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Uston v. Resorts International Hotel: An Unwarranted Intrusion on the Common Law Right of Exclusion Note

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NOTE

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INTRODUCTION

The right to exclude others has been recognized by the United States Supreme Court as one of the most essential components of the bundle of rights attendant upon the ownership of private property. This right to exclude has evolved through the common law and is protected by the fifth amendment of the United States Constitution. However, the right to exclude is not absolute. Courts have found an exception to the rule when the owner makes the property available for public use, and the individual, while on the premises, exercises a public right protected by the federal or state constitutions. In these cases the courts have held that "the more private property is devoted to public use, the more it must accommodate the rights which inhere in individual members of the general public who use that property." Where the right which the public wishes to exercise on privately owned property devoted to public use is constitutionally protected, the courts are justified in limiting the property owner's right to exclude. This is because of the preferred position accorded those individual rights compared with the property owner's common law right of exclusion. However, in Uston v. Resorts International Hotel the Supreme Court of New Jersey limited a privately owned gambling

2. See infra notes 7-15 and accompanying text.
3. Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979). The Court recognized that "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within the category of interests that the Government cannot take without compensation." U.S. Const. Amend. V, provides in part: "Nor shall any person. . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."
casino's right to exclude certain patrons. They did this without finding a competing individual right protected by the federal or state constitutions.

This Note will first trace the evolution of the right to exclude. Next, it will examine the exceptions to the right of exclusion recognized by the Federal and State courts. The Uston decision and the criticism it has inspired will then be analyzed.

Finally, this Note will suggest alternative approaches the Uston court might have adopted which would bar the casinos from excluding card counters while at the same time maintain a private property owner's right to exclude.

I. EVOLUTION OF THE RIGHT TO EXCLUDE BY OWNERS OF PLACES OF AMUSEMENT

In early English and American common law, many privately owned businesses of public accommodation were held to have a duty to serve the public without discrimination. Through the passage of time, courts restricted this duty to certain callings where the public's needs demanded its continuance. Innkeepers and common carriers are the most notable illustrations of businesses which, under both the early and present common law, have had a duty imposed on them not to discriminate in serving the public. This obligation to serve the public has been described as "a duty imposed by law from considerations of public policy." The rationale for this rule is that such exclusions would infringe on the public's constitutional right to travel, as well as placing the traveler's safety and security in jeopardy. An innkeeper or common carrier's decision to exclude a potential patron must bear a rational relationship, or causal nexus, between the reason for the exclusion and their function as an inn or common carrier.

7. See Arterburn, The Origin and First Test of Public Callings, 75 U. Pa. L. Rev. 411 (1927); Wyman, The Law of the Public Callings as a Solution of the Trust Problem, 17 Harv. L. Rev. 156 (1904).
8. Id.
11. See Kent v. Dulles, 357 U.S. 116, 125 (1958). Recognized a right to travel as an aspect of the "'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment."
12. Doe v. Bridgeton Hosp. Ass'n, Inc., 71 N.J. 478, 488, 366 A.2d 641, 646 (1976). Reasons such as full occupancy, the traveler's condition, such as drunkenness
Notwithstanding the duty imposed on innkeepers and common carriers, amusement place owners have traditionally been excluded from such common law obligation due to the lack of comparable public policy considerations. Relevant decisions disclose that owners of places of amusement, being under no obligations to serve the public, could deny admission to whomever they pleased.\(^{13}\) The majority view regarding the right of owners of amusement places to exclude was summarized by the New York Court of Appeals in *Woolcott v. Shubert*.\(^{14}\) Therein, the court stated:

[A] theater, while affected by a public interest which justified licensing under the police power or for the purpose of revenue, is in no sense public property or a public enterprise. It is not governed by the rules which relate to common carriers or other public utilities. The proprietor does not derive from the state the franchise to initiate and conduct it. His right to and control of it is the same as that of any private citizen in his property and affairs. He has the right to decide who shall be admitted or excluded.\(^{15}\)

II. **CONSTITUTIONAL EXCEPTIONS TO THE RIGHT OF EXCLUSION**

Federal and state courts have recognized that a private property owner's right to exclude is not absolute.\(^{16}\) Once the property owner opens his property up to the general public, his right to exclude has been held to be circumscribed by constitutionally protected rights belonging to the public entering upon the property.

A. **Federal Decisions**

This principle was first recognized in *Marsh v. Alabama*,\(^{17}\) a 1946 decision of the United States Supreme Court. Therein, Mrs. Marsh, a Jehovah's Witness, stood near the Post Office of Chicka-
saw, Alabama, and attempted to distribute religious literature. It would appear that this behavior was well within Mrs. Marsh’s first amendment rights since access to streets and other similar public places have historically been associated with the exercise of such rights. However, the town of Chickasaw was, in its entirety, privately owned by the Gulf Shipbuilding Corporation. Except for the private ownership Chickasaw had all the characteristics of any other American town. The corporate owner of Chickasaw had posted notices in the stores stating no solicitation of any kind would be permitted without written permission. After being warned and refusing to stop her activities, Mrs. Marsh was arrested and convicted under an Alabama statute which made it illegal to enter or remain on private property after having been told not to do so. On appeal, the Supreme Court of the United States held:

Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation.

