FENCE VIEWERS AND DIVISION FENCES IN VERMONT: NEW EXPECTATIONS

There where it is we do not need the wall:
He is all pine and I am apple orchard.
My apple trees will never get across
And eat the cones under his pines, I tell him
He only says, 'Good fences make good neighbors.'
Spring is the mischief in me, and I wonder
If I could put a notion in his head:
'Why do they make good neighbors? Isn't it
Where there are cows? But here there are no cows.
Before I built a wall I'd ask to know
What I was walling in or walling out,
And to whom I was like to give offense. . . .
He will not go behind his father's saying,
And he likes having thought of it so well
He says again, 'Good fences make good neighbors.'[1]

INTRODUCTION

At common law, a duty to fence a particular tract of land could be established either by agreement between interested parties or by prescription.[2] Absent either agreement or prescription, however, no affirmative duty to fence one's land would arise. Rather, the common law encouraged fencing by recognizing a trespass action against one whose escaping animals caused harm to another's property interests.[3] "If not bound at common law to fence his land, he was nevertheless bound, at his peril, to keep his cattle on his own grounds, and prevent them from escaping."[4]

To the Anglo-American common law, American jurisdictions have added a third means of imposing a duty to fence—by express statutory provisions. One type of fencing statute requires adjoining

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1. R. FROST, *Mending Wall*, in COMPLETE POEMS OF ROBERT FROST 47-48 (1949) (excerpt).

2. *See, e.g.*, Megquier v. Bachelder, 112 Me. 340, 342, 92 A. 187, 188 (1914); Deane v. Garniss, 294 Mass. 221, 222-23, 200 N.E. 923, 924 (1936). *See generally* 5 R. POWELL, THE LAW OF REAL PROPERTY ¶ 693 (1981) (division fences); Note, *Fencing Laws in Missouri—Restraining Animals*, 32 MO. L. REV. 519, 522 (1976) (discussing common law).

3. W. PROSSER, THE LAW OF TORTS 496-99 (4th ed. 1971). The common law in both England and the United States imposed strict liability for trespassing animals. *Id. See also* O.W. HOLMES, THE COMMON LAW 22-24 (1881) (discussing the scope of liability for trespassing animals).

4. 3 J. KENT, COMMENTARIES ON AMERICAN LAW *438.

landowners to share the cost of building and maintaining fences between their respective properties.[5] In addition, these statutes authorize locally appointed officials to assign obligations when disputes arise between adjoining landowners. The original American statute was probably that of Massachusetts dating back to 1693.[6] Since then, dozens of states have adopted fencing acts, many of which are strikingly similar.[7] Such statutes are found generally in those states which once were, and perhaps still are, heavily agricultural.

This note will consider these statutes as a particular form of fencing legislation.[8] Viewed in this manner, they represent an effort on the part of the state to avoid potential disputes and to resolve actual disputes between adjoining landowners. Their essence is to divide equitably the burden of erecting and maintaining fences between adjoining landowners. Hence, the expression "division fence" denotes "[a] fence that has been divided in such a way that one adjoining landowner has the legal obligation to maintain one designated portion of the fence and the other adjoining owner has the legal obligation to maintain the remaining portion of the fence."[9] The truly novel aspect of such legislation is that it empowers local officials to assign fencing burdens between landowners. These officials, often called fence viewers, exercise considerable

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5. *See, e.g.*, ME. REV. STAT. ANN. tit. 30, §§ 3451-3466 (1964); N.H. REV. STAT. ANN. §§ 473:1-:22 (1968 & Supp. 1981); R.I. GEN. LAWS §§ 34-10-1 to -20 (1969).

6. An Act For Regulating Of Fences, Cattle, Etc. 1693-1694 ACTS AND RESOLVES OF THE PROVINCE OF THE MASSACHUSETTS BAY, 138-39 (1869). No mention is made anywhere of English antecedents to the Massachusetts statute; this would suggest that such statutes are a distinctly American innovation. However, an early New York case, *In re* Rensselaer & S.R.R. Co., 4 Paige Ch. 553 (1834), invoked an equitable principle which the court claimed was derived from the *civil law* nations of Europe. The court cited existing law in France, Holland, and Scotland to substantiate its proposition. *Id.* at 556. Though any link to the civil law countries is undocumented, such a link is at least more probable than an English connection.

7. In fact, often times the only substantial difference between one of these statutes and another is accounted for by different geographic characteristics of the respective states. *See, e.g.*, R.I. GEN. LAWS § 34-10-6 (1969) (water fences recognized).

8. Another prominent form of fencing legislation concerns the creation of local fencing and stock districts. This note will address only fencing laws treating "division fences." For a thoughtful breakdown of all fencing and stock laws into categories and a discussion of their constitutionality, see Annot., 6 A.L.R. 212 (1920) and Annot., 18 A.L.R. 67 (1922).

9. Note, *Fencing Laws in Missouri—Restraining Animals*, 32 MO. L. REV. 519, 519 (1967). The expressions "division fence" and "partition fence" are often used interchangeably with resulting confusion. A partition is technically a fence marking a boundary line between two adjoining parcels of land. A division fence, on the other hand, does not necessarily establish a boundary line, although it may. *Id.*

discretion within broad legislative boundaries.

Vermont's fencing statute (hereinafter referred to as Fence Act)[10] was originally enacted at Bennington in 1780.[11] The 1780 Act, though only two paragraphs in length, set forth the basic principles underlying today's legislation. Extensive revision and amendment took place in 1797[12] and 1853.[13] Except for minor amendments, the Fence Act has remained essentially unchanged since 1853.

The Fence Act has been in existence for more than two hundred years. A pending Vermont case, *Choquette v. Perrault*,[14] recently shattered the quiet history of that statute by questioning its constitutionality under both state and federal law. Currently on appeal before the Vermont Supreme Court, *Choquette* has challenged the continued validity of the Fence Act in a society characterized by decreasing agricultural land use.

This note will serve three purposes: First, it will describe the mechanics of Vermont's Fence Act. Provisions pertaining to the codification of common law doctrines, the statutory requirements for assignment of fence divisions, the duties of fence viewers, the recording requirements, and the liability under the statute will be discussed. In addition, questions raised in *Choquette* regarding the scope of fence viewers' authority to assign divisions will be addressed. Second, the note will critique the Act from a constitutional perspective. The issues addressed are whether the Act is potentially void for vagueness, whether constitutional standards are met for a valid exercise of the police power, and whether the Act's notice and appeal provisions satisfy procedural due process and equal protection requirements. The *Choquette* case will be discussed in the context of this framework. Third, the note will dis-

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10. VT. STAT. ANN. tit. 24, §§ 3801-3817 (1975). This note will *not* address the Vermont statute requiring railroads to construct and maintain adequate fences along their rights-of-way which are adjacent to operating farms. For legislation regarding railroads and fencing requirements, see *id.* tit. 30, § 1474 (Supp. 1983). This statute was recently upheld in the face of an equal protection challenge. *See* Noble v. Delaware & H. Ry. Co., No. 536-81 (Vt. S. Ct. Nov. 2, 1982).

11. Act of October 19, 1780 *reprinted in* 12 STATE PAPERS OF VERMONT: LAWS OF VERMONT 1777-1780, at 197-98 (A. Soule ed. 1964). Vermont did not join the Union until 1791. *Id.* at ix.

12. *See* An Act Relating to Fences, and Defining the Duty of Fence-Viewers, 1797 Vt. Acts ch. 27.

13. *See* An Act Relating to the Building and Repairing of Fences, 1853 Vt. Acts No. 29.

14. No. 82-318 (Vt. S. Ct. filed July 13, 1982).

cuss means of remedying constitutional defects in the Fence Act by reviewing both case law and recent statutory revisions from other jurisdictions.

I. Vermont's Fence Act: Mechanics

A. *Statutory Provisions*

The original Fence Act provided:

> that whenever any person or persons, having Improvements adjoining each other, the Expense of making and maintaining a lawful Fence, shall be equally divided between them. And if they can not agree to divide the same, it shall be divided by the Select-men, or three indifferent Freeholders of such town, where such Land lyeth, each paying for their own part.—And where it shall so happen that any person or persons shall make fence against another Person's Land, that when that other person shall improve against said Fence, they shall pay the Person that built said Fence for the one half of said Fence, to be appraised by the Select-men, or three indifferent Freeholders of the town where such land lieth:—And if either of the Parties, or persons whose Improvements so adjoin each other, should refuse or neglect, to make or maintain, his, her or their proper part of said Fence, having three months notice, then the aggrieved party may enter Complaint thereof, to an Assistant, or Justice of the Peace, who is hereby directed to summon such delinquent or delinquents, to answer for his, her or their neglect; and being found delinquent, shall grant Execution thereon, for Cost and Damages.[15]

This historical version sets forth the core of the current statutory requirements regarding the assignment of a fence division, the role of the fence viewers, and liability.

Two fundamental questions addressed by the Fence Act are: First, what constitutes a materially sufficient fence for purposes of the Act?; and, second, when will an otherwise materially sufficient fence be ineligible for assignment? Section 3801 describes the attributes of a sufficient fence;[16] elsewhere, the statute prohibits the

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15. Act of October 19, 1780 *reprinted in* 12 State Papers of Vermont: Laws of Vermont 1777-1780, at 198 (A. Soule ed. 1964).

