Supreme Court Review: 1978-79 Term

edited by BERNDT I. BRAUER

Table of Cases

I. Commerce Clause

In a significant case involving the commerce clause, *Japan Line, Ltd. v. County of Los Angeles*,[a] the Supreme Court had its first opportunity to consider the validity of an apportioned state tax imposed upon international commerce. Using as a starting point the flexible test for determining the validity of a state tax on interstate commerce adopted in *Complete Auto Transit, Inc. v. Brady*,[b] the Court added two additional considerations to the four utilized in *Brady* where international commerce is involved. The Court thus continued the trend away from a rigid, formalized approach to state taxation on commerce evidenced in cases prior to *Brady*. Yet, the result in the case, holding the California ad valorem property tax in question unconstitutional, demonstrated that close scrutiny is still required of any state tax which affects interstate or international commerce.

*Japan Line, Ltd. v. County of Los Angeles**

In *Japan Line, Ltd. v. County of Los Angeles*[1] the Supreme Court addressed the problem of whether instrumentalities of commerce that are owned, based, and registered abroad, and used exclusively in international commerce may be the subject of apportioned ad valorem property taxation by a state. The California Supreme Court had unanimously determined that neither the "home-port" doctrine,[2] the commerce clause, nor United States treaties with Japan prevented imposition of such a tax.[3] In reversing, the United States Supreme Court held that California's tax resulted in a multiple tax burden, precluded national uniformity in the area of foreign commerce and was therefore unconstitutional[4] under the commerce clause of the United States Constitution.[5]

a. 441 U.S. 434 (1979).
b. 430 U.S. 274 (1977).

* Commentary by Jennifer Bremer, member, third-year class.

1. 441 U.S. 434 (1979).
2. *See* notes 17-19 and accompanying text *infra*.
3. 20 Cal. 3d 180, 571 P.2d 254, 141 Cal. Rptr. 905 (1977) (opinion by Manuel, J., expressing the unanimous view of the court).
4. 441 U.S. at 454.
5. U.S. CONST. art. I, § 8, cl. 3.

The Lower Court Decisions

The *Japan Line* case arose from California's attempt to impose a nondiscriminatory, apportioned ad valorem tax upon cargo containers owned by six Japanese shipping companies.[6] The taxpayers' businesses consisted of hiring out vessels and large cargo containers for the transportation of cargo in international commerce. Each company was incorporated under the laws of Japan and had both its principle place of business and commercial domicile there. Similarly, the vessels and containers owned by the taxpayers had their home ports in Japan—the ships were registered there and the containers were subject to Japanese property taxes.[7]

During the taxable years 1970, 1971 and 1972, the containers were in constant international transit except when awaiting loading, unloading or repairs.[8] In the course of that transit, they frequently passed through California but were never used in interstate or intrastate commerce except as part of an international journey. While no container remained in California permanently, some were present at any given time, generally for a stay of less than three weeks.[9]

California levied taxes of more than $550,000 on the assessed value of the containers under Revenue and Taxation Code sections 117 and 2192.[10] The code made property present in California on March 1 of any year subject to the ad valorem property tax. After paying the taxes under protest, the shipping companies sought and received a refund in the Superior Court of Los Angeles County.[11] The court of appeal reversed.[12] The Supreme Court of California granted a hearing and, adopting the opinion of the court of appeal, affirmed the reversal of the trial court.[13]

On appeal to the California Supreme Court the taxpayers unsuccessfully challenged the appellate court's holding on a variety of

6. 441 U.S. at 436-37. The facts were presented to the California Court of Appeal on an agreed statement. 20 Cal. 3d at 183, 571 P.2d at 256, 141 Cal. Rptr. at 907. This summary of facts is taken entirely from that stipulation.

7. 441 U.S. at 436-37.

8. *Id.*

9. *Id.*

10. CAL. REV. & TAX. CODE (West Supp. 1978).

11. The opinion of the Superior Court is not officially reported.

12. 132 Cal. Rptr. 531 (1976).

