted approximately five minutes and at its lowest point was 200 feet above the farm. *Id.* at 513.

59 *Id.* at 512. The United States argued that the open fields doctrine eliminated the necessity of obtaining a search warrant of the defendant’s farm. *Id.* at 513.

60 *Id.* at 514. “If the Court finds that the defendant could not have a reasonable expectation of privacy in the area where the seizure was made, in this case an open field, then he does not have the protection of the Fourth Amendment.” *Id.*

61 *Id.* The defendant’s girlfriend testified that planes frequently flew over the farm. *Id.* at 513. “What was exposed to police aerial surveillance was also exposed to the public.” *Id.* at 514.

oceanside ranch violated the fourth amendment. In Allen, a United States Customs Bureau officer suspected appellants of conducting a drug smuggling operation on Allen’s ranch. Photos taken of the ranch by the officer during a Coast Guard overflight revealed large-scale modifications to the barn and landscape, prompting further ground level investigation which led to the arrest of the appellants.

The appellants sought to establish that they legitimately expected privacy from aerial surveillance, because the objects photographed could not be viewed from any ground level vantage point outside the boundaries of the property. The court agreed that "a person need not construct an opaque bubble over his or her land in order to have a reasonable expectation of privacy." However, the court concluded that the appellants could not maintain even a subjective expectation of privacy from aerial surveillance for several reasons: the location of the ranch in an area routinely traversed by Coast Guard helicopters, the reasonable expectation that government officers conducting the flights would use electronic equipment, and the large size of the objects observed.

In United States v. Marbury, the Fifth Circuit became the first federal court to apply Oliver's reaffirmation of the open fields doctrine to an aerial surveillance situation. In Marbury, officers flew over a large gravel pit owned by one

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63 Id. at 1288. The Allen Ranch ran parallel to the ocean for about one mile but was separated from the beach by a narrow strip of federal property. Id. at 1286.
64 Id. at 1286. Allen terminated the previous owner's practice of permitting local fishermen and hunters to cross the ranch to reach the federal property on the ocean side. Id. The local residents complained to the local United States Customs Bureau office. Id. Larry Gano, the officer in charge, conducted a check on Allen's background which led him to believe Allen was using the ranch for a drug-smuggling base. Id.
65 Id. The officer took the photos with a telephoto lens. Id.
66 Id. at 1289.
67 Id. The court commented that today few unenclosed areas exist which could not be observed from the air, given the sophisticated electronic photographic devices now available. Id.
68 Id. at 1290.
69 732 F.2d 390 (5th Cir. 1984).
of the appellants in search of stolen machinery.\textsuperscript{70} Upholding the validity of this warrantless aerial search, the court found that the open fields doctrine of \textit{Oliver} authorized police observations of the plainly noncurtilage portions of this large tract of land, such as the sand dunes and roadways an eighth of a mile from the vehicle shed.\textsuperscript{71}

\textit{United States v. Bassford}\textsuperscript{72} involved warrantless aerial police overflights of separate marijuana plots cultivated by the two defendants.\textsuperscript{73} One of the defendants argued that the aerial surveillance occurred within the curtilage of his home and was thus unconstitutional \textit{per se}.\textsuperscript{74} However, the court refused to distinguish between ‘curtilage’ and ‘noncurtilage’ areas equally visible from the air.\textsuperscript{75} Instead the court limited its inquiry solely to whether the defendants maintained reasonable expectations of privacy from

\textsuperscript{70} Id. at 393. The officers conducted the aerial search after receiving two tips that equipment reported stolen was on the defendants’ premises. \textit{Id.}

\textsuperscript{71} Id. at 398. “Further, even absent the ‘open fields’ doctrine, aerial surveillance without a warrant of an area such as this large commercial gravel pit tract does not amount to an unconstitutional search, at least where, as here, it is for the purpose of verifying a particularized, justifiable belief concerning criminal activity associated with the premises.” \textit{Id.}

\textsuperscript{72} 601 F. Supp. 1324 (D. Me. 1985).

\textsuperscript{73} Id. at 1326. The police conducted a ground search of the Bassford property pursuant to a search warrant granted on the basis of the evidence obtained during the aerial observations and located one plot about ten feet from the Bassford home and a plot about 100 feet from the house. \textit{Id.} at 1327. Other plots were located approximately 370 feet and 450 feet from the dwelling. \textit{Id.} The officers believed they were still on Bassford property when they entered a dwelling actually owned and occupied by Richard Bradley. \textit{Id.} at 1328. More marijuana plants were found 200 feet from the Bradley house. \textit{Id.}