16. Vt. Stat. Ann. tit. 24, § 3801 (1975). The original Fence Act in the Laws of 1780 was preceded by a brief description of what constituted a lawful fence for purposes of the Act. Act of October 19, 1780, *reprinted in* 12 State Papers of Vermont: Laws of Vermont 1777-1780, at 197-98 (A. Soule ed. 1964). A fence was unlawful unless "four feet and an half high, well built with Logs, rails, stone, or Boards, or other fence equivalent." *Id.* Currently,

maintenance of what are commonly referred to as "spite fences." Such fences are erected merely to "[annoy] the owners of adjoining property by obstructing their view or depriving them of light or air."[17]

Two common law doctrines are codified within the Fence Act. Section 3807 codifies the common law doctrine of liability for escaping animals by declaring that when adjoining landowners are under no statutory obligation to maintain a division fence, they are still liable for damages caused by their straying animals.[18] The provision authorizes an action in tort to recover damages.[19] Section 3812 codifies the agreement doctrine,[20] whereby adjoining landowners can bind themselves to a division of fence if they so choose. Unlike the common law doctrine, however, this provision requires that the agreement be in writing, signed by both parties, witnessed by two witnesses, acknowledged by the parties, and recorded in the local town clerk's office.[21]

The statutory assignment of a fencing duty is set forth in sections 3802 and 3803. Section 3802 reads as follows:

> Owners or occupants of adjoining lands, where the lands of both parties are occupied, shall make and maintain equal portions of the division fence between their respective lands. The owner of unimproved and unoccupied land adjoining occupied land of another person shall make his proportion of a fence between such lands unless the selectmen of the town where the improved land lies, on request of either party, and on reasonable notice by the selectmen to parties interested, decide that such owner ought not to be compelled to make

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section 3801 dictates a similar standard with an additional requirement that fences be "so constructed as to prevent the escape of sheep." VT. STAT. ANN. tit. 24, § 3801 (1975). Perhaps this section was amended to accommodate and promote the sheep industry during its nineteenth century heyday in Vermont. *See generally*, H. WILSON, THE HILL COUNTRY OF NORTHERN NEW ENGLAND: ITS SOCIAL AND ECONOMIC HISTORY 1790-1930, at 75-94 (1936) (discussing the sheep industry). Today, with the preeminence of dairy farming, which requires a different type of fence, the "sheep" clause of section 3801 is probably never enforced.

17. VT. STAT. ANN. tit. 24, § 3817 (1975). A fine of not more than one hundred dollars can be imposed for violating this prohibition against spite fences. *Id.*

18. *See supra* notes 3-4 and accompanying text.

19. VT. STAT. ANN. tit. 24, § 3807 (1975).

20. *See supra* note 2 and accompanying text.

21. VT. STAT. ANN tit. 24, § 3812 (1975). Perhaps recording was required to give notice of possible encumbrance to subsequent purchasers of the lands in question.

any part of such fence.[22]

This provision applies when at least one of two adjoining landowners or occupants has "improved" land. If both lots are occupied, upon the request of one party the division becomes mandatory on the other. If only one lot is improved and that lot's owner or occupant requests a division, the division is still mandatory, but with one exception. The party opposing the fence division may request that the selectmen grant an exemption. In the event that such an exemption is granted, the owner of unimproved and unoccupied land is not bound to support the division.[23]

Assuming that such an exemption is granted and the owner of unimproved and unoccupied land subsequently derives some benefit from the fence, section 3803 provides that "he shall pay to the person so making [the fence], for his equal portion thereof, its value at the time."[24] In this manner, the Fence Act prevents an adjoining landowner from taking advantage of a fence already built.

Fence viewers are authorized to adjudicate certain disputes between adjoining landowners.[25] Fence viewers are municipal officers appointed by the town selectmen from the qualified voters of the town. A total of three are appointed per town, serving until such time as the selectmen decide to appoint new fence viewers.[26]

Duties of the fence viewers are listed in section 3810. Their basic duties are to examine fences within the town when requested and to assign divisions when appropriate under the Act.[27] Procedurally, fence viewers are required to give notice before examining a fence, to certify the terms of the division, and to file the resulting certificate in the town clerk's office.[28] When the fence line in question also constitutes a line between two towns, these procedural requirements apply equally to a board of fence viewers comprised

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22. *Id.* § 3802 (1975).

23. *Id.*

24. *Id.* § 3803. Apparently, contribution is not based on the value of the fence when originally built, but rather on the value of the fence at the time a benefit is derived.

25. *See id.* §§ 3804-3806, 3810, 3813. See *infra* notes 40-65 and accompanying text for a discussion of the scope of fence viewers' authority under the Act.

26. VT. STAT. ANN. tit. 24, § 871 (1975). Fence viewers are sworn in along with other municipal officers. *Id.* § 831.

27. *Id.* § 3810.

28. *Id.* § 3811.

of representatives from each of the towns.[29]

The Fence Act calls for the judgment of fence viewers in particular circumstances. For example, the Act allows adjoining landowners of pasture to occupy their lands in common—that is, to graze their animals without a division fence. However, if the parties are unable to agree regarding the number of animals each may graze, the fence viewers, on request, will determine that number.[30] Similarly, when adjoining landowners are unable to agree on a site for a proposed fence because of topographical obstacles, fence viewers, on request, will determine the site.[31]

Sanctions against a fence viewer's neglect of prescribed duties and a party's right to appeal are encompassed in section 3810. This provision authorizes an action in tort, with statutory damages of five dollars and court costs recoverable from a negligent fence viewer.[32] Appeal from a decision of the fence viewers may be taken to either district or superior court, provided that this right is claimed within two hours of the decision being rendered.[33]

The bulk of the Fence Act, not suprisingly, governs liability. Section 3807 codifies the common law rule that a landowner whose animals cause damage to another's property may be held liable through an action in tort.[34] Section 3808 authorizes an action to recover damages suffered due to the neglect of an adjoining landowner either to erect or to maintain a division fence. Moreover, under section 3808 the plaintiff may recover the cost of repairing a neglected portion of fence if the adjoining landowner neglects to repair the fence after ten days notice.[35]

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29. *Id.*

30. *Id.* § 3804. The fence viewers' decision is to be recorded, *id.*, and presumably is binding on the parties.

31. *Id.* § 3805. Guidelines for siting a fence require fence viewers to locate the fence as near to the property line as practicable. In addition, landowners are assured that such variance from the property line in no way transfers title from one party to the other. *Id.* § 3806. *See infra* note 66.

32. VT. STAT. ANN. tit. 24, § 3810 (1975). Though statutory damages are only minimal, the prospect of paying court costs under section 3810 constitutes a meaningful deterrent to negligence on the part of fence viewers. However, it is difficult to imagine what, other than a fence viewer's failure to appear and perform his duties, might constitute actionable negligence.

33. *Id.* Title 12, chapter 109 of Vermont Statutes Annotated is supposed to govern appeal. *But see infra* text accompanying notes 149-50.

34. VT. STAT. ANN. tit. 24, § 3807 (1975); *see also supra* note 18 and accompanying text.

35. VT. STAT. ANN. tit. 24, § 3808 (1975).

Similarly, section 3809 provides that, in the event that a division fence is damaged by fire, winds, or floods, a party adversely affected as a result may recover damages and costs of repairing the deficient portion of fence.[36] Thus, *X*, who is responsible for a particular span of fence, is strictly liable when a natural disaster occurs and either *X*'s animals or those of the adjoining landowner escape through *X's* portion of fence and cause subsequent damage, even though they escaped through no fault of *X*'s.[37]

Section 3814 defines a homesteader's liability. Failure to maintain the division fence between one's homestead and adjoining lands results not only in the owner's personal liability, but also in liability of the homestead to attachment and levy of execution to satisfy a judgment.[38] Finally, section 3816 is a blanket provision authorizing an action in tort to recover damages and the cost of erecting or repairing a fence whenever the duty to make and maintain a fence applies.[39]

B. *Scope of Fence Viewers' Authority to Assign Divisions*

In *Choquette v. Perrault*,[40] one of the issues on appeal is whether fence viewers from the Town of Newport gave Perrault adequate notice before examining the existing fence between Perrault's and Choquette's respective properties.[41] After examining the fence, the fence viewers filed a certificate of division assigning a portion of the fence line to Perrault, who had opposed any division whatsoever.[42] When Choquette sued Perrault pursuant to sections 3808 and 3816 of the Fence Act to recover the cost of erecting Perrault's portion, the defendant asserted that he had not received

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36. *Id.* § 3809.

37. For a general discussion of strict liability notions in the common law doctrine of trespass, see W. PROSSER, *supra* note 3, at 496-99.

38. VT. STAT. ANN. tit. 24, § 3814 (1975). Section 3814 originated as title 22, chapter 68, section 18 of the General Statutes of Vermont. Chapter 68, section 1 stated that a homestead, including the dwelling house, outbuildings, and land used in connection with them, plus rent, profits, and products were exempt from attachment and execution except in prescribed situations. One of those situations was the failure of a homesteader to build and maintain his portion of a division fence. VT. GEN. STAT. tit. 22, § 18 (1863).

39. VT. STAT. ANN. tit. 24, § 3816 (1975).

40. No. 82-318 (Vt. S. Ct. filed July 13, 1982).

41. Brief of the Appellant at 13-15, Choquette v. Perrault, No. 82-318 (Vt. S. Ct. filed July 13, 1982) [hereinafter cited as Appellant's Brief].

42. Findings of Fact, Conclusions of Law and Order at 3, Choquette v. Perrault, No. S51-790sC (Orleans Sup. Ct., June 14, 1982) [hereinafter cited as Findings and Conclusions].

advance notice as required by section 3811.[43]

The trial court could not find that advance notice had been given to Perrault by the fence viewers.[44] Nevertheless, it rejected the defendant's claim that notice was defective and jurisdiction lacking.[45] It did so by concluding that intervention by the fence viewers had not been required under the facts of the case to establish the defendant's liability to the plaintiff:

> [N]either the duty to make and maintain a portion of the division fence nor the liability of one owner to the other for failing to do so is contingent upon intervention or action on the part of the fence viewers. The validity or invalidity of the procedure of the fence viewers is therefore irrelevant to Plaintiffs' claim for damages in this case and any procedural defects will not defeat that claim.[46]

According to the trial court's construction of the Fence Act, section 3802 imposes the duty to fence regardless of any action by fence viewers to vary the baseline terms of that provision.[47] This strict reading of the statute is certainly plausible. In fact, section 3802 makes no mention whatsoever of fence viewers in describing the duty of adjoining landowners to maintain equal portions of the division fence.[48] Also noteworthy is the fact that the original Fence Act expressly authorized either selectmen *or* fence viewers to assign divisions "if [adjoining landowners] can not agree to divide

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43. *Id.* at 4. See *infra* text accompanying note 147 for the text of the notice requirement.