The Marsh Court recognized that when the constitutional rights of owners of property are balanced against those of the people to enjoy freedom of the press and religion, the latter occupy a preferred position. Therefore, it was quite reasonable to limit the owner of Chickasaw’s right to exclude, when the public wished to exercise their first amendment right on private property opened to the public.

Twenty-two years later, the Supreme Court extended its holding in Marsh by finding that a privately owned shopping center

18. Id. at 503.
19. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 316 (1968). U.S. CONST. amend I, provides in part: “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”
21. Id. The property consisted of residential buildings, streets, a system of sewers, a sewage disposal plant and a “business block” on which business places were situated.
22. Id. at 503.
23. Id. at 504.
24. Id. at 506.
25. See supra note 3.
was the functional equivalent\textsuperscript{27} of the business district of a town. This decision came about in \textit{Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.}\textsuperscript{28} The Court could see no reason why access to a business district in a company town for the purpose of exercising first amendment rights should be constitutionally protected, while access, for that very same purpose, to property functioning as a business district should be denied protection because the surrounding property is not under the same ownership.\textsuperscript{29} The Court held that a "State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put."\textsuperscript{30} The effect of this decision was that the owner of a private shopping center could not utilize state trespass laws to exclude members of the public who wished to express their views relating to shopping center operations.

However, two subsequent decisions by the Supreme Court, \textit{Lloyd Corp., Ltd. v. Tanner}\textsuperscript{31} and \textit{Hudgens v. NLRB},\textsuperscript{32} brought an end to the era of treating privately owned shopping centers like company towns. In \textit{Lloyd}, the Supreme Court reversed a lower court's injunction allowing draft and war protesters to continue distributing handbills peacefully on the shopping center premises.\textsuperscript{33} The Court distinguished the facts of \textit{Lloyd} from \textit{Logan Valley},\textsuperscript{34} and stated that "It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist."\textsuperscript{35}

\textit{Hudgens} involved picketing by union members in front of a

\textsuperscript{27.} Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 318 (1968).
\textsuperscript{28.} 391 U.S. 308 (1968).
\textsuperscript{29.} \textit{Id.} at 319.
\textsuperscript{30.} \textit{Id.} at 319-20. Justice Black, the author of the \textit{Marsh v. Alabama}, 326 U.S. 501 (1946) opinion, vigorously dissented. Justice Black believed the majority completely misread \textit{Marsh}. To Black, the sole issue in \textit{Marsh} was under what circumstances can private property be treated as public. The answer given in \textit{Marsh} is when that property has taken on all the attributes of a town. Seeing only one similar feature between a town and a shopping center, Justice Black would not have held this sufficient to confiscate a part of an owner's property and give it to people who wish to picket on it. \textit{Id.} at 327-32.
\textsuperscript{31.} 407 U.S. 551 (1972).
\textsuperscript{32.} 424 U.S. 507 (1976).
\textsuperscript{33.} Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551, 556 (1972).
\textsuperscript{34.} \textit{Id.} at 564-67. The Court noted that the handbilling in \textit{Lloyd} was not directed at any establishment in the shopping center as was the picketing in \textit{Logan Valley}, and that there were adequate alternative areas for such activities.
\textsuperscript{35.} \textit{Id.} at 567.
store leased by their employer in a privately owned shopping center. 36 The Court, after reviewing its prior decisions, found that the reasoning in Lloyd and Logan Valley could not be squared with one another, and that the rationale of Logan Valley did not survive Lloyd. 37 In Hudgens the Court concluded “that under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this.” 38 Therefore, the owner of a private shopping center may exclude members of the public wishing to exercise their right of expression as protected by the Constitution of the United States.

From this review of the decisions of the United States Supreme Court pertaining to the right of exclusion from private property held open to the public, it becomes clear that the first amendment rights protected by the Constitution of the United States occupy a preferred position over a private property owner's right to exclude only when said property possesses all the characteristics of a municipality. 39

B. State Decisions

Some state courts have interpreted their own constitutions as providing greater expressional rights than those protected by the federal constitution. 40 In Robins v. Pruneyard Shopping Center, 41 the California Supreme Court concluded that the California Constitution protects speech and petitioning, reasonably exercised, in privately owned shopping centers to which the public is invited. 42 On appeal, the United States Supreme Court affirmed the