13. 20 Cal. 3d 180, 571 P.2d 254, 141 Cal. Rptr. 905 (1977). The written opinion reversing the trial court was actually authored by Justice Cobey of the Court of Appeal, Second Appellate District, Division Three (Allport, Acting P.J., and Potter, J., concurring). It was adopted with various deletions and additions by Justice Manuel as the opinion of the Supreme Court. 20 Cal. 3d at 182, 571 P.2d at 255, 141 Cal. Rptr. at 906.

grounds. They first asserted that the case of *Sea-Land Service, Inc. v. County of Alameda*,[14] relied upon by the court of appeal, did not fully dispose of the issues raised by *Japan Line*. *Sea-Land*, decided by the California Supreme Court after the trial court rendered its judgment in *Japan Line*, had held that California could constitutionally tax domestically owned cargo containers used primarily in foreign commerce by means of the statutory scheme challenged in *Japan Line*.[15] Unlike the taxpayers in *Japan Line*, however, the taxpayer-shipping company in *Sea-Land* was incorporated and commercially domiciled within the United States and had conceded that its containers were subject to local taxation. Its sole argument against taxation had been that the taxes levied by California could be imposed only at the ships' home port.[16] The taxpayers in *Japan Line* asserted that their case required a different result because the containers were foreign-owned and used exclusively in foreign commerce. They maintained further that the home-port doctrine, which renders personal property fully taxable at the domicile of its owner,[17] precluded apportionment as a method of taxing foreign-owned instrumentalities of international commerce.[18] The California Supreme Court tersely rejected this argument, stating that "in *Sea-Land* [this court] specifically addressed this very contention, namely that the home-port doctrine retained vitality with respect to foreign commerce as distinguished from interstate commerce . . . and clearly rejected it."[19]

Similarly, the California Supreme Court dismissed the taxpayers' arguments that the tax violated United States treaty obligations with Japan[20] and that it amounted to indirect tonnage duties forbidden by the United States Constitution.[21] The court concluded that the treaty relied upon by the taxpayers merely required nondiscriminatory taxation of citizens and non-citizens—a requirement the court deemed was met in *Japan Line*.[22] The court further concluded that the constitutional prohibition against tonnage duties was inapplicable because the California tax was occasioned by the containers' continuous presence

14. 12 Cal. 3d 772, 528 P.2d 56, 117 Cal. Rptr. 448 (1974).

15. 12 Cal. 3d at 775; 528 P.2d at 58, 117 Cal. Rptr. at 450.

16. 12 Cal. 3d at 781, 786, 528 P.2d at 62, 65, 117 Cal. Rptr. at 454, 457.

17. *See* Hays v. Pacific Mail S. S. Co., 58 U.S. (17 How.) 596 (1854). *See also* notes 28-34 and accompanying text *infra*.

18. 20 Cal. 3d at 183-86, 571 P.2d at 256-58, 141 Cal. Rptr. at 907-09.

19. 20 Cal. 3d at 185, 571 P.2d at 257, 141 Cal. Rptr. at 908 (citation omitted).

20. [1953] 4 U.S.T. 2063, T.I.A.S. No. 2863.

21. U.S. CONST. art. I, § 10, cl. 3 provides: "No State shall, without the Consent of Congress, lay any Duty of Tonnage . . . ."