Other jurisdictions have reversed judgments against parties who received inadequate notice of the time and place of fence viewing proceedings. *See, e.g.*, Harris v. Sturdevant, 29 Me. 366 (1849) (defendant had received no notice); Emery v. Maguire, 87 Me. 116, 32 A. 781 (1895) (notice was qualified and thus insufficient). In *Emery*, the fence viewers specified a day on which to meet " 'unless very stormy, and if very stormy, on the next pleasant day following, except Sunday.' " *Id.* at 117, 32 A. at 781 (quoting fence viewers' note to defendant). At the same time, other jurisdictions have upheld notice which informs a party that on a certain day at a specified hour the fence between two adjoining pieces of property will be examined. *See* Bruner v. Palmer, 108 Ind. 397, 400, 9 N.E. 354, 355 (1886). The *Bruner* court relied partly on the additional fact that notice was in writing. While there appears to be no uniform requirement that such notice be in writing, an express statutory requirement that notice be written would obviate potential problems. See Barber v. Vinton, 82 Vt. 327, 73 A. 881 (1909), where the court held that, despite respondents' claim to have given notice orally, appellant could challenge a condemnation proceeding for lack of notice. *Id.* at 333-36, 73 A. at 883-84.

44. Findings and Conclusions, *supra* note 42, at 3.

45. *Id.* at 8.

46. *Id.*

47. *Id.*

48. *See* VT. STAT. ANN. tit. 24, § 3802 (1975).

the same."[49] The absence of such language in the current Fence Act suggests that the legislature sought to eliminate the quasi-judicial role of fence viewers in all but the most unusual situations.

It can be argued that fence viewers merely perform those duties expressly authorized by the Act. Those duties are to determine (1) the number of animals each landowner may pasture on land which the owners choose to occupy "in common,"[50] (2) the location and terms of a division when the fence cannot be made on the property line,[51] and (3) the terms of the division fence when parties are unable to agree and the property line coincides with the line between two towns.[52] Such an argument is consistent with section 3810, which authorizes fence viewers to make divisions only "in cases proper for them to determine."[53]

The problem with the trial court's construction is that the Fence Act fails to clearly denote what cases are, in fact, proper for fence viewers to determine. While section 3802 does not expressly authorize fence viewers to impose division obligations, neither does it expressly preclude fence viewers from doing so.[54] Furthermore, a close reading of section 3813 suggests that fence viewers exercise a quasi-judicial function by imposing division obligations when the parties do not agree. That provision authorizes fence viewers to impose a division "[w]hen the line on which a division fence is to be made or maintained is the line between two towns, and the parties do not agree upon the division."[55] Before imposing a division under these circumstances, however, fence viewers are required to give notice to the parties.[56] The notice required by section 3813 expressly incorporates the notice standard applicable to fence viewers in section 3811.[57]

Assuming, as the trial court suggests, that section 3802 alone gives rise to the duty to build and maintain division fences, an inconsistency results with respect to one's reading of the Act in its entirety. It makes no sense to require fence viewers to adjudicate

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49. *See supra* text accompanying note 15.
50. VT. STAT. ANN. tit. 24, § 3804 (1975).
51. *Id.* § 3805.
52. *Id.* § 3813.
53. *Id.* § 3810.
54. *See id.* § 3802 (1975).
55. *Id.* § 3813.
56. *Id.*
57. *Id.* See *infra* text accompanying note 147 for the text of the notice requirement of section 3811.

otherwise routine disputes and make divisions between adjoining landowners on town lines, but not allow them to do so within any given town. The thrust of section 3813 is fair representation and due process when officials from two towns, instead of just one, are implicated. No circumstances other than the inter-town character of the dispute are set forth in the provision to warrant intervention by the fence viewers.[58] Thus, it can be inferred that the notice requirement of section 3813 is merely an extension of the usual fence viewing procedure employed when fence viewers adjudicate routine disputes between adjoining landowners.

Such an inference suggests that while section 3802 sets forth the legal standard for imposing divisions, any landowner questioning his obligation to maintain a division can call on the fence viewers to interpret the law. This view, advocated by the appellant in *Choquette*,[59] would require fence viewers to act before liability can be imposed.

Other states have given fence viewers authority to impose divisions according to standards set forth in the statute when the parties cannot agree.[60] This would suggest that the appellant's argument is not so far-fetched. On the other hand, such statutes can be distinguished from Vermont's Fence Act. One difference is that they, unlike Vermont's statute, expressly authorize such activity by fence viewers.[61] Another is that they do not authorize selectmen to exempt landowners from divisions.[62] Based on these considerations, the trial court's construction is more persuasive.

The ambiguity of the Fence Act regarding the scope of fence viewers' authority is confirmed by the behavior of the parties in *Choquette*. Rather than rely on section 3802, Choquette requested that the fence viewers adjudicate the dispute.[63] Moreover, the fence viewers themselves claimed in their certificate of division to have established the division responsibilities of the respective parties.[64]

The defective notice claim is probably the least important is-

58. VT. STAT. ANN. tit. 24, § 3813 (1975).
59. Appellant's Brief, *supra* note 41, at 11-13.
60. *See, e.g.*, MASS. ANN. LAWS ch. 49, § 6 (Michie/Law. Co-op. 1983).
61. *See, e.g., id.*
62. *See, e.g., id.* §§ 1-20.
63. Findings and Conclusions, *supra* note 42, at 2.
64. Complaint, Exhibit 1, Choquette v. Perrault, No. S51-790sC (Orleans Sup. Ct. June 14, 1982).

sue raised by the appellant in *Choquette*. Unlike the constitutional claims which attack the Fence Act itself, the defective notice claim poses no challenge to the substance of the notice provision.[65] Nevertheless, it has raised important questions regarding the role of fence viewers in the statutory scheme. While the Vermont Supreme Court need not reach these questions in the event that it finds the Act unconstitutional, it should do so, if for no other reason than to furnish the legislature with guidelines to properly revise the Fence Act.

II. Constitutionality of Vermont's Fence Act

Until *Choquette*, the Fence Act had gone largely unchallenged in the courts.[66] The appellant in that case has alleged that the Fence Act constitutes an invalid exercise of the police power and that its appeal provision violates the fourteenth amendment, as well as article IV of the Vermont Constitution.[67] In one sense, these challenges have arisen when one would least expect them to. Indications are that the Fence Act has been invoked less frequently in recent years and that the activity of fence viewers is decreasing.[68] On the other hand, while the signs of formal activ-

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65. See *infra* text accompanying notes 146-48 for a discussion of whether the notice requirement of section 3811 satisfies procedural due process and equal protection requirements.

66. In fact, the only major constitutional question concerning the scope of the Act was raised in Shaw v. Gilfillan, 22 Vt. 565 (1850), where the plaintiff sought to have the location of a fence, which had been marked by fence viewers pursuant to their statutory authority, declared conclusive as to a subsequent boundary line dispute between the same parties. The Vermont Supreme Court declared that fence viewers have no authority to settle boundary disputes. *Id.* at 567.

67. Appellant's Brief, *supra* note 41, at vii-ix.

68. The town clerks and fence viewers of four towns in different areas of Vermont were interviewed. The town clerks were asked whether any certificates of division had been filed in the last ten years. None of the town clerks could remember having filed a certificate of division in the last ten years. Telephone interview with Edith Smith, Town Clerk of Arlington, Vt. (Jan 7, 1983); telephone interview with Richard Roscorla, Town Clerk of Bridport, Vt. (Jan. 13, 1983); telephone interview with Neal Goodwin, Town Clerk of Craftsbury, Vt. (Jan. 6, 1983); telephone interview with Kathleen Welch, Town Clerk of Tunbridge, Vt. (Jan. 20, 1983). Fence viewers from the same towns independently confirmed this report when questioned whether they could recall having filed any certificates of division either in the last ten years or, if they have served for less than ten years, since becoming fence viewers. Telephone interview with Roy Crofut, Fence Viewer of Arlington, Vt. (Jan. 26, 1983) [hereinafter cited as Arlington Fence Viewer]; telephone interview with Daniel Huestis, Fence Viewer of Bridport, Vt. (Jan. 20, 1983) [hereinafter cited as Bridport Fence Viewer]; telephone interview with Robert Anderson, Fence Viewer of Craftsbury, Vt. (Jan. 20, 1983) [hereinafter cited as Craftsbury Fence Viewer]; telephone interview with Paul Russell, Fence Viewer of Tunbridge, Vt. (Jan. 20, 1983) [hereinafter cited as Tunbridge Fence

ity—particularly certificates of division on file with the town clerks—are scant, fence viewers have continued to mediate fence disputes informally.[69] As to the allegation that the Fence Act represents an invalid exercise of the police power, it is not surprising that a constitutional challenge has arisen, given the widespread utilization of the Act in informal mediation. This section will address the particular challenges raised in *Choquette*, as well as distinct bases of challenge, in the context of both formal and informal activity under the statute.

A. *Vagueness*

To a large degree, the Fence Act is vulnerable to constitutional challenge because of the ambiguity of its terms. Confusion abounds as to precisely what the terms "occupancy" and "improvement" mean and how they relate to each other. Section 3802 addresses either "[o]wners or occupants of adjoining lands . . . ."[70] The statute suggests that an occupant is one who does not own but, nevertheless, possesses the land. Thus, one would expect that a tenant who resides on a given tract of land would be treated as an occupant. Is the tenant who leases land but resides elsewhere also an occupant? One could argue that such a tenant would not be an occupant since section 3802 envisions circumstances where land is both unimproved and unoccupied.[71]

The conclusion that occupancy requires residency, however, is contradicted by provisions of the Act which suggest that perhaps occupancy was equivalent to improvement in the minds of the draftsmen.[72] In section 3803 an allowance is made to reimburse the original fence-building party when the exempted party subsequently "occupies the adjoining land so as to be benefited by such fence . . . ."[73] A tenant farmer who suddenly clears a tract of land and begins grazing animals up to an existing fence obviously benefits from that fence. If that tenant happens to reside elsewhere,

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Viewer]. When asked about incidents of informal dispute mediation, each fence viewer remembered at least one such incident in the same ten-year period. The Bridport and Arlington fence viewers described an average of one or two such incidents each year.