\textsuperscript{74} Id. at 1331. Bassford argued that \textit{Oliver} supported the proposition that the warrantless aerial search of an area within the curtilage of the home was \textit{per se} unconstitutional. \textit{Id.} at 1328. The court replied that \textit{Oliver} did not delineate the scope of the curtilage exception to the open fields doctrine. \textit{Id.} at 1329. \textit{Oliver} did not speak to the propriety of aerial surveillance of areas located within the curtilage but easily viewed from the air. \textit{Id.}

\textsuperscript{75} Id. at 1331. The court reasoned that only physical intrusions into the curtilage typically violated the fourth amendment. \textit{Id.} Observations of areas within the curtilage from outside ground locations were generally permissible. \textit{Id.} “Under the same reasoning and assuming that aerial surveillance of the particular place is lawful, there would appear to be no sound reason for distinguishing between ‘curtilage’ and ‘noncurtilage’ areas equally visible from the air. In most cases it would be impracticable to view one without contemporaneously viewing the other.” \textit{Id.}
aerial surveillance of the areas, whether curtilage or noncurtilage.\textsuperscript{76}

The \textit{Bassford} court reviewed prior cases involving the fourth amendment problems created by aerial surveillance and enumerated several factors it found important in determining if a reasonable expectation of privacy from aerial observation existed: \textsuperscript{77} 1) the altitude of the aircraft, \textsuperscript{78} 2) the size of the objects observed, \textsuperscript{79} 3) the nature and use of the area observed, \textsuperscript{80} 4) the frequency of flights over the area, \textsuperscript{81} 5) and the frequency and duration of the

\textsuperscript{76} \textit{Id.}

\textsuperscript{77} \textit{Id.} at 1330. "Rather than embracing a general rule courts have taken a case-by-case approach to the fourth amendment problems implicated by aerial surveillance." \textit{Id.}

\textsuperscript{78} See \textit{Dow Chem. Co.}, 106 S. Ct. at 1827 (taking of aerial photographs from "navigable airspace" does not violate the fourth amendment); \textit{DeBacker}, 493 F. Supp. at 1081 (frequent low-altitude flights (200 feet) over the area reduced privacy expectations); People v. Lashmett, 71 Ill. App. 3d 429, 389 N.E.2d 888, 890 (1979)(aerial surveillance from an altitude of 2400 feet did not constitute a search), \textit{cert. denied}, 444 U.S. 1081 (1980); \textit{Burkholder} v. Superior Court of Santa Cruz, 96 Cal. App. 3d 421, 158 Cal. Rptr. 86, 89 (1979)(aerial observation from lawful altitude (1500 to 2000 feet) is not unreasonable); State v. Stachler, 58 Haw. 412, 570 P.2d 1323, 1327 (1977)(that police helicopter flew at a lawful and reasonable height was a factor to consider in determining the "reasonableness" of the privacy expectation; unreasonably low helicopter surveillance might be unconstitutional); People v. Sneed, 32 Cal. App. 3d 535, 108 Cal. Rptr. 146, 151 (1973)(the defendant had reasonable expectation of privacy from surveillance at twenty to twenty-five feet, but not legitimate expectation of privacy from observation at "legal and reasonable heights").

\textsuperscript{79} See \textit{Allen}, 633 F.2d at 1289 (large-scale modifications of buildings and landscape); \textit{Lashmett}, 71 Ill. App. 3d at 431, 389 N.E.2d at 890 (farm machinery); People v. Superior Court of Los Angeles, 37 Cal. App. 3d 839, 112 Cal. Rptr. 764, 765 (1974)(conspicuous and identifiable automobile hood); \textit{Dean} v. Superior Court of Nevada, 35 Cal. App. 3d 112, 110 Cal. Rptr. 585, 589 (1973)(one who established a three-quarter-acre tract of cultivated marijuana exhibited no reasonable expectation of privacy from overflights).

\textsuperscript{80} See \textit{People v. St. Amour}, 104 Cal. App. 3d 890, 163 Cal. Rptr. 187, 190 (1980) (the individual seeking constitutional safeguards must show that the land is used in accordance with the common habits of peoples engaged in the cultivation of agricultural land who exhibit an expectation of privacy with respect to the pursuit in question); \textit{Burkholder}, 96 Cal. App. 3d at 423, 158 Cal. Rptr. at 88 (the owner of land upon which marijuana is grown can exhibit no reasonable expectation of privacy from an overflight consistent with the common habits of persons engaged in agrarian pursuits); \textit{Dean}, 35 Cal. App. 3d at 116, 110 Cal. Rptr. at 589 (the need for secrecy surrounding cultivated marijuana is not consistent with the common habits of mankind in the use of agriculture and woodland areas).