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37. Id. at 518. The Court recognized that “[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” Therefore, that if the respondents in the Lloyd case did not have a First Amendment right to enter that shopping center to distribute handbills concerning Vietnam, then the pickets in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike against the Butler Shoe Co.” Id. at 520-21 (citation omitted).
38. Id. at 521.
40. See supra note 4.
42. CALIF. CONST. art. I § 2(a) provides: “Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.”
43. Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 910, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1979). Plaintiff Robins and several of his high school friends entered the Pruneyard Shopping Center in order to obtain signatures on a petition to be sent to the White House protesting a United Nations resolution against “Zionism.” They were then told by a security guard that they would have to leave the premises. Plaintiff left the premises and subsequently brought suit to enjoin the shopping center
Similarly, the Supreme Court of New Jersey, in *State v. Schmid*, interpreted their own state constitution as providing greater "speech and assembly" rights than those granted by the federal constitution. *Schmid* involved the arrest of a member of the United States Labor Party on criminal trespass charges. Schmid was, at the time of his arrest, distributing political materials on the campus of Princeton University, which is a private non-profit academic institution. Schmid, who was not a student at Princeton, was convicted of trespass under the state's penal trespass statute. The Supreme Court of New Jersey reversed Schmid's conviction, relying on the Pruneyard principle that the more private property is dedicated to public use, the more it must "accommodate" individual rights. The *Schmid* court came to its decision after analyzing both the public function doctrine of *Marsh* and the functional equivalent doctrine of *Logan Valley*, finding neither applicable to the university setting. The court concluded that rights of speech and assembly guaranteed by the state constitution are protectable not only against governmental bodies, but under some circumstances, against private persons as well. The court relied on the extent of Princeton's dedication of its campus to public use in order to determine the nature of the restrictions that may be placed upon the private owner's enjoyment of the incidents of ownership. It appears that the result of the *Schmid* decision was to create a forced right of access and use by private parties of the private property of another where none previously existed.


45. 84 N.J. 535, 423 A.2d 615 (1980).
46. N.J. CONST. art. I, para. 6 provides in part: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."
47. U.S. CONST. amend. I, provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
49. *Id.*
50. N.J. STAT. ANN. § 2C:18-3(b) (West 1980).
52. *Id.* at 549, 423 A.2d at 622.
53. *Id.*
54. *Id.* at 560, 423 A.2d at 628.
55. *Id.* at 561, 423 A.2d at 629.
The standard set forth in Schmid was a major consideration of the New Jersey Supreme Court in its Uston decision.

III. FACTS OF USTON

On January 30, 1979, Resorts International Hotel barred Plaintiff Kenneth Uston from playing blackjack in its casino solely for the reason that he was a professional card counter. This move prompted an industry-wide policy to ban card counters. Each casino maintained a list of persons to be barred as card counters.

Uston appealed Resorts' action to the New Jersey Casino Control Commission. The Commission, relying principally on a decision by the former Supreme Court of New Jersey, Garfine v. Monmouth Park Jockey Club, held that Resorts had a common law right to exclude any person it chose, for whatever reason it chose, so long as the exclusion did not violate state or federal civil rights laws.

The New Jersey Superior Court Appellate Division reversed the Commission's decision. The appellate division based its decision

57. Uston v. Resorts Int'l Hotel, 89 N.J. 163, 445 A.2d 370, 372 (1982). A card counter keeps track of the playing cards through use of his memory and increases his wages accordingly when the odds are in his favor. This practice is not considered cheating, nor is it illegal. See K. USTON, THE BIG PLAYER (1977).

58. Uston v. Resorts Int'l Hotel, 89 N.J. at 167, 445 A.2d at 372. Presently, every jurisdiction in the world with established casino gambling, except New Jersey and Makua, a Portuguese colony in East Africa, permits the casino exclusion of card counters.

59. Id.

60. 29 N.J. 47, 148 A.2d 1 (1959). Garfine involved the exclusion of a would-be patron from the Monmouth Park race track, by security guards employed by the race track. Garfine filed suit seeking injunctive relief against his further exclusion from the track. The Supreme Court of New Jersey held that under common law, inkeepers and common carriers are obliged to serve the public without discrimination, but operators of most other businesses, including places of amusement such as race tracks, are under no such obligation. Therefore, the race track operator could exclude Garfine for any reason, so long as the exclusion was not based on race, creed, color, national origin or ancestry.


All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

N.J. STAT. ANN. § 10:1-2 (West 1971), provides: "All persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities and privileges of any places of public accommodation, resort or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons."

RIGHT OF EXCLUSION

upon their interpretation of Section 5:12-71a\(^\text{64}\) of the New Jersey Casino Control Act, which dealt with regulations requiring exclusion of certain persons.

In interpreting this provision, the appellate division stated: “It is manifest by the terms of the above section that it is the Commission which is solely vested with the authority to designate persons to be excluded from the casinos, under reasonable standards first established by the Commission.”\(^\text{65}\)

The appellate division held that even if Garifine\(^\text{66}\) does espouse a common law right in a gambling casino to exclude or expel any person, for any reason, not in violation of state or federal civil rights acts, such common law right has been abrogated by the foregoing provisions of the Casino Control Act.\(^\text{67}\) Therefore, only the Casino Control Commission is empowered to exclude patrons from participating in licensed casino games.\(^\text{68}\) Until the commission promulgates a rule excluding card counters, Uston must be permitted to engage in the game of blackjack whenever offered at Resorts.\(^\text{69}\)

The Supreme Court of New Jersey affirmed the holding of this lower court decision.\(^\text{70}\) However, they interpreted the Casino Control Act, N.J.S.A. Section 5:12-71a, somewhat differently than did the appellate division. Where the appellate division interpreted this provision as completely abrogating Resorts’ right to exclude, the New Jersey Supreme Court held that the statute only

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64. N.J. Stat. Ann. § 5:12-71a (West 1982). The portions of the statute pertinent to the court’s decision provide:

- The commission shall, by regulation, provide for the establishment of a list of persons who are to be excluded or ejected from any licensed casino establishment. Such provisions shall define the standards for exclusion, and shall include standards relating to persons:
  1. Who are career or professional offenders as defined by regulation of the commission;
  2. Who have been convicted of a criminal offense under the laws of any state or the United States, which is punishable by more than 6 months in prison, or any crime or offense involving moral turpitude; or
  3. Whose presence in a licensed casino would, in the opinion of the commission, be inimical to the interest of the state of New Jersey or the licensed gaming therein, or both.