69. *See supra* note 68.

70. VT. STAT. ANN. tit. 24, § 3802 (1975); *see supra* text accompanying note 22.

71. *See id.*

72. Unfortunately, legislative history other than original bills and minor amendments is nonexistent.

73. VT. STAT. ANN. tit. 24, § 3803 (1975).

which is not at all uncommon, will he be exempt from reimbursing the party that built the fence? Common sense dictates that occupation in this context means the act of improving. It would appear that at least in this instance, under section 3803, the draftsmen were using the terms interchangeably.

What constitutes an improvement sufficient to warrant fence division is the ultimate unanswered question. The Fence Act has left this question entirely to the discretion of the selectmen and fence viewers; their only guidance is that there be some benefit.[74] The Act's approach is not to assign fence divisions on the basis of particular improvements, but rather to compel division unless land is totally unimproved and, even then, only at the discretion of the selectmen.[75]

The vagueness of the terms "occupancy" and "improvement" suggests that the draftsmen of Vermont's Fence Act—whoever they might have been—were not skilled and, moreover, that they relied on a general expectation of agricultural land use to give those terms meaning. Farming was undoubtedly the dominant land use of the eighteenth and nineteenth centuries, particularly in Vermont.[76] With that expectation, it was fair to assume that to occupy and improve land was to farm it in some form and that a homestead would naturally be in need of a fence. The selectmen and fence viewers could be trusted to exempt parties that "ought not to be compelled to make any part of such fence."[77]

As long as the underlying expectation of agricultural land use prevailed, the Fence Act was relatively easy to apply. Today, however, that expectation is quickly fading. An unrelenting afforestation process began in 1880 which has ushered in corresponding decreases in cleared land.[78] As of 1973 only seventeen percent of

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74. *Id.*

75. *See id.* § 3802.

76. *See* H. WILSON, *supra* note 16, at 6-8. According to the author, the number of farms and total improved acreage in Vermont peaked around 1880 and began a slow and steady decline thereafter. *Id.* at 99-100.

77. VT. STAT. ANN. tit. 24, § 3802 (1975).

78. H. WILSON, *supra* note 16, at 237-38. It has been estimated that between 1900 and 1930 one-fourth of the farms in Vermont were given up and the amount of improved land decreased by 34%. *Id.* at 346-47. Between 1945 and 1974 the proportion of approximate land area in farms further decreased by 38%. U.S. DEP'T OF COMMERCE, 1974 CENSUS OF AGRICULTURE: VERMONT, vol. 1, part 45, I-1 (1977). Although statistics compiled over the years are subject to varying methods of measuring improved land, H. WILSON, *supra* note 16, at 100-01, the trend they describe is undisputed.

Vermont acreage was comprised of crop and pastureland.[79] Today, it is much more common for working farms to share their fence lines with abandoned farmland. As a result of this change in land use patterns, application of the Fence Act has become much more problematic.

Two examples should suffice to amplify this point. *X* purchases a ten-acre lot including an old farmhouse and barn, adjoining a working dairy farm. *X* works in a nearby factory. Other than some chickens, no animals are kept on the premises. Should *X* be compelled to maintain a division fence with the adjoining farmer? Under the apparent meaning of section 3802, the selectmen would have no discretion to exempt *X* from such a division. *X* owns and occupies the land in question. Since the land is not unoccupied, the statute mandates division of the fence line.[80] Also consider the case of *Y* who resides out of state but purchases a 200-acre farm in Vermont which he uses as a vacation home a few months out of the year. *Y* does not lease the farm or keep animals. In the summer, though, he cuts hay, primarily to keep the fields from reverting to forest. Assuming that *Y*'s neighbor is a farmer, should *Y* be compelled to maintain a division fence? Is the owner of land who only resides on it a few months each year an occupant? Moreover, is this sort of improvement one that warrants division, even though no animals are pastured?[81] It is doubtful whether the draftsmen of Vermont's Fence Act envisioned either of these situations. Nevertheless, the small nonagricultural residence and the vacation home are two exceedingly common forms of land use in Vermont today. Even assuming benefits exist which, in fact, warrant fence divisions in the case of the nonagricultural residence and vacation home, those benefits are insufficiently clear when one must rely on nebulous concepts of "occupancy" and "improvement" for guidance.[82]

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79. THE VERMONT ECONOMIC ALMANAC 198 (G. Bright ed. 1980).

80. VT. STAT. ANN. tit. 24, § 3802 (1975).

81. See *infra* note 117 in which two fence viewers give conflicting responses to these questions.

82. Absent the mutual benefit which a fence affords in restraining livestock, it is difficult to imagine what other benefits might warrant division of fences. It might be argued that fence division makes the maintenance of fences more likely than otherwise and, in so doing, indirectly assists the respective parties in ascertaining their mutual boundary lines. However, since fences often stray from boundary lines and are not determinative in boundary line disputes, Shaw v. Gilfillan, 22 Vt. 565 (1850); *see supra* note 66; *see also* VT. STAT. ANN. tit. 24, § 3806 (1975), such an argument treads on thin ice. Moreover, less costly means of securing the suggested benefit undoubtedly exist if the state perceives ascertainment of

Whether Vermont's Fence Act is potentially void for vagueness is a difficult question. The crux of the void for vagueness doctrine has been described as follows: "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[83] This doctrine has usually been employed when statutes proscribe certain activity as criminal.[84] While no authority has expressly limited application of the doctrine to the criminal sphere, nevertheless, courts are more likely to invalidate laws for vagueness where the deprivation of life or liberty—as opposed to that of property—is the due process concern.

The courts have not favored void for vagueness arguments. In *Gonyaw v. Gray*,[85] a Vermont statute[86] authorizing school officials to administer corporal punishment to secure order and obedience and to correct student behavior was upheld against a vagueness challenge.[87] The district court emphasized that "[t]he mere fact that a statute vests an official with discretion in seeking legitimate objectives does not render that statute void for vagueness merely because the possibility exists that discretion may be abused."[88] In another recent case,[89] the Vermont Supreme Court held that a statute[90] is not void for vagueness merely because it authorizes a court to issue a divorce decree based partly on a "reasonable probability" that marital relations will not resume.[91]

In light of these cases, it is not likely that the broad discretion granted fence viewers would cause the court in *Choquette* to invalidate the Fence Act under the void for vagueness doctrine. At least one writer has suggested that courts have used the vagueness doctrine to evade other constitutional issues and has advocated that those courts return to a more responsible constitutional analysis.[92]

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boundary lines as benefiting the public.

83. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

84. *See, e.g., id.* (violation of state minimum wage laws); United States v. Harriss, 347 U.S. 612 (1954) (illegal lobbying activity); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (violations of vagrancy ordinance).

85. 361 F. Supp. 366 (D. Vt. 1973).

86. VT. STAT. ANN. tit. 16, § 1161 (1974).

87. 361 F. Supp. at 370.

88. *Id.*

89. Boone v. Boone, 133 Vt. 170, 333 A.2d 98 (1975).

90. VT. STAT. ANN. tit. 15, § 551(7) (1974).

91. *Boone*, 133 Vt. at 172-73, 333 A.2d at 100.

92. Note, *Void For Vagueness: An Escape From Statutory Interpretation*, 23 IND. L.J.

If, in fact, the vagueness doctrine is less persuasive than other constitutional doctrines, and given the existence of additional grounds for constitutional challenge,[93] the Vermont Supreme Court should be able to address the Fence Act's flaws without reaching the issue of vagueness.

B. *Exercise of the Police Power*

In general, fencing statutes like Vermont's are justified by the state's police power.[94] The police power has been defined as "the governmental power of conserving and safeguarding the public safety, health, and welfare."[95] When considering the constitutionality of legislation enacted under the police power of the state, the courts keep in mind due process, equal protection, and eminent domain considerations. If a given statute deprives a person of life, liberty, or property without due process of law, denies a person equal protection of the law, or takes private property for public use without just compensation, it is unconstitutional.[96] The valid exercise of the police power is subject to these limitations.

By and large, fencing statutes have been upheld as constitutional.[97] They are generally perceived as promoting the public welfare.[98] Though few courts have bothered to engage in detailed anal-

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272, 284-85 (1948). For other discussions of the void for vagueness doctrine and important cases, see generally Freund, *The Use of Indefinite Terms in Statutes*, 30 YALE L.J. 437 (1921); Note, *The Void For Vagueness Doctrine In The Supreme Court*, 109 U. PA. L. REV. 67 (1960); NOTE, *Due Process Requirements of Definiteness in Statutes* 62 HARV. L. REV. 77 (1948).

93. *See supra* notes 94-141 and accompanying text (invalid exercise of the police power); *see infra* notes 141-69 and accompanying text (notice and appeal provisions violate procedural due process and equal protection).

94. 5 R. Powell, The Law of Property ¶ 693, at 62-12 (1981).

95. State v. Quattropani, 99 Vt. 360, 363, 133 A. 352, 353 (1926). Vermont's Constitution expressly authorizes exercise of the police power by the state legislature.VT. CONST. ch. 1, art. V. Such exercise of the police power by a state is valid under the tenth amendment to the United States Constitution which reserves to the states those "powers not delegated to the United States by the Constitution, nor prohibited by it to the States . . . ."U.S. CONST. amend. X.

96. *See* U.S. CONST. amends, V; XIV, § 1; VT. CONST. ch. 1, arts. I, II, VII.

97. Coster v. Tide Water Co., 18 N.J. Eq. 54, 68-69 (1866); *see, e.g.*, McKeever v. Jenks, 59 Iowa 300, 306, 13 N.W. 295, 298 (1882); Tomlinson v. Bainaka, 163 Ind. 112, 116-19, 70 N.E. 155, 157-58 (1904); Gilson v. Munson, 114 Mich. 671, 673-74, 72 N.W. 994, 994-95 (1897).