\textsuperscript{81} See \textit{Allen}, 633 F.2d at 1290 (Coast Guard helicopters routinely traversed the
aerial surveillance. In upholding the constitutionality of the overflights, the court concluded that the frequency of flights over the area, the distinctively different coloration of the marijuana on a mountainside where farming would not be expected, and the brevity of the surveillance were factors militating against a reasonable expectation of privacy from aerial observation.

After the Bassford court rejected the distinction between 'curtilage' and 'open fields' in the aerial surveillance context, a federal district court reemphasized the importance of the curtilage doctrine in National Organization for the Reform of the Marijuana Laws (NORML) v. Mullen. In NORML the plaintiffs instituted a class action against various state and federal officials and agencies involved in California's Campaign Against Marijuana Planting (CAMP). The plaintiffs complained about intrusive and dangerous CAMP helicopter activities, and many alleged sustained and repeated low-level "buzzings" and "dive-bombings" of their homes.

area); Mullinex, 508 F. Supp. at 514 (airplane flights over farm were not unusual); Stachler, 58 Haw. at 417, 570 P.2d at 1328 (daily flights over area); Superior Court of Los Angeles, 37 Cal. App. 3d at 840, 112 Cal. Rptr. at 765 (patrol by police helicopter was common).

See Allen, 633 F.2d at 1289 (extensive police surveillance did not violate reasonable expectation of privacy); National Org. for the Reform of Marijuana Laws (NORML) v. Mullen, 608 F. Supp. 945, 957 (N.D. Cal. 1985) (regular disruptive and intrusive low level helicopter surveillance violated reasonable expectations of privacy); DeBacker, 493 F. Supp. at 1081 (police did not regularly view the defendant's property for criminal activity; aerial observation was a nonintrusive isolated event); Stachler, 58 Haw. at 417, 570 P.2d at 1328 (prolonged aerial surveillance lasting hours or days would likely be unconstitutional).

Bassford, 601 F. Supp. at 1331.

Although Bassford may well have hoped that planes passing overhead would be occupied by persons uninterested in his unusual farming location and his distinctive crop, he could not reasonably expect that others, such as the police, would not fly over and take note. All of the plots in the Bassford property, including plot #1, which was about ten feet from the house, were clearly and contemporaneously visible from the same vantage point.

Id. at 1332.


Id. at 949. CAMP was a sophisticated law enforcement program that used airplanes and helicopters to locate cultivated marijuana plots. Id.

Id. at 955. The plaintiffs gave numerous accounts of disruptive and intrusive
Unlike the court in Bassford, the NORML court began its analysis by distinguishing between an aerial observation of the curtilage and one of the open fields.\textsuperscript{87} The court first acknowledged that the open fields doctrine of Oliver left no doubt that CAMP personnel could constitutionally use aircraft to locate marijuana in open fields.\textsuperscript{88} The court then stated that the fourth amendment did place limitations on CAMP's ability to use its air power to search homes or the curtilage.\textsuperscript{89} The court emphasized that the CAMP helicopters deliberately looked into and invaded peoples' homes and curtilage.\textsuperscript{90}

The court found that the plaintiffs sustained a reasonable expectation of privacy from this kind of aerial intrusion by weighing factors similar to those considered in Bassford.\textsuperscript{91} First, CAMP did not limit its observations to an "occasional, casual peek," but instead engaged in sustained and repeated buzzings, hoverings, and dive-bombings.\textsuperscript{92} Second, the low-level helicopter flights violated Federal Aviation Administration (FAA) regulations establishing minimum altitude limits for helicopters.\textsuperscript{93} The court declared that any helicopter surveillance conducted in violation of FAA safety regulations created a presump-
tively unreasonable search. Finally, the court objected to the random nature of the airborne observations. The court enjoined the defendants from using helicopters for general surveillance purposes except over open fields.

The federal district court in United States v. Broadhurst interpreted the open fields doctrine in an unprecedented manner. In Broadhurst several defendants moved to suppress evidence obtained from a warrantless aerial patrol of their greenhouse in which police had suspected the defendants cultivated marijuana. The officers flew in circles around the greenhouse at an altitude of one thousand feet, viewing its contents from different angles. The court concluded that the greenhouse was situated in the open fields. However, the court refused to apply the open fields doctrine because the officers conducting the surveillance did not intend to observe the open fields surrounding the defendants’ dwelling, but sought solely to observe the contents of the enclosed structure on the land.

The court found that the defendants maintained a reasonable expectation of privacy from this type of aerial surveillance, even though an airport was located nearby.