22. 20 Cal. 3d at 189, 571 P.2d at 260, 141 Cal. Rptr. at 911.

within the state, not by the movement of the containers.[23]

The taxpayers' remaining constitutional argument, that the tax at issue resulted in a multiple tax burden because the containers were subjected to Japanese as well as California property taxes, was also rejected by the court. In disposing of this question, the California Supreme Court stated that "the threat of double taxation from foreign taxing authorities has no role in commerce clause considerations of multiple burdens, since burdens . . . [imposed by foreign states] are not attributable to discrimination by the taxing state [but are] matters for international agreement."[24]

The United States Supreme Court Decision

The Supreme Court reversed the California holding.[25] Writing for an eight-member majority,[26] Justice Blackmun framed the issue presented by *Japan Line* as follows: "This case presents the question whether a State, consistently with the Commerce Clause of the Constitution, may impose a nondiscriminatory ad valorem property tax on foreign-owned instrumentalities (cargo containers) of international commerce."[27] After briefly stating the facts and history of the case, Justice Blackmun proceeded to examine the California decision in light of two considerations: the home-port doctrine and the commerce clause.

The Court first considered Japan Line's contention that the home-port doctrine provided the proper rule for taxation of the ships and containers.[28] That doctrine, described by the Court as "a corollary of the medieval maxim *mobilia sequuntur personam*" results "in personal property being taxable in full at the domicile of the owner."[29] Although the doctrine has now been replaced by the rule of fair apportionment among the states as a rule for taxation of moving equipment,[30] Justice Blackmun noted that "[i]n discarding the 'home-port' theory" the Court had consistently "distinguished the case of

23. 20 Cal. 3d at 186-87, 571 P.2d at 258, 141 Cal. Rptr. at 909.

24. 20 Cal. 3d at 185, 571 P.2d at 257, 141 Cal. Rptr. at 908 (citation omitted).

25. 441 U.S. 434 (1979).

26. Justice Rehnquist, the lone dissenter, filed a dissenting statement which read as follows: "Substantially for the reasons set forth by Justice Manuel in his opinion for the unanimous Supreme Court of California, Mr. Justice Rehnquist is of the opinion that the judgment of that court should be affirmed." *Id.* at 457.

27. *Id.* at 435-36.

28. *Id.* at 441-44.

29. *Id.* at 442.

30. *See, e.g.*, Braniff Airways, Inc. v. Nebraska State Bd. of Equalization and Assessment, 347 U.S. 590 (1954).

ocean going vessels."[31] In doing so, Justice Blackmun admitted that the taxpayers' argument favoring application of the doctrine had an "inner logic,"[32] but he refused to base the Court's holding on that ground. Justice Blackmun found this refusal necessary in view of the fact that the doctrine could "claim no unequivocal constitutional source" and was based, instead, on "common-law jurisdiction to tax."[33] He concluded therefore that "[t]he question . . . [in *Japan Line* was] a much more narrow one, that is, whether instrumentalities of commerce that are owned, based and registered abroad and that are used exclusively in international commerce, may be subjected to apportioned ad valorem property taxation by a state."[34]

The United States Supreme Court's holding reversing the California courts was based squarely on the commerce clause.[35] Accordingly, the Court initially considered several factors appropriate to commerce clause analysis. At the outset, Justice Blackmun noted that instrumentalities of interstate commerce were required to bear a fair portion of state tax burdens. He then considered the validity of Los Angeles County's contention that the tax at issue did not impose an impermissible burden on commerce under the reasoning of *Complete Auto Transit, Inc. v. Brady*.[36] In *Complete Auto* the Court held that a tax such as the one imposed in *Japan Line* would be "sustained . . . against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[37] Los Angeles County asserted that all four of these requisites were present in *Japan Line*: (1) the containers' continuous presence within the state provided a "substantial nexus" with California; (2) the tax was "fairly apportioned" because it was based on the containers' average presence within the state; (3) the tax was nondiscriminatory because it applied equally to all personal property in California; and (4) it was "fairly related to services provided" by California such as police and fire protection. The Supreme Court agreed in part with this contention. The *Complete Auto* requirements would indeed be met if the containers were instrumentalities of inter-

31. 441 U.S. at 442.
32. *Id.* at 443.
33. *Id.*
34. *Id.* at 444.
35. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.
36. 430 U.S. 274 (1977).
37. *Id.* at 279.

state commerce.[38] The Court, however, rejected the notion that foreign and interstate commerce were subject to the same commerce clause considerations as interstate commerce alone. Justice Blackmun explained why: "When a State seeks to tax the instrumentalities of foreign commerce, two additional considerations, beyond those articulated in *Complete Auto*, come into play."[39] Those considerations are the increased risk of multiple taxation and the need for federal uniformity in the area of foreign commerce.[40] California's tax failed to meet both of these requirements and was therefore unconstitutional.