The commission shall promulgate definitions establishing those categories of persons who shall be excluded pursuant to this section, including cheats and persons whose privileges for licensure have been revoked.

65. Uston v. Resorts Int’l Hotel, 179 N.J. Super. at 227, 431 A.2d at 175.
69. Uston v. Resorts Int’l Hotel, 179 N.J. Super. at 227, 431 A.2d at 175.
abrogated Resorts' right to exclude patrons based upon their strategies for playing licensed casino games.\footnote{71}{Id. at 167, 445 A.2d at 372.}

Although the court's interpretation of N.J.S.A. Section 5:12-71a was determinative of the issue of whether Resorts could exclude Uston for his strategy of playing blackjack, they felt compelled to decide the precise extent of Resorts' common law right to exclude patrons not covered by the statute.\footnote{72}{Id. Although N.J. Stat. Ann. § 5:12-71(a) (West 1982) abrogated Resorts' right to exclude patrons based on their strategies of playing licensed casino games, the casino control commission's opinion implied that absent supervening statutes, the owners of places open to the public enjoy an absolute right to exclude patrons without good cause.}

IV. ANALYSIS OF USTON V. RESORTS INTERNATIONAL HOTEL

The Uston court began its decision by acknowledging that at one time an absolute right of exclusion prevailed in New Jersey.\footnote{73}{Id. at 171, 445 A.2d at 374.} However, it seems that this statement was offered more for reasons of prior deference by the New Jersey courts to the noted English precedent of Wood v. Leadbitter, than for reasons of policy.\footnote{74}{Id.}

In Wood v. Leadbitter,\footnote{75}{153 Eng. Rep. 351 (Ex. 1845).} the Court of Exchequer did not deal with an exclusion, but with an ejection from a public horserace track.\footnote{76}{Id. at 352.} The plaintiff had purchased his ticket and entered the grounds, then refused to leave when asked to do so because of some alleged misconduct on a former occasion.\footnote{77}{Id.} After being forcibly ejected, he sued in trespass for assault and false imprisonment.\footnote{78}{Id.} In denying recovery, the court took the position that the plaintiff had no easement\footnote{79}{See Black's Law Dictionary 457 (5th ed. 1979). An easement is an interest in land permitting a right of use over the property of another. It is distinguishable from a "license" which merely confers personal privilege to do some act on the land. \textit{See infra} note 81.} or similar property right entitling him to remain on the grounds after the request to leave had been made.\footnote{80}{Wood v. Leadbitter, 153 Eng. Rep. 351, 355 (Ex. 1845).} Instead, he held only a personal license which could be revoked at any time.\footnote{81}{See Black's Law Dictionary 829 (5th ed. 1979). A license with respect to real property is a privilege to go on premises for a certain purpose, but does not operate to confer on, or vest in, licensee any title, interest, or estate in such property. \textit{See infra} note 81.} The court held that the plaintiff's only remedy was a claim for breach of contract.\footnote{82}{Wood v. Leadbitter, 153 Eng. Rep. at 359; Marrone v. Washington Jockey Club, 227 U.S. 633, 636 (1913). A ticket purchased to enter a race track is a legally binding contract. The purchaser is obligated to pay a valuable consideration for the
The Uston court then looked at *Shubert v. Nixon Amusement Co.*, a New Jersey Supreme Court decision. The plaintiff in *Shubert*, a theatrical producer, purchased a ticket for a show of his competitor, Florenz Ziegfield. After he took his seat, and while occupying it peacefully, he was asked to leave. The plaintiff then filed a tort action against Ziegfield and Nixon Amusement Company seeking damages for injury to his good name and for being ejected from the theater. Taking note that the plaintiff made no allegation of exclusion on the basis of race, color or previous condition of servitude, the *Shubert* court concluded:

In view of the substantially uniform approval of, and reliance on, the decision in *Wood v. Leadbitter* in our state adjudications, it must fairly be considered to be adopted as part of our jurisprudence; and whatever views may be entertained as to the natural justice or injustice of ejecting a theater patron without reason, after he has paid for his ticket and taken his seat, we feel constrained to follow that decision as the settled law.

In developing its rationale for limiting an amusement place owner's right to exclude, the Uston court stated "it hardly bears mention that our common law has evolved in the intervening 70 years since *Shubert*. In fact, *Leadbitter* itself was disapproved three years after the *Shubert* decision by *Hurst v. Picture Theatres Limited*." However, any reliance by the court on *Hurst* as authority for limiting Resorts International Hotel's right to exclude patrons from its casino seems misplaced.