94 NORML, 608 F. Supp. at 965.
95 Id. at 958.
96 Id. at 965.
98 Id. at 781. The police conducted the search after a citizen informed them that he had seen marijuana in the greenhouse while deer hunting. Id. at 780.
99 Id. at 782. The police actually conducted three overflights. Id. at 781.
100 Id. at 787. The distance of the greenhouse from the dwelling led the court to dismiss the argument that the greenhouse was within the curtilage of the home and thus within the shelter of the fourth amendment. The greenhouse was separated from the residence by approximately 375 feet of steep, hilly terrain. Id. The court could find no case extending the curtilage principle to an area so far away from the home. Id. Also, the greenhouse was not within the fenced area surrounding the dwelling. Id. at 789.
101 Id. at 787. The court found nothing in the Oliver opinion to suggest that the open fields doctrine applied to a structure used to grow agricultural products located in an open field. Id. “While this fact alone does not necessarily require a conclusion that defendants’ asserted privacy interest was reasonable, it does render inapplicable the virtually per se rule excluding open fields from the protection of the Fourth Amendment.” Id.
102 Id. at 792, 794-95.
In so holding, the court emphasized that the defendants could not reasonably expect aircraft to circle above the greenhouse and employ special maneuvers to observe the marijuana inside.\textsuperscript{103} The defendants had taken every precaution to ensure privacy from ground level observation including erecting fences, posting no trespassing signs, and using specially-tinted siding and roofing for the greenhouse.\textsuperscript{104} Because of these extraordinary measures, the court rejected the government’s argument that no reasonable expectation of privacy existed because the marijuana was plainly visible from a place where the officers had a right to be.\textsuperscript{105} In support of its holding, the court stated that it found no cases

which hold that a person, in order to protect himself from the unwelcome eye of the general public or law enforcement, must lock himself away so tightly, and so completely as to preclude any clever or technologically endowed eavesdropper from viewing his activities from any angle. The fourth amendment does not set up a contest between government and private citizen to test which party can outmaneuver the other in a game of hide and seek.\textsuperscript{106}

The Supreme Court recently considered the constitutionality of a warrantless aerial surveillance of an industrial complex in Dow Chemical Co. v. United States,\textsuperscript{107} a companion case to California v. Ciraolo. In Dow Chemical the EPA employed an aerial photographer to take photographs inside Dow’s two-thousand-acre chemical plant us-

\begin{itemize}
\item \textsuperscript{103} Id.
\item The Court recognizes that while a reasonable person might assume some form of privacy invasion from so-called curious aerial passersby, . . . such a momentary invasion of privacy does not equate to the directed aerial search exhibited in this case. Citizens, whether rural or otherwise, should not have to anticipate low flying and/or circling reconnaissance missions in order to protect their reasonable privacy expectations.
\item \textsuperscript{104} Id. at 785.
\item \textsuperscript{105} Id. at 795. The court found that the officers had no right to be where they were while conducting the search. \textit{Id.}
\item \textsuperscript{106} Id. at 792.
\item \textsuperscript{107} 106 S. Ct. 1819 (1986).
\end{itemize}
ing an aerial mapping camera from navigable airspace. Dow claimed that the EPA's use of aerial photography took place within the "industrial curtilage" rather than an open field, and thus violated Dow's reasonable expectation of privacy from such surveillance. The Court rejected the concept of "industrial curtilage" as inconsistent with the strict definition of "curtilage." It reasoned that the fourth amendment protected the curtilage surrounding the home from warrantless police searches because of the private family activities occurring there. Because such intimate family activities did not occur in the outdoor areas surrounding the buildings within Dow's manufacturing plant, those outdoor areas were not analogous to the curtilage of a dwelling. Since an industrial complex was more comparable to an open field, Dow's expectations of privacy from aerial observation were not reasonable, despite Dow's ground level elaborate security system. The Court denied that its decision required Dow erect a huge cover over Dow's entire facility to protect itself from warrantless aerial observation. How-

108 Id. at 1822. The Court noted, "It may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant. But the photographs here are not so revealing of intimate details as to raise constitutional concerns.

109 Id. at 1826-27.

110 Id. The EPA had, with Dow's permission, inspected powerplants within the complex. Id. When Dow denied the EPA's request for a second inspection, the EPA did not seek a search warrant before resorting to aerial surveillance techniques. Id.

111 Id. The Court in Dow Chemical reaffirmed the oft-quoted definition of "curtilage" as "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" Id. at 1825 (quoting Oliver, 466 U.S. at 180).

112 Id.

113 Id. The Court granted Dow a reasonable expectation of privacy within the interior of its covered buildings because Dow maintained an elaborate security system to prevent public exposure from the ground. Id. However, the EPA's aerial observation of the outdoor areas of the manufacturing facility without physical entry did not constitute a fourth amendment search. Id.