98. One court has noted that a possible purpose of such statutes was to prevent "devils' lanes," or alley-like corridors created when two adjoining landowners each erected a fence in close proximity to the other's, rather than enter into a division. Livestock, especially horned cattle, were often injured as a result of penetrating one fence and subsequently becoming

yses—relying instead on other courts' conclusions as to the validity of fencing statutes—those which seek to support their decisions more firmly reason that such statutes confer benefits on each of the parties.[99]

Conversely, where the benefits conferred are not mutual, statutes have not survived judicial scrutiny.[100] The most recent cases employing a benefit-conferred standard is *Sweeney v. Murphy*,[101] which held a New York statute unconstitutional as applied to the plaintiff's property. Sweeney resided on a large tract of land and cultivated ten acres but kept no livestock. The adjoining landowner operated a 200-acre dairy farm on which he grazed 110 milking cows. The two landowners shared 2,200 feet of boundary. Upon request of the dairy farmer, the defendant fence viewers decided the plaintiff should repair half of the existing fence pursuant to the New York statute[102] which called for division unless both landowners agreed not to fence along the division line.[103] The court in *Sweeney* reasoned that the legislation served a public interest at one time, but that it was presently arbitrary and confiscatory regarding certain real property. Using the test set forth by the United States Supreme Court in *Lawton v. Steele*,[104] the court found that the law as applied did not serve a public interest or employ reasonable means. It concluded under state law that the plaintiff should not have to maintain a fence which he did not need or want, and accordingly held the statute in question uncon-

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trapped between the two fences. Such "devils' lanes" were blamed for provoking animosities among neighbors. Alma Coal Co. v. Cozad, 79 Ohio St. 348, 352, 87 N.E. 172, 173 (1909).

99. *See, e.g.*, Zarbaugh v. Ellinger, 99 Ohio St. 133, 138, 124 N.E. 68, 69 (1918) (benefits accrue to owner of a right-of-way as well as to adjoining landowners); Kloeppel v. Putnam, 76 Ohio App. 130, 135-36, 63 N.E.2d 237, 239 (1945) (benefits accrue to grain farmer as well as to adjoining owner of stock).

100. See, e.g., Dilworth v. State, 36 Tex. Crim. 189, 36 S.W. 274 (1896), where it was held that a law making it a misdemeanor for a party to build a fence more than three miles long in any direction without providing a gateway, violated the Texas Bill of Rights which prohibited the taking of private property without just compensation. The court reasoned that providing a passage through a fence and over private property at that landowner's expense would, in effect, create an easement that would benefit only certain individuals and not the general public. *Id.* at 191-92, 36 S.W. at 275-76.

101. 39 A.D.2d 306, 334 N.Y.S.2d 239 (1972), *aff'd*, 31 N.Y.2d 1042, 342 N.Y.S.2d 70, 294 N.E.2d 855 (1973).

102. N.Y. Town Law § 300 (McKinney 1965), *amended by* N.Y. Town Law § 300 (McKinney Supp. 1981).

103. *Sweeney*, 39 A.D.2d at 307, 334 N.Y.S.2d at 240-41.

104. 152 U.S. 133, 136-37 (1894). The Court upheld a New York fish and game law as a valid exercise of the police power because it served a public interest and employed reasonable means. *Id.*

stitutional as applied to Sweeney.[105]

The facts of *Choquette v. Perrault*[106] are very similar to those in *Sweeney*. Choquette, the appellee, is a dairy farmer who maintains 265 head of cattle on 700 acres of land. He purchased a parcel of land in 1974 adjacent to the land of Perrault, the appellant.[107] Perrault kept no animals on his property. His seventy acres were characterized by the trial court as follows: "[E]xcept for a garden, the land is pretty much grown up to pastureland."[108] Choquette asked Perrault to maintain a portion of the existing fence line between the two properties. Perrault, who had not previously maintained the fence in any way, declined. After temporarily erecting an electric fence, Choquette contacted an attorney and, eventually, the fence viewers for the Town of Newport.[109] The fence viewers, at Choquette's request, measured the fence; they then drew up, signed, and filed a certificate of division with the town clerk. Perrault was invited to participate in the proceeding but refused. He was subsequently informed by letter of the decision to assign a division.[110]

Choquette then prepared and sent an estimate of repair for Perrault's portion of the fence.[111] When Perrault failed to reply or take any action to repair the fence, Choquette undertook the work himself. He repaired approximately 850 feet of fence which the certificate of division attributed to Perrault. To recover the cost, Choquette brought suit for damages under sections 3802, 3808, 3810, and 3816 of the Fence Act.[112] In his answer to the complaint, Perrault asserted as an affirmative defense that the Fence Act is unconstitutional under state and federal law.[113]

Not surprisingly, Perrault is relying heavily on *Sweeney* in his appeal from the judgment for the plaintiff decreed below. As in *Sweeney*, the party engaging in farming apparently derives all the benefit and the other party none. In addition, the Vermont statute,

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105. *Sweeney*, 39 A.D.2d at 308, 334 N.Y.S.2d at 242.

106. No. S51-790sC (Orleans Sup. Ct., June 14, 1982), *appeal docketed*, No. 82-318 (Vt. S. Ct. July 13, 1982).

107. Findings and Conclusions, *supra* note 42, at 1.

108. *Id.*

109. *Id.* at 2.

110. *Id.* at 3.

111. *Id.*

112. Complaint at 1-2, Choquette v. Perrault, No. S51-790sC (Orleans Sup. Ct., June 14, 1982).

113. Findings and Conclusions, *supra* note 42, at 4-5.

like New York's former statute, does not allow any exemption from a division under these circumstances. Section 3802[114] makes "occupancy" the touchstone of division. Although the Act does not define that term, a popular source defines an occupant as "[o]ne who has actual use, possession or control of a thing."[115] According to this definition, Perrault is clearly an occupant of the land in question. Moreover, he is not eligible for exemption under section 3802 unless his land is both unoccupied *and* unimproved.[116] The implication is that only unoccupied land can qualify for the exemption. Thus, Perrault is ineligible for an exemption under section 3802.[117]

Sweeney suggests that the Fence Act is not immune from the police power challenge raised in *Choquette*. It can be argued persuasively that the Act, like the statute in *Sweeney*, is arbitrary and confiscatory and that by failing to exempt landowners like Perrault it does not employ reasonable means. While the Fence Act allows a division obligation to be imposed on a landowner who was once exempted from division but who subsequently improves his land,[118] no allowance is made to exempt from division a landowner whose land has reverted from farmland to forestland. Under such circumstances, the only possible means of escaping a division obligation is for a landowner to cease occupying his property and petition the selectmen for exemption under section 3802. The problem is essentially the same as that raised in *Sweeney*: Is a sufficient benefit conferred on the occupant of otherwise unimproved land to make the assignment of a division constitutionally valid? There is no principled distinction between the fact pattern in *Choquette* and that in *Sweeney*, where it was held that the occupant of predominantly unfarmed land would not benefit sufficiently from a fence to warrant its division.[119]

The Orleans Superior Court in *Choquette* rejected Perrault's

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114. VT. STAT. ANN. tit. 24, § 3802 (1975). *See supra* text accompanying notes 22-23.

115. *See supra* text accompanying note 22.

116. BLACK'S LAW DICTIONARY 973 (rev. 5th ed. 1979).

117. One Vermont fence viewer who has mediated disputes involving out-of-state owners of abandoned farms insisted that under the law, landowners in Perrault's situation are required to maintain preexisting fence divisions, despite not farming or pasturing animals of any kind. According to him, the owner of land subject to a fence division can escape his or her responsibility only by leasing the land to another who then assumes the obligation. Bridport Fence Viewer, *supra* note 68. On the other hand, another fence viewer felt that the law is unclear. Craftsbury Fence Viewer, *supra* note 68.

118. *See* VT. STAT. ANN. tit. 24, § 3803 (1975); *see also supra* text accompanying note 24.

119. *See supra* text accompanying notes 101-05.

argument that the Act constitutes an invalid exercise of the police power.[120] It acknowledged the possibility that the defendant had no desire or need for the fence, but insisted that

> it cannot be said that the addition of a repaired or newly constructed fence on the property line in no way enhances the value of Defendant's land. This is clearly a benefit in a rural area, if for no other reason than Robert Frost's observation that 'good fences made good neighbors.'[121]

Thus, the court found a valid public interest served by the Act. It went on to observe that section 3802 makes sufficient allowance for exemption from division by allowing owners of unimproved *or* unoccupied land to petition the selectmen.[122] In this fashion, the court distinguished *Sweeney*, where no provision for exemption existed, and concluded that the means adopted were clearly and reasonably related to the purposes of the statute and the promotion of general welfare.[123]

In deciding *Choquette* the Vermont Supreme Court must consider whether the Fence Act violates either state or federal constitutional provisions.[124] Both Vermont and federal law prescribe indentical tests for evaluating the propriety of a state's exercise of the police power: The statute in question must serve a public interest and employ reasonable means.[125] If the court so chooses, it can invalidate the Fence Act under the federal standard set forth in *Lawton v. Steele*.[126] In all probability, though, if the court does strike down the Fence Act, it will look to state law for authority, as

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120. Findings and Conclusions, *supra* note 42, at 5.

121. *Id.* The trial court's mention of Frost's renowned poem is surprising. A close reading of the poem suggests that, rather than supporting the fence mending custom, the poet was marvelling at its cultural persistence in the face of common sense. The poem is nothing less than a compelling comment on blind, unquestioning adherence to tradition for tradition's sake. *See* text accompanying note 1.

122. *Id.* at 6.

123. *Id.* at 5.

124. State v. Ludlow Supermarkets, Inc., 141 Vt. 261, 268, 448 A.2d 791, 795 (1982).

125. *See* Lawton v. Steele, 152 U.S. 133, 136-37 (1894); *see supra* note 104 and accompanying text; Vermont Woolen Corp. v. Wackerman, 122 Vt. 219, 167 A.2d 533 (1960). *Wackerman* contains a concise test for purposes of validating or invalidating an exercise of the police power: "[S]tatutes in furtherance of the public welfare generally must . . . confer varying benefits upon individuals. So long as the public purpose is paramount and the enactment reasonably related to that purpose, the statute is not made invalid thereby." *Id.* at 226, 167 A.2d at 538.