In *Hurst v. Picture Theatres Limited*, another English decision, the court rejected the holding in *Leadbitter* and allowed recovery in an assault action by the purchaser of a theatre ticket who was forcibly ejected by the proprietor acting on the mistaken belief that the plaintiff had not paid his admission fee. The court held that it would be neither logical nor good law to hold that a theatre proprietor had the absolute right to eject a patron who had paid for his ticket and was peaceably occupying his assigned seat. The theatre ticket was deemed to be a license bearing an agreement not to
revoke which equity would enforce. It is apparent that the
touchstone of the Hurst opinion is that the plaintiff had paid for
his ticket. This payment provided the consideration for the agree-
ment not to revoke the license, which equity would enforce. A
casino patron pays no admission fee, and therefore obtains no
agreement which would be enforceable in equity. Absent the
payment of admission, a patron possesses only a license, which is
revocable at the will of the owner who granted it.

The Uston court intimated that the common law of New Jersey
regarding the amusement place owner's right to exclude has con-
sistently evolved in the seventy years since the 1912 Shubert
decision. However, it seems that absolutely no decision existed
justifying this statement until the ruling of State v. Schmid in
1980. At least until 1959, when Garifine was decided, the court
had not abandoned its holding in Shubert.

The critical point relied on in Uston to limit Resorts' right to
exclude is the principle enunciated by the Supreme Court of New
Jersey in State v. Schmid. In Schmid, it was held that, "the
more property is devoted to public use, the more it must accom-
modate the rights which inhere in individual members of the gen-
eral public who use that property." Applying this principle, the
Uston court held that since Uston did not threaten the security of
any casino occupant or disrupt the functioning of casino opera-
tions, he possesses the usual right of reasonable access to Resorts
International's blackjack tables. In other words, since Resorts
International Hotel granted the right of access to their casino to
the general public, they cannot unreasonably exclude members of
the public wishing to gamble in their casino.

The Supreme Court of New Jersey, in equating its decision in
Uston with the principle enunciated in Schmid, failed to recognize
that it was the nature of Schmid's expressional activities which

93. Id. at 9.
94. J. Calamari & J. Perillo, Contracts, § 4-1 (2d ed. 1977). As a condition to the
enforceability of a contract, the common law usually requires that informal promises
be made for a consideration. The essence of consideration is legal detriment that has
been bargained for and exchanged for the promise.
95. Admission to the ten casinos presently established in Atlantic City is free.
presence or absence of consideration are basically the same in equity as in law.
97. See supra note 81 and accompanying text.
98. Uston, 89 N.J. at 172, 445 A.2d at 374.
104. Uston, 89 N.J. at 174, 445 A.2d at 375.
raised them to the level protected by the state constitution. As the United States Supreme Court held in *Marsh*, when constitutional rights of owners of property are balanced against those of the people to enjoy freedom of press and religion, "[w]e remain mindful of the fact that the latter occupy a preferred position."\(^{105}\) Therefore, the *Schmid* court was acting within reason when it limited Princeton University's right to exclude the public who wished to enter on the University's premises and exercise its constitutionally protected right of expression.\(^{106}\) However, in *Uston*, the court limited the casino's right to exclude when no such competing interest was at stake.

The right of access to Resorts' blackjack tables which Uston claimed is found in neither the federal or state constitutions, nor in any statute enacted by the New Jersey legislature.\(^{107}\) If Uston wished to exercise his right of expression as protected by the New Jersey Constitution,\(^ {108}\) and was then excluded by Resorts, reliance on the *Schmid* principal would be perfectly in order. However, Uston was not being excluded for attempting to exercise any constitutionally protected right.\(^ {109}\) Therefore, by creating a right of access to play blackjack, *Uston* has raised such right to a level more worthy of protection than the federally protected right of exclusion.\(^ {110}\)

\[\text{V. CRITICISM OF THE *USTON* HOLDING}\]

The New Jersey Supreme Court, in limiting Resorts International's right to exclude, has seemingly intruded into what appears to be a legislative function. If the legislature of New Jersey had intended to create a right to gamble, and more specifically to play blackjack, it would have passed legislation creating such a right. Since it has remained silent in regard to the rule espoused in *Garifine*,\(^ {111}\) it can be implied that it is their intention that private property owners should enjoy the common law right of exclusion. Therefore, it seems the *Uston* court interfered with the intentions of the legislature by placing limitations on the private property owner's right to exclude where none previously existed.


\(^{106}\) N.J. Const. art. I, para. 6.

\(^{107}\) The right of access which Uston claimed is implied from the invitation made by Resorts International Hotel to the general public to come and gamble in their casino.


\(^{109}\) Neither the United States nor the New Jersey constitutions mention the right to play blackjack or the right not to be excluded from another's private property.

\(^{110}\) See supra note 3 and accompanying text.