114 Id.
ever, the Court did find Dow’s complete lack of effort to protect against aerial surveillance important in holding that Dow did not have a reasonable expectation of privacy from such observation.\footnote{Id. at 1826 n.4.}

III. \textit{California v. Ciraolo}

In \textit{California v. Ciraolo}\footnote{Id. at 1826 n.4.} the United States Supreme Court confronted the constitutionality of a warrantless aerial surveillance of private property for the first time.\footnote{Id. at 1826 n.4.} The Court began its review of the lower court’s opinion with a general discussion of its fourth amendment analysis.\footnote{Id. at 1826 n.4.} It stated that the basis of the analysis is the two-part reasonable expectation test introduced in \textit{Katz}.\footnote{Id. at 1826 n.4.} The defendant’s subjective expectation of privacy was not

\begin{itemize}
  \item Dow did not take any precautions against aerial intrusions, even though the plant was near an airport and within the pattern of planes landing and taking off. If elaborate and expensive measures for ground security show that Dow has an actual expectation of privacy in ground security, as Dow argues, then taking no measure for aerial security should say something about its actual privacy expectation in being free from aerial observation. \footnote{Id. (quoting Dow Chem. Co. v. United States, 749 F.2d 307, 312 (6th Cir. 1984)).}
  \item The Supreme Court was not impressed by the fact that Dow investigated all low-level flights over its complex. It commented that Dow’s procedure of keeping track of the identification numbers of planes flying overhead in order to check on whether photographs were taken did not constitute a procedure designed to protect the manufacturing complex from aerial photography. \textit{Id.}
  \item The Supreme Court reversed the California Court of Appeals, which had found that the warrantless aerial police search of the defendant’s backyard violated the fourth amendment. \textit{Ciraolo}, 106 S. Ct. at 1810. The California Court of Appeals based its decision on two factors. \textit{Id.} at 1811. First, because the defendant’s backyard was within the curtilage of his dwelling and surrounded by an extensive fence, the court concluded that the defendant maintained a reasonable expectation of privacy from aerial surveillance. \textit{Id.} Second, the court found it significant that the flyover did not result from a routine police patrol, but was undertaken for the particular purpose of viewing the defendant’s backyard. \textit{Id.} The Supreme Court dismissed this second rationale as irrelevant and unsubstantiated saying, “[W]e find difficulty understanding exactly how respondent’s expectations of privacy from aerial observation might differ when two planes pass overhead at identical altitudes, simply for different purposes.” \textit{Id.} at 1813 n.2.
  \item \textit{Ciraolo}, 106 S. Ct. at 1811.
  \item \textit{Id.} “The touchstone of Fourth Amendment analysis is whether a person has a ‘constitutionally protected reasonable expectation of privacy.’” \textit{Id.} (quoting
at issue, \cite{120} so the Supreme Court continued to the second query of the *Katz* test, i.e., whether the defendant's subjective expectation was one that society would recognize as objectively reasonable. \cite{121} The Court emphasized that this second inquiry did not focus on whether the individual took steps to conceal the observed activity, but instead focused on whether the government's search infringed upon the personal and societal values protected by the fourth amendment. \cite{122}

The defendant contended that the yard's location

\begin{quote}

\cite{120} *Ciraolo*, 106 S. Ct. at 1811. The State did not challenge the California Court of Appeals' finding that the defendant manifested a subjective expectation of privacy. *Id.* The Supreme Court remarked that the defendant clearly met the test of manifesting his own subjective intent to maintain privacy as to his unlawful agricultural pursuits. *Id.*

It can reasonably be assumed that the 10-foot fence was placed to conceal the marijuana crop from at least street level views. So far as the normal sidewalk traffic was concerned, this fence served that purpose, because respondent 'took normal precautions to maintain his privacy.'... Yet a 10-foot fence might not shield these plants from the eyes of a citizen or a policeman perched on the top of a truck or a 2-level bus. Whether respondent therefore manifested a subjective expectation of privacy from all observations of his backyard, or whether instead he manifested merely a hope that no one would observe his unlawful gardening pursuits, is not entirely clear in these circumstances. Respondent appears to challenge the authority of government to observe his activity from any vantage point or place if the viewing is motivated by a law enforcement purpose, and not the result of a casual, accidental observation.

*Id.* at 1812. Thus, while the Court agreed that the defendant maintained a subjective expectation of privacy from ground level observation, it indicated that the defendant's subjective expectation of privacy from all observation was unreasonable.

\cite{121} *Id.*

\cite{122} *Id.*

While no single consideration has been regarded as dispositive, 'the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, ...the uses to which the individual has put a location, ...and our societal understanding that certain areas deserve the scrupulous protection from governmental invasion. ...Our decisions have made it clear that this inquiry often must be decided by 'reference to a place,' ...and that a home is a place in which a subjective expectation of privacy virtually always will be legitimate.'

*Id.* at 1816 (Powell, J., dissenting).
within the curtilage precluded any governmental aerial surveillance without a warrant. The Court rejected the defendant's argument, replying that warrantless police observations of an area located within the curtilage were not per se unconstitutional. The aerial observation of the curtilage was unconstitutional only if the owner maintained a reasonable expectation of privacy from such observation.