Justice Blackmun gave the following reasons for invalidating California's tax. By requiring the apportionment of state taxes imposed on interstate commerce, the Supreme Court prevents multiple taxation because no jurisdiction may tax the property in full. This safeguard is not present, however, in the realm of foreign commerce. In that area, the Supreme Court "is powerless to correct malapportionment of taxes imposed from abroad in foreign commerce."[41] California's tax on international commerce not only created a substantial risk of multiple taxation, it produced it in fact.[42] In giving this rationale, the Court rejected Los Angeles County's reliance on the case of *Moorman Manufacturing Co. v. Bair*,[43] for the proposition that the presence of multiple taxation did not provide sufficient grounds for invalidating the tax. It did so by distinguishing *Moorman*. In *Moorman* the Court had sustained Iowa's use of a one-factor formula for the apportionment of corporate income, despite the very real threat of multiple taxation owing to other states' use of three-factor formulae.[44] This, however, had no bearing on the situation presented in *Japan Line*, according to Justice Blackmun, because: (1) the presence of multiple taxation in *Moorman* was "speculative," while in *Japan Line* it was proven to exist; (2) *Moorman* involved "mathematical imprecision in apportionment" whereas *Japan Line* involved a complete lack of apportionment; and (3) *Moorman* dealt with interstate rather than international commerce.[45]

38. 441 U.S. at 445.
39. *Id.* at 446.
40. *Id.* at 446-48.
41. *Id.* at 454.
42. *Id.* at 452.
43. 437 U.S. 267 (1978) (opinion by Stevens, J.; Brennan, Blackmun and Powell, JJ., dissenting).
44. "The only conceivable constitutional basis for invalidating the Iowa statute would be that the Commerce Clause prohibits any overlap in the computation of taxable income by the States. If the Constitution were read to mandate such precision in interstate taxation, the consequences would extend far beyond this particular case." *Id.* at 278.
45. 441 U.S. at 455.

Turning to the question of federal uniformity, Justice Blackmun concluded that the tax sought to be imposed in *Japan Line* prevented the United States from "speaking with one voice" as it should in the regulation of foreign trade.[46] Because American-owned cargo containers were not taxed in Japan, the Court expressed concern about the international repercussions possibly attendant to California's tax.[47] As Justice Blackmun put it, "[t]he risk of retaliation by Japan, under these circumstances, is acute, and such retaliation of necessity would be felt by the Nation as a whole."[48]

Analysis

Prior to the Supreme Court's decision in the case of *Complete Auto Transit, Inc. v. Brady*,[49] state taxation of interstate commerce had traditionally been subject to commerce clause analysis in the form of a series of rigid and formalized rules. In general, these rules prohibited states from taxing the privilege of doing business exclusively in interstate commerce,[50] from taxing goods moving in interstate transit[51] and from taxing interstate sales.[52] *Complete Auto*, decided in 1977, changed this by overruling the line of decisions which had held "that a state tax on the 'privilege of doing business' is *per se* unconstitutional when it is applied to interstate commerce."[53] In *Complete Auto*, the Court determined that such a tax would be sustained under the commerce clause if the taxpayer's business had a substantial nexus with the taxing state and the tax itself was fairly apportioned, nondiscriminatory, and fairly related to services provided by the state.[54] This standard for determining the validity of taxes in interstate commerce was repeated in *Department of Revenue of Washington* v. *Association of Washington Stevedoring Cos.*,[55] wherein the Court sustained a state tax imposed upon the full receipts received from interstate stevedoring because the

46. *Id.* at 451.