A further difficulty with the *Uston* opinion is in the court's statement that "property owners have no legitimate interest in unreasonably excluding particular members of the public when they open their premises for public use." This statement implies that since Uston's presence in the casino neither threatens the security of casino occupants nor disrupts the functioning of the casino, the decision to exclude him is unreasonable. Although the court recognizes that the reasonableness of a casino's decision to exclude a would-be patron is a question of fact which must be decided on a case by case basis, the *Uston* court apparently did not fully consider the reasonableness of Resorts' decision to exclude Uston.

A casino provides amusement and entertainment. Instead of a patron paying for this entertainment in advance as one would do, for example, at a theater or sporting event, he pays for it during the course of his play. This occurs as a result of the house advantage built into the rules of each casino game. However, card counters, such as Uston, with their unique technique of playing blackjack, have a built-in advantage over the house. This player advantage assures that, over a period of time, the experienced counter will win. Therefore, it seems quite reasonable for a casino to exclude a card counter. No business should be forced to sell its product at a guaranteed loss which is what the casinos must do if they cannot bar card counters. Places of entertainment such as concert halls, sporting events, and theaters are run for the purpose of being profitable to the owners. If they are not profitable, they will cease to exist. Since a casino is no different than other forums which provide entertainment for profit, in order for the game of blackjack to be profitable, the casinos must be able to exclude card counters. Since no person has a vested right to win at a casino game, Resorts' exclusion of Uston was

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113. See supra note 104 and accompanying text.
115. Petitioner's Supplemental Brief at 6, *Uston v. Resorts Int'l Hotel*, 89 N.J. 163, 445 A.2d 370 (1982) [hereinafter cited as Supplemental Brief] [copy on file in the offices of California Western Law Review]. "A general public blackjack player will, over the long run, experience a net loss of between 0.85 and 1.0 unit bets per hour, while playing blackjack. Thus, if the player is placing $10.00 bets, his play will cost him between $8.50 and $10.00 per hour." *Id.*
116. See generally K. *USTON, ONE THIRD OF A SHOE* (1979). This technique involves the player adding in his head or electronically, 1 for each low-value card (2's through 9's) dealt and -1 for each high-value card (10's and face cards) dealt. When the running count is a positive number, the remaining cards are favorable to the player, the higher the plus count the greater the player's advantage and the house's disadvantage.
118. *Id.* at 5. In a 13-day period in 1979, during which the commission permitted
reasonable to protect its return on investment. A finding by the court that Uston’s exclusion was reasonable so that the casinos could continue to run their blackjack tables at a profit would have allowed the casinos to continue excluding counters.

Finally, the state legislature of New Jersey delegated to the Casino Control Commission, because of its expertise in gambling affairs, the widest latitude in its regulation of the casino industry. It is evident that the legislature intended the Casino Control Commission’s judgment, on matters concerning casino gambling, to be afforded the greatest possible weight. The Uston court, in coming to their decision, ignored the scope of judicial review to be applied to an appeal from an administrative agency. The role of the court in such review is limited to a finding of whether or not the expert agency, entrusted with regulatory responsibility, has taken an irrational or arbitrary view of the evidence presented to it. If the action taken by the commission is not irrational or arbitrary, then the agency’s action must be affirmed. In light of Section 5:12-100 of the Casino Control Act, which provides in part:

All gaming shall be conducted according to rules promulgated by the commission. All wagers and pay-offs of winning wagers at table games shall be made according to rules promulgated by the commission, which shall establish such minimum wagers and other limitations as may be necessary to assure the vitality of casino operations and fair odds to and maximum participation by casino patrons . . . ;

The decision by the Casino Control Commission permitting the casinos to exclude card counters should not have been reversed. The fact that Resorts International Hotel and Caesar’s Palace, the only two licensed casinos at the time, lost 1.4 million dollars to card counters during a 13-day trial period in 1979 when card counters were permitted to play blackjack, should have been sufficient evidence of the rationality behind the commission’s decision to allow the casinos to continue excluding card counters to gamble.

119. N.J. STAT. ANN. § 5:12-75 (West 1982) provides: “The commission may exercise any proper power or authority necessary to perform the duties assigned to it by law, and no specific enumeration of powers in this act shall be read to limit the authority of the commission to administer this act.”


121. Unimed, Inc. v. Richardson, 458 F.2d 787, 789 (D.C. Cir. 1972); Motyka v. McCorkle, 58 N.J. 165, 276 A.2d 129 (1971). Holding that agency commissioner’s action is entitled to the benefit of the rebuttable presumption of validity afforded to administrative regulations generally.


123. N.J. STAT. ANN. § 5:12-100(e) (West 1982) (emphasis added).

124. See supra note 118.
cision to subsequently allow the casinos to bar card counters. Allowing the casinos to exclude card counters must be considered a rational method of assuring the vitality of casino operations in light of the large sums of money guaranteed to be lost to the professional card counter. Therefore, the Uston court should have affirmed the commission’s decision.