The defendant further contended that he maintained a reasonable expectation of privacy from aerial surveillance because he had taken measures to restrict ground level views of his backyard. The Supreme Court concluded, however, that his expectation of privacy from aerial surveillance was neither reasonable nor an expectation society was prepared to honor because his activities were clearly visible to the officer observing "from a public vantage point where he ha[d] a right to be." The Court

Id. at 1812. The Court reaffirmed the curtilage doctrine stating, "[t]he protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." Id. The Court agreed that the yard was within the curtilage since that area was immediately adjacent to a home and surrounded by a fence. Id. The dissent stated that this case involved surveillance of a home itself because the curtilage is considered part of the home for fourth amendment purposes. Id. at 1816.

Id. at 1812.

Id. The defendant contended he had done all that could reasonably be expected to tell the world he wished to maintain privacy without covering his backyard. Id. at 1811. "Such covering, he argues, would defeat its purpose as an outdoor living area; he asserts he has not 'knowingly' exposed himself to aerial views." Id.

Id. at 1812 (quoting United States v. Knotts, 460 U.S. 276, 282 (1983)). The Court noted that the observation took place within public navigable airspace in a physically nonintrusive manner. Id. at 1813. In upholding the validity of an aerial surveillance, many lower federal and state courts have used the rationale that the area searched was visible to police from a public place where they had a right to be. See DeBacker, 493 F. Supp. at 1081 (the police were in a place they otherwise had a right to be); Mulliner, 508 F. Supp. at 514 (what was exposed to police aerial surveillance was also exposed to the public); People v. St. Amour, 104 Cal. App. 3d 893, 163 Cal. Rptr. 187 (1980)(officers were flying at normal heights and observed marijuana from a place where they had a right to be); Lashmett, 71 Ill. App. 3d at 431, 389 N.E.2d at 890 (when sheriff observed machinery from the air, he was in a place where he had a right to be and the machinery was in clear view); Dean, 35 Cal. App. 3d at 116, 110 Cal. Rptr. at 588 (fourth
stated that any member of the public flying in public navigable airspace could have glanced down and observed everything the officers observed.\textsuperscript{128}

Prior to Oliver's reaffirmance of the open fields doctrine, many lower courts applying the \textit{Katz} reasonable expectation test found ground level measures to restrict observations of an \textit{open field} inadequate to support a reasonable expectation of privacy from aerial surveillance.\textsuperscript{129} The Supreme Court went a step further, however, by concluding that the defendant's ground level measures to prevent public view of the \textit{curtilage} of his home did not create a reasonable expectation of privacy from aerial surveillance.\textsuperscript{130}

The dissent contended that the majority's holding rested solely on the fact that navigable airspace is open to amendment permits officers to make observations of suspicious activities from a place where they have a right to be).

The dissent claimed that reliance on this language quoted from \textit{Knotts} to judge aerial surveillance constitutional is misplaced. \textit{Id.} at 1818 (Powell, J., dissenting). The activities under surveillance in \textit{Knotts} took place on public streets, not in private homes. \textit{Id.} In \textit{Knotts}, the officers were truly observing "from a public vantage point where they had a right to be." The activity in this case, on the other hand, occurred within the private area of the curtilage. Therefore, the reasoning in \textit{Knotts} was not applicable to the fact situation involved in \textit{Ciraolo}. \textit{Id.}

\textsuperscript{128} \textit{Ciraolo}, 106 S. Ct. at 1813. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." \textit{Id.} at 1812 (quoting \textit{Katz}, 389 U.S. at 351).

\textsuperscript{129} See \textit{Allen}, 633 F.2d at 1290 (despite posting of "No Trespassing" signs and efforts to keep public off property, the defendant could not maintain a reasonable expectation of privacy from aerial surveillance when the Coast Guard routinely flew over the area); \textit{DeBacker}, 493 F. Supp. at 1080-81 (the defendant contended he had a reasonable expectation of privacy because of the lengths to which he went to insure privacy; because the defendant planted marijuana in places not observable from the road does not mean all surveillance of the property is foreclosed); \textit{Mullinex}, 508 F. Supp. at 514 (the defendant could not have a reasonable expectation of privacy from aerial surveillance despite remoteness of farm and efforts to conceal marijuana from road side view because airplane flights over land were not unusual); \textit{St. Amour}, 104 Cal. App. 3d at 896, 163 Cal. Rptr. at 190 ("The reasonable expectation to protect the airspace overlying the land . . . . cannot be demonstrated by measures taken to defend the land from earthly intrusions (e.g., by setting up a road block, trespass signs or by hiding the area or activity from ground observations)").