126. 152 U.S. 133, 136-37 (1894).

did the court in *Sweeney*.[127]

In *State v. Ludlow Supermarkets, Inc.*,[128] the court struck down a statute[129] which promoted small, locally owned retail stores by prohibiting larger stores from doing business on Sunday. The court reasoned that the law, by favoring one part of the community over another, violated article VII of the Vermont Constitution.[130] Article VII reads in part: "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community, and not for the particular emolument or adantage of any single man, family or set of men, who are a part only of that community . . . ."[131] This article is somewhat analogous to the equal protection clause of the fourteenth amendment. Significantly, the *Ludlow* court chose to invalidate the law in question on state constitutional grounds and not on the federal grounds of equal protection.

A comparison of the statutes scrutinized in *Ludlow* and *Choquette* suggests ways to distinguish the two cases. The statute in *Ludlow* had the express purpose of promoting small retail stores.[132] Faced with this purpose, the court reasoned that the statute was in direct conflict with article VII of the Vermont Constitution and could not serve a public interest.[133]

By contrast, the Fence Act contains no such expression of purpose. The statute's purpose is more open to debate. The trial court, therefore, was able to read the Fence Act broadly as promoting agriculture, an important segment of the Vermont economy, by regulating the building and maintaining of fences.[134] The court chose not to read the statute as promoting farmers. Such a reading would have cast the Fence Act in a mold more similar to that of the statute struck down in *Ludlow*.

How the supreme court chooses to frame the purpose of the Fence Act will undoubtedly influence the court's ultimate decision. Unlike the *Sweeney* court, which held that the New York statute

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127. *See supra* text accompanying note 105.
128. 141 Vt. 261, 448 A.2d 791 (1982).
129. VT. STAT. ANN. tit. 13, §§ 3351-3358 (Supp. 1981) (repealed 1983).
130. *Ludlow*, 141 Vt. at 270, 448 A.2d at 795-96.
131. VT. CONST. ch. 1, art. VII.
132. VT. STAT. ANN. tit. 13, § 3352 (Supp. 1981) (repealed 1983).
133. *Ludlow*, 141 Vt. at 269, 448 A.2d at 795.
134. Findings and Conclusions, *supra* note 42, at 5.

did not serve a public interest,[135] the Vermont Supreme Court could conceivably find a valid public interest based on Vermont's rural character.[136] Assuming the court finds a valid public interest served by the Fence Act, it must then find that the statute employs reasonable means. The court can more readily invalidate the Fence Act on this second prong of the test.

In *Ludlow*, the court considered whether purposes other than the promotion of small retail stores could be utilized to uphold the statute in question.[137] Those purposes were the establishment of a common day of rest and the conservation of energy.[138] In both cases, the court assumed a valid public interest and found, nevertheless, that the statute did not employ reasonable means to effect such purposes. Less restrictive alternatives were clearly available.[139]

As in *Ludlow*, less restrictive alternatives can be utilized to serve the purposes of the Fence Act, assuming the statute serves a public interest. An adequate exemption provision would narrow the application of the Act to situations where both landowners, instead of just one, keep animals requiring fences. The effect would be to promote agriculture in predominantly agricultural areas without burdening landowners not engaged in agricultural land use.

While the trial court's finding of a public interest may be at least defensible, its reading of section 3802 as providing an adequate exemption to persons like Perrault is not. The statute does not allow the owner of unimproved land like Perrault's to petition for exemption. Only the owner of unimproved *and* unoccupied land can entertain the possibility of exemption under section 3802.[140] Since Perrault's land was occupied, he could not hope for exemption. Thus, the trial court's distinguishing of *Sweeney* and its resulting conclusion that the Fence Act employs reasonable means are analytically unsound.

The court should utilize the *Ludlow* decision to invalidate sec-

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135. *See supra* text accompanying note 105.

136. That finding, however, would fly in the face of common knowledge that agricultural land use has decreased drastically over the years. *See supra* notes 78-79 and accompanying text.

137. 141 Vt. at 269, 448 A.2d at 796.

138. *Id.*; VT. STAT. ANN. tit. 13, § 3352 (Supp. 1981) (repealed 1983).

139. *Ludlow*, 141 Vt. at 269-70, 448 A.2d at 796.

140. *See* VT. STAT. ANN. tit. 24, § 3802 (1975).

tion 3802 of the Fence Act. As currently written, that provision clearly favors one part of the community over another. It enables anyone keeping animals which require fencing to exact contribution from anyone who so much as occupies a parcel of land.[141] Without an adequate exemption provision, it should be invalidated.

C. *Adequacy of the Notice and Appeal Provisions*

The fourteenth amendment to the United States Constitution guarantees that no "[s]tate [shall] deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[142] The Vermont Fence Act raises two questions in these areas of constitutional law: First, does the statutory notice to adjoining landowners of fence viewers' pending inspection satisfy procedural due process? Second, does the provision governing appeal from the fence viewers' disposition furnish sufficient procedural due process and equal protection safeguards?

Procedural due process generally recognizes the twin rights to reasonable notice and an opportunity to be heard.[143] The Vermont Supreme Court recently acknowledged that when property interests are implicated, procedural due process rights attach.[144] Nevertheless, the court was quick to qualify that statement by insisting that property interests do not always enjoy the "full panoply" of rights associated with criminal proceedings.[145]

Courts have scrutinized closely the adequacy of notice in fence

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141. The appellant suggests that the effect of section 3802 is to favor farmers as a class over non-farmers. Appellant's Brief, *supra* note 41, at 9. While farmers are undoubtedly included in the benefited class, they are not the only benefited group. Someone keeping a horse for pleasure could just as easily invoke the Fence Act's authority to compel division. This hypothetical, even more than the fact pattern in *Choquette*, casts doubt on the validity of the public interest argument in favor of the Fence Act. Does the public interest warrant the subsidizing of one person's hobby by another person who does not share that hobby? The impact of agriculture on the state and its economy may justify certain state action, but the furthering of isolated hobbies clearly should not.

142. U.S. CONST. amend. XIV, § 1. Vermont's constitution likewise affords procedural due process protection. *See* VT. CONST. ch. 1, arts. IV, X.

143. Vermont Real Estate Comm'n v. Martin, 132 Vt. 309, 311, 318 A.2d 670, 672 (1974); Armstrong v. Manzo, 380 U.S. 545, 550 (1965).

144. Burroughs v. West Windsor Bd. of School Directors, 138 Vt. 575, 579, 420 A.2d 861, 863 (1980) (teacher challenged sufficiency of hearing on non-renewal of a teaching contract).

145. *Id.*

viewing proceedings.[146] Notice of pending action by fence viewers is required by section 3811: "When called upon to act, the fence viewers shall give notice to parties interested, or to their tenants or agents, of the time when they will examine the fence or line between adjoining lands, before they make a division relating to the same."[147] While this provision could benefit from a more precise wording, it is essentially sound.

The Vermont Supreme Court has described the requisite quality of notice as follows: "Considerations of due process entitle all interested parties to the best notice possible, or that notice which is 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' "[148] Section 3811, judged in this light, satisfies due process—at least on its face. It explicitly requires notice of the time of viewing and implicitly requires notice of the location to be viewed.

Whether the scheme for appeal from a disposition of the fence viewers satisfies constitutional requisites is a more difficult question. Section 3810 allows "[e]ither party [to] appeal from the decision of the fence viewers to a district or superior court if such appeal is claimed within *two hours* from the rendition of the decision. Such appeal shall be taken as provided by chapter 109 of Title 12."[149] A preliminary problem afflicting this provision is that chapter 109 of title 12, governing "Appeals From Justice's Court in Civil Actions," was repealed, effective April 9, 1974,[150] and no other provision has taken its place. In effect, parties to fence viewing proceedings have a right to appeal but no guidance on how to pursue their appeals.

Notwithstanding this shortcoming, the provision does allow an appeal to district or superior court regardless of the lack of express procedure. The question then becomes whether the time provided for appeal by section 3810 is sufficient. Allowing an appeal only if

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146. *See, e.g.*, Harris v. Sturdevant, 29 Me. 366 (1849); Emery v. Maguire, 87 Me. 116, 32 A. 781 (1895).

147. VT. STAT. ANN. tit. 24, § 3811 (1975).

148. Committee to Save the Bishop's House v. Medical Center Hosp. of Vt., Inc., 136 Vt. 213, 215-16, 388 A.2d 827, 829 (1978) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

149. VT. STAT. ANN. tit. 24, § 3810 (1975) (emphasis added).

150. 1973 Vt. Acts No. 249, § 111 (Adj. Sess.).

claimed within "two hours from the rendition of the decision"[151] hardly can be described as meaningful. First, the point at which a decision of the fence viewers is rendered is unclear. Is it rendered on site when the fence viewers make their decision or when they file a certificate with the town clerk as required by section 3811?[152] Second, assuming the fence viewers' decision is rendered when a certificate is filed with the town clerk, is two hours constitutionally adequate to secure a right to appeal? The appellant in *Choquette* has challenged the validity of the entire statutory scheme based on these considerations.[153] He contends that "[i]f 'rendered' at a time of day when, or at a place where an appellant, even if he knew about it, could not reach the court house to file an appeal, he would be foreclosed."[154]

In *Lindsey v. Normet*,[155] the United States Supreme Court stated that the due process clause of the fourteenth amendment does not require the states to provide appellate review if a full and fair trial on the merits is provided.[156] However, once an opportunity for appeal has been provided, that opportunity may not be offered so as to deny litigants equal protection of the laws.[157] In holding that a double-bond prerequisite for appealing a forcible-entry-and-detainer action violated tenants' rights to equal protection, the Court noted that not only the indigent tenant but also the non-indigent tenant was discriminated against as compared to other civil litigants afforded an opportunity to appeal.[158]

Lindsey v. Normet suggests two possible equal protection challenges to the Fence Act's appeal provision. First, the two-hour appeal provision discriminates against those landowners who are not local residents and, for that reason, are unable to attend fence

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151. VT. STAT. ANN. tit. 24, § 3810 (1975).