VI. POLICY AGAINST ACCEPTANCE OF THE USTON HOLDING

The main purposes behind initiating casino gaming in New Jersey were to provide economic recovery for a deteriorating area, as well as to provide tax revenues for the state. The key to achieving these goals is successful casino gaming and the ensuing profits it generates. The amount of tax which the casino must turn over to the state is directly tied to the casino’s gross revenues. If the gross profits of the casinos fall, so also do the tax revenues the state derives from the casino industry. Blackjack is the most popular casino game and currently accounts for almost one-half of the casino’s gross profits. Since professional card counters employ a method of playing blackjack in which they are guaranteed a substantial win over a period of time, their presence at a casino blackjack table means an automatic reduction in the tax revenues received by the state. The Uston court’s holding puts at risk the goals of casino gaming. If the Uston court had permitted the casinos to bar card counters, the legislative goals would surely be preserved.

The casinos themselves are at a loss to cure the situation. Their only remedy would be to remove all of the blackjack tables from their casino. However, they lack the authority to do so since the Casino Control Act requires “at least four blackjack tables for each 10,000 square feet of casino space.” Therefore, the best a casino operator could do to protect his profits, as well as the state tax revenues, is to limit the amount of blackjack tables to the statutory minimum.

Since New Jersey casinos are now powerless to exclude card counters, it is up to the Casino Control Commission to promulgate rules of play which minimize the card counter’s advantage. One rule put into effect by the commission following the Uston decision allows the casinos to shuffle the cards at will.

125. N.J. STAT. ANN. § 5:12-1—12-152 (West 1982).
126. Id.
127. N.J. STAT. ANN. § 5:12-144 (West 1982).
129. Tax revenue otherwise lost to card counters will be retained by the state.
130. N.J. STAT. ANN. § 5:12-100(j) (West 1982).
this rule may have the effect of minimizing the card counter’s winnings it also reduces the speed of the game by lessening the amount of hands that can be played during any given time period. Since the casinos depend on their small house advantage over an infinite number of hands for their revenues, any reduction of the speed of the game immediately diminishes casino profits and state tax revenues.\textsuperscript{132}

At the same time, this “shuffle-at-will” rule has the potential of working an undue advantage in favor of the casinos. Since the casino dealers can count cards as well as patrons, it is likely the casinos will hire dealers who are themselves card counters. If the dealer is counting cards and is also able to shuffle at will, he will shuffle the deck whenever the odds become favorable to the casino patrons, thereby greatly increasing the house advantage. While this might even up the score between the casino and the professional card counters, it would virtually eliminate the recreational player’s opportunities to win.\textsuperscript{133} This would be contrary to the fair odds provision of the Casino Control Act.\textsuperscript{134}

One question left open by \textit{Uston} is whether or not the Casino Control Act empowers the commission to exclude card counters.\textsuperscript{135} The court’s suggestion that the commission promulgate such a rule will almost certainly have a detrimental effect on the taxpayers of New Jersey. If the commission promulgates a rule excluding card counters, any exclusion pursuant to that rule will involve state action,\textsuperscript{136} thus invoking the due process guarantees of the fourteenth amendment.\textsuperscript{137} Therefore, any patron barred pursuant to the commission’s rule authorizing such exclusions will be entitled to a due process hearing at the inconvenience of the commission and the expense of the taxpayers.\textsuperscript{138} The hearing would be unnecessary and the attendant cost upon the taxpayers avoided if the casinos were permitted to retain their common law right of exclusion.

\textsuperscript{132} Supplemental Brief, \textit{supra} note 115, at 12. The house advantage in Atlantic City at blackjack is .54 percent (.54%).

\textsuperscript{133} \textit{Id.}


\textsuperscript{135} \textit{Uston}, 89 N.J. at 174, 445 A.2d at 375.

\textsuperscript{136} \textit{See generally} Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

\textsuperscript{137} U.S. Const. amend. XIV provides in part: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

\textsuperscript{138} Supplemental Brief, \textit{supra} note 115, at 32.
VII. ALTERNATIVES TO USTON'S HOLDING

The Uston court had two possible alternatives by which they could have attained the same result of prohibiting the exclusion of card counters from the casinos without intruding on a private property owner's right of exclusion.

The first of these alternatives would have been for the Uston court to conclude that sufficient involvement existed between Resorts International Hotel and the state to hold the casino to be public rather than private property.139 Resorts then, acting nominally as the state, could not have excluded Uston because it would constitute a deprivation of liberty without due process as protected by the United States Constitution.140 The Supreme Court of the United States has held that mere state regulation of a private industry in and of itself does not constitute state action.141 Nevertheless, more state involvement is present here than mere regulation. In Section 1 of the Casino Control Act,142 the state legislature found that casino gambling was permitted in New Jersey for the dual purposes of revitalizing the state's tourist trade and renewing the luster of Atlantic City.143 In furtherance of these purposes, state revenues were to be augmented by a tax of eight to twelve percent on gross gaming revenues and an additional investment obligation of two percent.144 Further, the Casino Control Act declares the public policy of New Jersey to be "that the institution of licensed casino establishments in New Jersey be strictly regulated and controlled."145 In view of the state's relationship to the casino industry, there seems to be sufficient evidence to support a finding that the state be considered a joint participant in the casino industry. Therefore, an exclusion of a potential casino patron would necessarily involve state action requiring due process guarantees be afforded the excluded