\textsuperscript{130} \textit{Ciraolo}, 106 S. Ct. at 1813.
all persons for travel in airplanes. Justice Powell argued that the fact that commercial air travelers might observe activities occurring within uncovered backyards apparently nullified expectations of privacy even from purposeful aerial police surveillance of those yards. Powell contended that this reasoning was incorrect for two reasons. First, passengers of commercial and private flights normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the homes over which they pass. This type of observation constituted no real threat to the homeowner's privacy. A commercial overflight was not analogous to a low altitude police overflight for the specific purpose of observing a particular area. Second, the rationale that the officer observed the backyard from a public place "where he had a right to be" was flawed. This oft-quoted language upon which the majority relied originated in United States v. Knotts. Knotts involved activities under observation on a

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131 Id. at 1814 (Powell, J., dissenting). Justices Brennan, Marshall, and Blackmun joined Justice Powell in his dissent. Id.
132 Id.
133 Id. The only possible basis for this holding is a judgment that the risk to privacy posed by the remote possibility that a private airplane passenger will notice outdoor activities is equivalent to the risk of official aerial surveillance. But the Court fails to acknowledge the qualitative difference between police surveillance and other uses made of the air space. Members of the public use the air space for travel, business, or pleasure, not for the purpose of observing activities taking place within residential yards. Here, police conducted an overflight at low altitude solely for the purpose of discovering evidence of crime within a private enclave into which they were constitutionally forbidden to intrude at ground level without a warrant. Id.
134 Id. at 1818.
135 Id.
136 Id. The dissent points out that there is little risk, if any, that a passenger on a plane might actually observe private activities and connect them to particular people. Id. "It is no accident that, as a matter of common experience, many people build fences around their residential areas, but few build roofs over their backyards." Id. Thus, people do not "knowingly expose" their yards to the public simply because they do not build barriers to prevent aerial surveillance. Id.
137 Id.
138 Id. See supra note 127 for a discussion of Knotts.
public street, not in a private area such as the curtilage surrounding the home. Therefore, the rationale of Knotts did not apply. The dissent concluded that the defendant had a reasonable expectation of privacy in his yard, and the aerial surveillance undertaken by the police for the purpose of discovering evidence of crime constituted a search within the meaning of the fourth amendment.

The dissenting opinion stated that the majority's holding constituted a significant departure from the reasonable expectation test developed in Katz for deciding when a fourth amendment violation has occurred. Justice Powell implied that the majority had reverted back to the pre-Katz fourth amendment analysis, which required a physical trespass into a constitutionally protected area for a fourth amendment search. Powell admonished against upholding an aerial observation simply because it does not involve a physical trespass onto private property. The dissent ended its opinion with a warning that aerial surveillance, which involves no physical intrusion on private property, presents "the obnoxious thing in its mildest and least repulsive form." The dissent warned

139 Ciraco, 106 S. Ct. at 1818.
140 Id.
141 Id. at 1819. The dissent worried that this surveillance posed "far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight." Id.
142 Id. at 1814. In Katz the Court found that the presence or absence of a physical trespass into a given area was irrelevant to the question whether the fourth amendment had been violated. Katz, 389 U.S. at 353. In so holding, the Court recognized electronic intrusions as well as physical intrusions can defeat reasonable expectations of privacy. Id. at 360 (Harlan J., concurring). Katz was concerned primarily with the potential for electronic interception of private communications as a result of advancing technology. Id. at 362.
143 Ciraco, 106 S. Ct. at 1815, 1817-19. See supra notes 16-25 and accompanying text for a discussion of the fourth amendment analysis prior to Katz. "Katz announced a standard under which the occurrence of a search turned not on the physical position of the police conducting the surveillance, but on whether the surveillance in question had invaded a constitutionally protected reasonable expectation of privacy." Ciraco, 106 S. Ct. at 1815.
144 Id. at 1817. "Reliance on the manner of surveillance is directly contrary to the standard of Katz." Id.
145 Id. at 1819 (quoting Boyd v. United States, 116 U.S. 616, 635 (1885)).
of the technological advances that enable the police to conduct surveillance in the home itself without any physical trespass. The Court failed to enforce individual privacy rights when it upheld this aerial surveillance.

The majority addressed the dissent's accusation that the Court ignored the fourth amendment analysis announced in *Katz*. The Court explained that Justice Harlan's warnings about electronic surveillance in *Katz* were not aimed at simple visual observations from a public place. The Court doubted that Harlan's concern in *Katz* regarding the impact of future electronic developments upon an individual's privacy encompassed aircraft. The Court stated that a man can reasonably expect privacy in his home, but objects, activities, or statements that he exposes to the plain view of outsiders are not protected by the fourth amendment. The Court then summarized its holding:

In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet. The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye.