152. "When fence viewers make a division of fence, or appraise the value of a fence made or repaired, or examine as to the sufficiency of a fence, they shall certify the same. When they make a division of fence and so certify, a record of the same in the office of the clerk of the town in which the line is situated shall be valid against the parties, their heirs and assigns." VT. STAT. ANN. tit. 24, § 3811 (1975).

153. Appellant's Brief, *supra* note 41, at 16-17. The trial court summarily rejected this argument for the same reason it rejected the argument that defective notice required dismissal of the suit. Findings and Conclusions, *supra* note 42, at 8; *see supra* text accompanying notes 44-46.

154. Appellant's Brief, *supra* note 41, at 16.

155. 405 U.S. 56 (1972).

156. *Id.* at 77.

157. *Id.*

158. *Id.* at 79.

viewing proceedings.[159] Although this class will subsequently receive notice of the fence viewers' decision, such notice is likely to come by mail at least twenty-four hours after a decision is rendered. Thus, the class may be effectively barred from the appeal process. Resident landowners, on the other hand, can more easily be present for fence viewing proceedings and, assuming that a decision is rendered at the location of the proceeding, immediately seek appeal if dissatisfied.[160] Second, the two-hour appeal provision discriminates against all landowners subject to fence viewing proceedings as compared to parties subject to other quasi-judicial proceedings. For example, appeals from both state administrative[161] and district environmental commission[162] decisions allow thirty-day notice.

The appeallant in *Choquette* has suggested that the appeal provision violates article IV of the Vermont Constitution.[163] Article IV reads as follows:

> Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain right and justice, freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; conformably to the laws.[164]

Along with the fourteenth amendment to the United States Constitution, article IV embodies equal protection grounds for invalidating section 3810. Thus, the Vermont Supreme Court has the choice of striking down the current appeal provision as inadequate on either state or federal constitutional grounds.

If the court chooses to invalidate the statute, the legislature will be faced with a dilemma: Should it expand the time limit for

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159. This class could include, but by no means is limited to, out-of-state landowners. In-state landowners could easily reside two hours' distance from the land subject to fence viewing proceedings.

160. It should be reiterated, however, that section 3810 does not specify the time within which a decision must be rendered. *See supra* text accompanying note 152.

161. VT. STAT. ANN. tit. 3, § 815 (Cum. Supp. 1983). This provision is subject to the Vermont Rules of Appellate Procedure, which provide generally that where an appeal is permitted by law as of right, notice must be filed with the supreme court within thirty days of a judgment or order below.VT. R. APP. P. 4, 13(a), 13(b) (1971 & Cum. Supp. 1983). Since section 3810 provides for appeal as of right, it is clearly in conflict with these rules and should be amended to conform to the thirty-day standard.

162. VT. STAT. ANN. tit. 10, § 6089 (Cum. Supp. 1983).

163. Appellant's Brief, *supra* note 41, at 16.

164. VT. CONST. ch. 1, art. IV.

taking appeal from fence viewers' decisions to meet constitutional standards or, alternatively, abolish the right to appeal itself? Under *Lindsey*, an appeal is not required by the federal constitution if a full and fair trial on the merits has been provided.[165] It is unclear whether fence viewing proceedings constitute a full and fair trial on the merits consistent with procedural due process principles. Other courts have found such proceedings per se to satisfy procedural due process.[166] However, those decisions were made at a time of less expansive due process construction. Today they might be subject to overruling.[167]

An additional consideration for the legislature is the fact that section 3810 provides no appeal whatsoever from decisions of the selectmen under section 3802 regarding exemption from division obligations.[168] When elected officials exercise a quasi-judicial function in this manner it militates strongly in favor of providing appellate review in order to satisfy procedural due process requirements. The legislature would be well advised to expand, rather than abolish, the current appeal provision to encompass selectmen's proceedings. Moreover, a lengthier period for *de novo* appeal from both fence viewers' and selectmen's decisions should be prescribed.[169] To do otherwise may very well subject both types of proceedings to constitutional scrutiny. The proposed revision

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165. 405 U.S. at 77.

166. *See, e.g.*, Tomlinson v. Bainaka, 163 Ind. 112, 116-19, 70 N.E. 155, 157-58 (1904); Gilson v. Munson, 114 Mich. 671, 673-74, 72 N.W. 994, 994-95 (1897); McKeever v. Jenks, 59 Iowa 300, 306, 13 N.W. 295, 298 (1882).

167. *See* Friendly, "*Some Kind of Hearing*", 123 U. PA. L. REV. 1267, 1268 (1975). "[W]e have witnessed a greater expansion of procedural due process in the last five years than in the entire period since ratification of the Constitution." *Id.* at 1273. The expansion of due process is epitomized by the Court's decision in Goldberg v. Kelly, 397 U.S. 254 (1970), which held that due process requires an adequate hearing before welfare benefits can be terminated. The *Goldberg* Court described an adequate hearing as including notice and an opportunity to confront and cross-examine witnesses, to present oral arguments, and to have counsel present. *Id.* at 267-70. While a full trial or even the type of hearing prescribed in *Goldberg* would not likely be applicable to fence viewers' and selectmen's proceedings, nevertheless, questions are raised regarding what kind of hearing is required as part of those proceedings. In scrutinizing the adequacy of hearings under the Fence Act, courts would balance the government's interest, the private interest at stake, and the risk of an erroneous deprivation of that interest, as well as the probable value of additional procedural safeguards. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 335 (1976). For a discussion of factors which courts might look to in defining a fair hearing for purposes of the Fence Act, see Friendly, "*Some Kind of a Hearing*", 123 U. PA. L. REV. 1267, 1279-95 (1975).

168. *See* VT. STAT. ANN. tit. 24, § 3810 (1975).

169. Section 3810, lacking procedural guidelines, does not specify whether a *de novo* hearing is intended or not. Given the highly informal nature of fence viewing proceedings, a *de novo* hearing would seem essential.

would obviate this problem.[170]

III. Mending the Fence Act

Faced with the constitutional infirmities of the Fence Act, two possible options are suggested. One is to rely on judicial construction of the Act to preclude an unconstitutional application. In deciding the *Choquette* case, the Vermont Supreme Court can exercise this option. A second option is to engage in statutory revision to clarify the terms by which divisions are assigned and to provide a more meaningful opportunity for appeal. These options are not mutually exclusive.

Judicial review is attractive for several reasons. First, any challenge to the statute calls into question the meaning of various terms. Since the meanings of "occupancy" and "improvement" are unclear,[171] a court would not be precluded by the canons of construction from imputing constitutionally acceptable meaning. Second, in the course of appeal, courts should be able to snare blatantly unjust applications of the Fence Act.[172] Third, Vermont has adequate state guidelines to regulate exercise of the police power.[173] Fourth—and most importantly—a wealth of case law from other jurisdictions may be utilized if the need arises.

Regarding the circumstances under which a division may be assigned, *Sweeney v. Murphy* is important in that it is the first case to acknowledge that fencing legislation which once served a legitimate public interest may no longer do so.[174] With *Sweeney* as persuasive authority, the Vermont courts could conceivably find the assignment of a fence division to be unconstitutional under certain circumstances without having to strike down any provision of the Fence Act.[175]

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170. *See infra* text accompanying notes 201-02.

171. *See supra* text accompanying notes 70-82.

172. *But see supra* text accompanying notes 151-54.

173. State v. Ludlow Supermarkets, Inc., 141 Vt. 261, 448 A.2d 791 (1982) contains the most recent interpretation of those guidelines. *See also supra* note 125 and accompanying text.

174. Sweeney v. Murphy, 39 A.D.2d 306, 308, 334 N.Y.S.2d 239, 241 (1972), *aff'd*, 31 N.Y.2d 1042, 342 N.Y.S.2d 70, 294 N.E.2d 855 (1973). *See supra* text accompanying notes 103-05.

175. The *Sweeney* court did not hold the statute in question, N.Y. Town Law § 300 (McKinney 1965), to be unconstitutional per se; rather, it invalidated the statute only as applied to the facts of the case.

The Vermont courts might also look to Ohio where the courts have ruled on the validity of the state fencing statute based on a benefit-conferred rationale. Through a series of cases, the Ohio courts have clarified the scope of that statute. In *Alma Coal Co. v. Cozad*,[176] the plaintiff coal company argued against the division because the company had no desire either to cultivate or otherwise improve the land in question.[177] The Ohio Supreme Court agreed, reasoning that the concept of division could not apply to a fence where only one party would benefit.[178] In *Zarbaugh v. Ellinger*,[179] the plaintiff challenged a statutory provision which declared that owners of rights-of-way connecting public highways with farms should share the cost of maintaining fencing on either side of those rights-of-way with adjoining landowners. The plaintiff argued that since the statute was meant to facilitate enclosure, a right-of-way, being open on either end, would not come within the statute's scope.[180] The Ohio Supreme Court disagreed and held the provision constitutional, reasoning that benefits would be conferred on both parties. The owner of the right-of-way would gain the assistance of a fence in driving his stock in and out; the adjoining landowners would gain protection for their crops and property.[181]

Statutory revision, on the other hand, is a compelling option for remedying the Fence Act's flaws because its impact would be felt in those cases which never reach the courts. There can be no doubt that Vermont's fence viewers are currently engaging in informal dispute mediation.[182] Moreover, it is evident that fence viewers are not in agreement as to what the law requires.[183] If one accepts the proposition that a fence viewer's understanding of the

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176. 79 Ohio St. 348, 87 N.E. 172 (1909).

177. *Id.*

178. *Id.* at 354-55, 87 N.E. at 172.

179. 99 Ohio St. 133, 124 N.E. 68 (1918).

180. *Id.*

181. *Id.* at 138, 124 N.E. at 69. In another case, the Ohio Court of Appeals held that unless land is wild and uncultivated, its owner must contribute to a fence division. Kloeppel v. Putnam, 76 Ohio App. 130, 63 N.E.2d 237 (1945). The court reasoned that cultivated land, as distinguished from grazing land, gained the benefit of protection from the encroachment of neighboring stock and, in any event, a fence would add to the value of the farm. *Id.* at 135, 63 N.E.2d at 239. *Kloeppel* should be overruled. If benefits are held to be conferred on cultivated land, then the law has effectively abolished any notion of trespass for all intents and purposes. *Sweeney*, in which it was held that the owner of partly cultivated land was *not* sufficiently benefited, is the better reasoned case. *See supra* text accompanying notes 101-05.