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139. Such a holding automatically would have involved a state action analysis. See Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).
140. U.S. CONST. amend. XIV provides in part: "nor shall any state deprive any citizen of life, liberty, or property, without due process of law." See generally Goldberg v. Kelly, 397 U.S. 254 (1970). (Holding that before a state could deprive a welfare recipient of benefits, a pretermination hearing must be provided the recipient to satisfy the due process clause of the fourteenth amendment).
142. N.J. STAT. ANN. § 5:12-1 to 5:12-152 (West 1982).
143. Id.
144. Id. at § 5:12-144. The "Investment Obligation" requires the casinos to invest a percentage of their net profits in the urban renewal of Atlantic City. The "Investment Obligation" can be satisfied by the purchase of municipal bonds that could be used to finance redevelopment projects. Asbury Park Press, December 5, 1982, at A1, col. 1.
145. N.J. STAT. ANN. § 5:12-1(13) (West 1982). The Uston court admits that "the Commission's regulation of Blackjack is more extensive than the entire administrative regulation of many industries." Uston, 89 N.J. at 169, 445 A.2d at 373.
patron.\textsuperscript{146}

The second alternative would have been a finding that the operation of Resorts International Hotel was essentially a public function as delineated in \textit{Marsh}.\textsuperscript{147} Compared with the company town in \textit{Marsh}, Resorts contains many of the same attributes, including gift and clothing stores, restaurants, lounges where entertainment is provided, a casino, a bank, hotel rooms, etc. A finding by the court that Resorts was performing a public function would have subjected it to state regulation. Therefore, some procedural due process, that is, notice and hearing, must be afforded whenever a card counter is sought to be excluded.\textsuperscript{148}

A finding by the court that Resorts International Hotel was public property or performing a public function would have seemingly been a more favorable conclusion than the result reached, that is, creating a forced right of access to another's private property. Such a holding would have precluded Resorts from barring a potential patron unless they provided him with a due process hearing.\textsuperscript{149} Meanwhile, since Resorts would be considered public property, the private property owner's right of exclusion as previously recognized would be preserved.

\textbf{CONCLUSION}

As more states consider establishing legalized casino gaming,\textsuperscript{150} the issue of whether the casinos should be permitted to exclude the above average gambler from their premises will become of utmost importance to the state gambling commissions. When formulating a decision, a commission should be mindful of the purposes behind casino gaming, namely to provide economic recovery in the form of increased employment, a revitalized tourist trade, building renovation, and also to provide state tax revenues. The purpose is not to line the pockets of the professional gambler.

The Supreme Court of New Jersey in \textit{Uston v. Resorts International Hotel} has held that a gambling casino may not exclude a potential patron without a showing that he threatens the security of another casino occupant or disrupts the function of casino oper-

\textsuperscript{146} But see Uston v. Hilton Hotels Corp., 448 F. Supp. 116 (D. Nev. 1978) where Federal District Court in Nevada found no state action involved in a casino's exclusion of a potential patron.
\textsuperscript{149} See supra note 140 and accompanying text.
\textsuperscript{150} Presently New York, Florida, Pennsylvania, Washington, Louisiana, North Dakota, California, and Massachusetts are considering the effect casino gaming would have in their jurisdictions.
In doing so, the court was apparently unmindful of these policy considerations. Without constitutional, statutory, or case law authority, the New Jersey Supreme Court decision severely impinges upon the common law right of exclusion belonging to owners of private property. In coming to their decision the *Uston* court not only rejected over one hundred years of property law, but rejected it completely in the face of the legislature's economic policy behind establishing casino gaming.

There are situations in which the right of private property owners to exclude whomever they please from their premises must give way to the public's need of access to their premises. The decisions prior to *Uston* which have limited the right to exclude have either involved a constitutional or statutory right belonging to the public who wished to enter the private property held open to the public, or involved the rule applicable to persons engaged in public callings such as innkeepers or common carriers. The rationale behind these limitations on the property owners make them reasonable. Where a constitutional right is at stake, the property owner's interest must yield to the policy favoring free exercise of the public's constitutional rights. Likewise, the public's need of access to services such as hotels and the various forms of transportation justifies a decision requiring the owners of private property to serve the public without discrimination. However, no constitutional or statutory right exists to gamble, or more specifically, to play blackjack.

The *Uston* decision cannot be reconciled with earlier decisions of the Supreme Court of New Jersey which limit a property owner's right of exclusion. The *Uston* case did not present any comparable competing interest on the part of a potential patron which would justify imposing a rule limiting a private property owner's right to exclude. The courts should not have the power to force a right of access to private property so that unwilling owners

154. *See supra* notes 7-12 and accompanying text. Even though Resorts International Hotel can be considered an inn in the common law sense, the rule applicable to innkeepers cannot be applied in the present case. The relationship between Resorts and Uston was not one of innkeeper and patron, but rather one of casino owner and prospective gambler. Therefore, the policies upon which the innkeeper's duty to serve without discrimination rest are not present. *See* Uston v. Airport Casinos, Inc., 564 F.2d 1216 (9th Cir. 1977).
are forced to accommodate persons with whom they have chosen not to deal.

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