47. The Court was further concerned about retaliation by other nations: "Retaliation by some nations could be automatic. West Germany's wealth tax statute, for example, provides an exemption for foreign-owned instrumentalities of commerce, but only if the owner's country grants a reciprocal exemption for German-owned instrumentalities." *Id.* at 453 n.18 (citation omitted).

48. *Id.* at 453 (footnote omitted).

49. 430 U.S. 274 (1977).

50. *See* Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951).

51. *See* Kelley v. Rhoads, 188 U.S. 1 (1903).

52. *See* Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887).

53. 430 U.S. at 289 (Blackmun, J., expressing the unanimous opinion of the Court).

54. *Id.* at 287.

55. 435 U.S. 734 (1978).

tax had been fairly apportioned. All of the taxable stevedoring occurred within the State of Washington. The standards articulated in *Complete Auto* and *Washington Stevedoring* were calculated to ensure that multiple taxation could not occur when the same business was taxed by more than one state.[56] Those cases, however, were concerned with interstate commerce and consequently their holdings did not take into account the peculiar problems posed by a tax on a foreign taxpayer engaged in international commerce.

In *Japan Line*, the Court was confronted for the first time with the issue of the validity of an apportioned state tax imposed upon international commerce. Justice Blackmun's response was to conclude that all of the *Complete Auto* requirements—as well as two others—apply to international commerce. The first additional requirement is that the tax on international commerce not substantially increase the risk of multiple taxation. The Court held that a tax on foreign commerce will be unconstitutional if it produces multiple taxation in fact.[57] Whether the mere possibility of multiple taxation will by itself invalidate a tax still remains unclear. The Court expressly refused to decide the issue.[58] Indeed, the Court did not even intimate how it would evaluate such a factor.[59]

The second additional requirement imposed by the Court is that a tax on instrumentalities of international commerce must not obstruct the uniformity of national policy in an area where federal uniformity is essential.[60] The Court indicated several ways in which a tax might frustrate the need for uniformity. It might encourage international disputes over formulae or retaliation from foreign nations affected by the tax, or it might encourage other states to impose similar taxes, thereby unfairly multiplying taxation of interstate commerce.[61]

In the future a state will not, consistent with the commerce clause, be able to impose apportioned ad valorem property taxes on foreign-owned instrumentalities of international commerce unless six standards are met. Four of these are applicable to interstate as well as foreign

56. *See also* Braniff Airways, Inc. v. Nebraska State Bd. of Equalization and Assessment, 347 U.S. 590 (1954).

57. 441 U.S. at 453-54.

58. *Id.* at 452 n.17.

59. "Because California's tax in this case creates multiple taxation in fact, we have no occasion here to decide under what circumstances the mere risk of multiple taxation would invalidate a state tax, or whether this risk would be evaluated differently in foreign, as opposed to interstate, commerce." *Id.* (emphasis omitted).

60. *Id.* at 448.

61. *Id.* at 450-51.

commerce, while two apply to foreign commerce alone. First, the taxed business must have a substantial nexus with the taxing state.[62] Second, the tax must be fairly apportioned to prevent a state from taxing property or income which is properly attributable to activities conducted in another jurisdiction.[63] Third, the tax must not discriminate against interstate commerce.[64] Fourth, the tax must be fairly related to services provided by the taxing state.[65] With the advent of *Japan Line*, two additional requirements have been added in the area of foreign commerce: to be sustainable under the commerce clause, a state tax may not in fact result in multiple taxation[66] and may not prevent national uniformity in foreign commerce.[67]

II. Speech or Debate Clause

During the 1978-79 Term, the Court had a relatively rare opportunity to consider a case involving the speech or debate clause. *Hutchinson v. Proxmire*[a] was an action brought by the recipient of a government grant against a member of Congress for allegedly defamatory statements made in press releases and newsletters. In holding that the statements were not privileged, the Court refused to extend the scope of speech or debate clause protection beyond the "legitimate legislative activity" standard established in *Kilbourn v. Thompson*[b] and recently reaffirmed in *Gravel v. United States*.[c] It thus appears that the Court would hold only those internal communications essential to the deliberations of Congress protected by the speech or debate clause.

62. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).
63. *Id.*
64. *Id.*
65. *Id.*
66. 441 U.S. at 451. Whether the mere risk of multiple taxation will invalidate a tax is uncertain. *See* notes 58 & 59 and accompanying text *supra*.
67. 441 U.S. at 451.

a. 99 S. Ct. 2675 (1979).
b. 103 U.S. 168 (1881).
c. 408 U.S. 606 (1972).

*Hutchinson v. Proxmire**

In *Hutchinson v. Proxmire*,[1] the Supreme Court was called upon to decide whether the speech or debate clause of the Constitution[2] protects members of Congress against suits for allegedly defamatory statements made in press releases and newsletters. The Court also addressed a related First Amendment issue involving the appropriate standard of proof required for petitioner Hutchinson to establish his defamation allegations: that is, whether Hutchinson was a public figure or a public official thereby invoking the standard of actual malice.[3]

The facts underlying the *Hutchinson* litigation are uncomplicated.[4] In April, 1975, respondent William Proxmire, a United States Senator from Wisconsin, awarded his "Golden Fleece of the Month Award" to the National Science Foundation, the National Aeronautics and Space Administration (NASA) and the Office of Naval Research. The award, which is designed to publicize the most egregious examples of wasteful government spending, was given to these agencies for their joint funding of research done by a Professor Hutchinson of Western Michigan University. The agencies spent over half a million dollars over a seven year period to assist Professor Hutchinson.[5] Hutchinson's research involved observations of primates' behavioral reactions when exposed to aggravating stimuli. The research sought to measure aggression. Both NASA and the Navy felt that Hutchinson's work would be useful to them in resolving problems of aggression associated with confining humans in close quarters for extended periods of time in space and under water. Reports of Hutchinson's research were published in various scientific journals.

The Golden Fleece Award in question was prepared by Senator Proxmire's legislative assistant, Morton Schwartz, who discovered and investigated the government's subsidy of Hutchinson's research. As a result, Schwartz helped write a satirical speech for Senator Proxmire

* Commentary by Malcolm Kushner, member, third-year class.

1. 99 S. Ct. 2675 (1979).

2. U.S. CONST. art. I, § 6, cl. 1. The speech or debate clause states: "[F]or any Speech or Debate in either House, [legislators] shall not be questioned in any other Place."

3. 99 S. Ct. at 2687. In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Court held that the standard of proof required in a defamation action brought by a public official is actual malice; that is, actual knowledge of falsity or reckless disregard of the truth. Under Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), this standard of proof was extended to actions by public figures.

4. The summary of the facts of this case is taken from the Supreme Court opinion. 99 S. Ct. at 2677-79.

5. *Id.* at 2678.

which characterized Hutchinson's research as a waste of the taxpayers' money.[6] The speech was incorporated into a press release and sent to members of the news media.[7] Prior to release of the speech, Hutchinson was informed of its content. He objected to it as inaccurate and incomplete. Schwartz disagreed and it was published. Following the announcement of the award, Schwartz, acting on behalf of Senator Proxmire, contacted a number of the federal agencies that supported Hutchinson's research to discuss the merits of their continued funding of Hutchinson's work.