182. *See supra* note 68.

183. *See supra* note 117.

law has an effect on his or her performance as a mediator, it is likely that the law is being misrepresented. Such misrepresentation may well induce unwilling landowners to agree to some sort of division.[184] Given the prohibitive cost of litigation, it is also likely that most landowners who suspect an erroneous construction of the Act by fence viewers will forego a court challenge. The *Choquette* case must be viewed as the exception, not the rule. It is for those landowners unable to afford going to court that statutory revision and the resulting clarification would have the greatest impact.

While not pervasive, statutory revision has occurred in a number of jurisdictions with fencing statutes like Vermont's.[185] Those states which offer alternatives for the definition of circumstances under which a division obligation arises include New Jersey, New York, Connecticut, and Ohio. New Jersey's law was amended in 1958 to read as follows:

> Where the lands of any 2 or more persons shall join each other and 1 or more of them are *using said lands for the pasturage or keeping of animals*, each of them so using said lands shall make or amend and maintain a just proportion of the partition fence between said lands except when all of said persons shall choose to let their adjoining lands lie vacant and open, *but no such adjoining owner shall be required to make, amend or maintain any portion . . . unless he is using his adjoining lands for said purposes.*[186]

This provision is attractive because it restricts the imposition of a division to a specifically defined land use—the pasturing or keeping of animals—and prohibits a landowner not engaged in such use from being compelled to support a division.

New York, after *Sweeney v. Murphy*, revised the statute which came under fire in that case. Prior to *Sweeney*, the law required that two adjoining landowners maintain a division unless they agreed otherwise.[187] Subsequent to *Sweeney*, the law was

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184. *See id.*

185. *See, e.g.*, N.J. STAT. ANN. § 4:20-7 (West 1973); N.Y. TOWN LAW § 300 (McKinney Supp. 1982-83). Some states have statutes which are as vulnerable to constitutional challenge as Vermont's presently is. *See, e.g.*, ILL. ANN. STAT. ch. 54, § 4 (Smith-Hurd Supp. 1983-84) (anyone living in a county of less than 1,000,000 and outside a municipality may compel division if he encloses his land); R.I. GEN. LAWS § 34-10-11 (1969) (landowner shall keep up and maintain division ever afterwards, whether he continues to improve or not).

186. N.J. STAT. ANN. § 4:20-7 (West 1973) (emphasis added).

187. N.Y. TOWN LAW § 300 (McKinney 1965).

amended to contain the following proviso: "that the owner of an adjoining tract of land who does not keep . . . animals thereon within 5 years of the date of the erection or repair of a division fence shall not be obligated or liable for erecting, maintaining or repairing such a division fence under this article."[188] Again, the notion of division is qualified by the requirement that animals be kept on the land.

Ohio has taken a different path. Rather than limit the scope of its fencing statute, it has chosen explicitly to leave that question open: "The fact that any land or tract of land is wholly unenclosed or is not used, adapted, or intended by its owner for use for agricultural purposes shall not excuse the owner thereof from the obligations imposed . . . on him as an adjoining owner."[189] The disadvantage of this approach is that it encourages recourse to judicial review, as was seen in *Zarbaugh v. Ellinger*.[190]

Connecticut, on the other hand, has broadened the scope of its fencing statute, authorizing division of fences around home lots if dwellings are within one hundred rods of the line.[191] The sole purpose mentioned for assigning division is "to secure [the parties'] particular fields."[192] The statutory description of sufficient fences includes materials comprising chain link fences.[193] Apparently, the Connecticut Legislature has decided that nonagricultural, residential benefits exist along with agricultural benefits to justify the division of fences in many circumstances.[194]

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188. *Id.* (McKinney Supp. 1982-83). This revised section allows for depreciation of the value of a fence over a five-year period. After five years, a party can conceivably graze cattle without having to contribute until a new fence is built or repairs undertaken.

189. OHIO REV. CODE ANN. § 971.02 (Baldwin 1983).

190. *See supra* notes 179-81 and accompanying text. Moreover, this statute authorizes the imposition of a division where no clear benefit is conferred, as occurred in *Kloeppel v. Putnam*. *See supra* note 181.

191. CONN. GEN. STAT. § 47-56 (West 1978).

192. *Id.* § 47-43.

193. *See id.*

194. The advantage of Connecticut's statute is that it tailors such application to situations where dwellings are within a certain distance of the lot line. CONN. GEN. STAT. § 47-56 (West 1978). Of course, this assessment assumes that sufficient nonagricultural benefits are conferred under Connecticut's statute. Such assumption notwithstanding, residential dwellings in close proximity to one another arguably reap division benefits which do not attach with unimproved agricultural land.

Vermont could conceivably revise the Fence Act to conform to both New Jersey's agricultural provision, *see supra* note 186 and accompanying text, and Connecticut's nonagricultural provision. The Fence Act is currently broad enough to be applied in a nonagricultural, residential context. *See supra* text accompanying notes 80-81. However, the ambiguity inherent in its terms militates in favor of clarifying the circumstances in which divisions be-

Additionally, Massachusetts, Maine, and New Hampshire have provisions which explicitly allow for the reversion of improved agricultural land to unimproved land and the corresponding cessation of division duty.[195] Maine's statute reads as follows: "If any person lays his lands common, and determines not to improve any part of them adjoining such fence, and gives 6 months notice to all occupants of adjoining lands, he shall not be required to maintain such fence while his land so lies common and unimproved."[196] It is fairly representative of "laying lands common" statutes, which enable parties in agricultural areas to abandon fence divisions without the necessity of calling in fence viewers when benefits are no longer conferred. For this reason, they are well-suited to a changing land use pattern. On the other hand, these statutes suffer from vagueness.

Several states have recognized the need for periodic review of division obligations in light of changing land use. New Hampshire's provision, while not elaborate, at least reflects an understanding that new divisions do become necessary—for whatever reason.[197] Ohio's goes one step further by declaring that divisions will bind the parties and successive owners "until such divisions become unequal by a sale or division of land or a portion thereof, in which case a new division may be had."[198] New York law allows for a new division not only in the event of subdivision, but also any time land is transferred, either in whole or in part, by conveyance, devise, or descent.[199] When a new division is declared, the grantor is then entitled to a refund, to be determined by the fence viewers.[200]

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come obligatory—both in agricultural and nonagricultural contexts. *See supra* text accompanying note 82.

Connecticut also recognizes benefits conferred on the state by authorizing division between private landowners and both the State Highway Department and Department of Environmental Protection. *See* CONN. GEN. STAT. §§ 47-46, 47-46a (West 1978 & Supp. 1983-84).

195. *See* MASS. ANN. LAWS ch. 49 § 11 (Michie/Law Co-op. 1973); ME. REV. STAT. ANN. tit. 30 § 3463 (1978); N.H. REV. STAT. ANN. § 473:14 (1968).

196. ME. REV. STAT. ANN. tit. 30, § 3463 (1978).

197. *See* N.H. REV. STAT. ANN. § 473:12 (1968). A new division will be determined, on demand, "[i]f after a division of fence made or established between adjoining owners a new division for any cause shall become necessary . . . ." *Id.*

198. OHIO REV. CODE ANN. § 971.10 (Baldwin 1983).

199. N.Y. TOWN LAW § 302 (McKinney 1965). Although this provision increases administrative costs by creating more work for fence viewers and town clerks, such costs are probably outweighed by the benefit of eliminating guessing on the part of landowners who are either unaware of the law or uncertain about its scope. New Hampshire's and Ohio's provisions, while less costly to administer, do not address this problem as effectively.

200. *Id.*

Regarding the opportunity for appeal, it is particularly noteworthy that Iowa, one of the few jurisdictions offering a statutory right to appeal from the fence viewers' decisions, allows the parties twenty days to file a notice of appeal.[201] Section 3810 could clearly benefit from amendment to that effect.[202]

The statutory revisions described above demonstrate that other states have already identified and grappled with the kinds of problems plaguing Vermont's Fence Act. While statutory revision in Vermont, if undertaken, need not limit itself to these alternatives, nevertheless, they provide a solid base from which to proceed. At the very least, Vermont should adopt a provision which, like New Jersey's,[203] restricts the division duty to specifically defined land uses. Such a provision would make more apparent the benefits conferred on the respective parties. In addition, Vermont should extend to landowners the right to be exempted from the division duty when circumstances no longer warrant their continued contribution. Finally, a thirty-day appeal provision should be adopted in place of the existing provision.

Conclusion

When enacted, the Vermont Fence Act was premised on an implicit expectation of agricultural land use. Over two hundred years later, farming is still a vital land use in Vermont, despite having diminished in proportion to other uses of land. The Fence Act still serves a public interest. However, it must be remembered that the form of fencing legislation of which it is representative has its origins in the equitable notion that the cost of maintaining shared fences should be apportioned between the parties benefited. Due to the blatant ambiguity of the law and the historical change in land use patterns, the potential now exists for patently inequitable and perhaps unconstitutional applications of the Fence Act. *Choquette v. Perrault*, now pending before the Vermont Supreme Court, has brought the Fence Act's flaws into sharp focus.

The Vermont Fence Act should be completely revised. Legislative revision would accomplish two fundamental goals: first, it would give much needed and deserved guidance to fence viewers and, second, it would provide a modicum of protection to non-ben-

201. Iowa Code Ann. § 113.23 (West Supp. 1983-84).
202. *See supra* text accompanying notes 149-60.
203. *See supra* text accompanying note 186.

efited landowners. Numerous states have already undertaken extensive revisions. Those existing revisions provide a large pool of alternatives from which to draw. By affording a meaningful appeal, the Fence Act's most egregious flaw can be remedied. Ultimately, however, the circumstances under which divisions may be imposed will have to be tailored to explicit benefits if the equitable spirit of fence division is to be restored.

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