IV. Conclusion

The Supreme Court's analysis in *Ciraolo* provides lower
federal and state courts with workable guidelines and standards for determining the constitutionality of a warrantless aerial surveillance. First, the Supreme Court affirmed the applicability of the curtilage and the open fields doctrines to the aerial surveillance context. In *Dow Chemical*, another aerial surveillance case decided in conjunction with *Ciraolo*, the Court reiterated simplified criterion for distinguishing between these two areas. It observed that "for most homes the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage—as the area around the home to which the activity of homelife extends—is a familiar one easily understood from our daily experience." While the Court did not attempt to define the boundaries of an open field, it noted that the term 'open fields' includes any unoccupied or undeveloped area without the curtilage.

Next, the Court applied a mechanical fourth amendment analysis consisting of a two-part inquiry to determine if the aerial surveillance was unconstitutional. First, "Is the area observed located within the curtilage, or is it in an open field?" If the area searched is within the open fields, the warrantless observation is apparently valid *per se* under Oliver's reaffirmance of the open fields doctrine. If the area is within the curtilage, however, the analysis proceeds to the second query. "Does the owner of the property maintain a reasonable expectation of privacy from aerial surveillance?" A warrantless aerial surveillance of the curtilage will be invalidated only if the homeowner is found to have sustained a reasonable

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153 See id. at 1812, 1816-17.
154 *Dow Chem.*, 106 S. Ct. at 1826 n.3.
155 Id.
156 Id.
157 *Ciraolo*, 106 S. Ct. at 1812.
158 See supra notes 42-47 and accompanying text for a discussion of the open fields doctrine of *Oliver*.
159 *Ciraolo*, 106 S. Ct. at 1812. "Accepting, as the State does, that this yard and its crop fall within the curtilage, the question remains whether naked-eye observation of the curtilage by police from an aircraft of 1,000 feet violates an expectation of privacy that is reasonable." Id.
expectation of privacy from such observation. The Supreme Court's holding indicates that as long as the activities observed on the property are clearly visible from public navigable airspace, no reasonable expectation of privacy from aerial surveillance can exist despite measures taken by the homeowner to restrict ground level observation such as high fences, "No trespassing" signs and remote locations. Apparently nothing short of an actual covering over the yard will support a reasonable expectation of privacy from aerial surveillance. In Dow Chemical the Supreme Court held Dow had a legitimate expectation of privacy "within the interior of its covered buildings," implying that only an actual covering will suffice.

If read broadly, the Court's holding in Ciraolo presents serious implications for private family activities taking place in the yard, or curtilage, of the home. The dissent forecasted:

The feature of such activities that makes them desirable to citizens living in a free society, namely, the fact that they occur in the open air and sunlight, is relied on by the Court as a justification for permitting police to conduct warrantless surveillance at will . . . . It would appear that, after today, families can expect to be free of official surveillance only when they retreat behind the walls of their homes.

An obvious result of the decision in this case is that a property owner can never expect family activities occurring in his yard to be free from aerial police observation unless he is willing to literally erect a roof over the yard. Furthermore, while this case upheld only a naked-eye police observation of the curtilage, it is clear that a warrantless aerial surveillance of the curtilage will almost always be upheld regardless of the type of surveillance technique

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160 Id.
161 Id. at 1812-13.
163 Ciraolo, 106 S. Ct. at 1819 n.10.
used, because the Court has made it nearly impossible to maintain a reasonable expectation of privacy there.

The dissent also intimated other implications of the Court's holding. In _Ciraolo_, the majority did not indicate that it would uphold a warrantless ground level police surveillance if the homeowner had taken proper ground level measures to preclude such observation. The fact that the dissent does not distinguish between aerial and ground surveillance in its forecast above, however, indicates that the dissent fears this holding heralds the complete elimination of fourth amendment protection of the curtilage. Arguably, the majority's narrow application of the reasonable expectation test to this warrantless aerial police surveillance of the curtilage may result in the erosion of fourth amendment protection of the curtilage from warrantless ground level surveillance. The dissent is predicting that in the future only the home itself will be afforded protection from warrantless police surveillance.

Thus, the Supreme Court in _Ciraolo_ answered several questions about the constitutionality of aerial surveillance and in the process provided some guidelines and standards to follow in such cases in the future. The Court's holding has serious implications for family life, however, the most frightening of which is the possibility that eventually private outdoor family activities will not be free from either warrantless aerial or ground level police surveillance despite measures taken by the homeowner to protect against such intrusive observation. While the fourth amendment status of the "house" appears unshaken by the ruling in _Ciraolo_, in the future the "house" may be the only haven from the prying eyes and ears of the police.

_Laura J. Johnson_