In May, 1975, Senator Proxmire repeated his criticism in a newsletter sent to 100,000 people including many nonconstituents.[8] Later in that year, Senator Proxmire referred to Hutchinson's research during a television interview but did not mention Professor Hutchinson by name. A final reference to the research was made in a February, 1976 newsletter summarizing the reasons why certain agencies had been recipients of the Golden Fleece Awards of 1975. The newsletter did not refer to Hutchinson by name.[9]

The Lower Court Decisions

On April 16, 1976, Hutchinson instituted a defamation action in federal court,[10] alleging that defendants Senator William Proxmire and Morton Schwartz had damaged his professional standing by publicizing the Golden Fleece Award. The defendants responded to this contention by asserting the congressional privilege of immunity to suit found in the speech or debate clause of the Constitution. They contended that the privilege extended to press releases and newsletters circulated by members of Congress. The district court granted summary judgment for respondents, holding that the speech or debate clause afforded absolute immunity to the Senator and his staff for reporting and publicizing the funding of Hutchinson's research in a Senate speech and in a press release. According to the court, the press release fell within the "informing function" of Congress.[11] In the court's view it was not distinguishable from a television or radio broadcast of a speech

6. *Id.*
7. *Id.*
8. *Id.* at 2679.
9. *Id.*
10. 431 F. Supp. 1311 (1977).
11. *Id.* at 1324-25. The congressional "informing function" refers to (1) Congress' ability to inform itself through investigatory activities, and (2) Congress' duty to inform the public about its activities.

from the Senate floor.[12] Hence it was protected by the immunity conferred by the speech or debate clause.

Turning to the First Amendment, the district court brought the newsletters and interviews within the boundaries of protected speech.[13] It held Hutchinson to be a public figure for purposes of the suit and thereby required him to meet the standard of actual malice.[14] Such a holding was made necessary by Hutchinson's "long involvement with publicly funded research, his active solidification of federal and state grants, the local press coverage of his research, and the public interest in the expenditure of public funds on the precise activities in which he voluntarily participated."[15] The district court held that neither respondents' failure to investigate nor their failure to edit properly was sufficient to establish actual malice. Therefore no genuine issue of material fact was present[16] and no defamation action could lie.

The court of appeals affirmed[17] but its rationale differed from that of the district court. The court of appeals held that the speech or debate clause protected the statements made both in the press release and the newsletters but not the follow-up telephone calls to the agencies funding Hutchinson.[18] The follow-up calls and the interviews were held protected under the First Amendment.[19] In so holding, the court of appeals agreed with the district court that Hutchinson was a public figure and that no actual malice had been shown.[20]

12. *Id.* at 1325. *See also* 39 U.S.C. § 3210 (1970). Under the franking statute, congressmen are authorized to use the mails free of charge for certain types of communications, including newsletters and press releases. The franking statute affects mailed materials "which may deal with such matters as the impact of laws and decisions on State and local governments and individual citizens; reports on public and official actions taken by members of Congress; and discussions of proposed or pending legislation or government actions and the positions of Members of Congress on and arguments for or against, such matters." 39 U.S.C. § 3210(3)(B) (1970). Although the district court mentioned this privilege, it did not rest its conclusion on the statute.

13. 431 F. Supp. at 1325–33.

14. *Id.* at 1327.

15. *Id.*

16. *Id.* at 1333.

17. 579 F. 2d 1027 (1978).

18. *Id.* at 1032–34. The court of appeals stated: "The district court did not specifically address the Speech or Debate status of the follow-up phone calls. It appears, however, that the court below viewed these actions as merely a part of the total investigation and therefore abolutely privileged. In light of the language in *Gravel*, we must disagree." *Id.* at 1032 n.9 (citation omitted).

19. *Id.* at 1034.

20. *Id.*

The United States Supreme Court Decision

The United States Supreme Court reversed both the district court and the court of appeals.[21] Chief Justice Burger, writing for the majority, determined that the speech or debate clause does not protect the communication of information by individual congressmen through press releases and newsletters.[22] The Court reviewed the history of the case law interpreting the clause and found no intent to create an absolute privilege from liability or suit for defamatory statements made outside congressional chambers.[23] The Court examined the scope of protection afforded by the clause against suits inhibiting the freedom of congressional deliberations and found neither Senator Proxmire's newsletter nor his press release essential to those deliberations.[24] The Chief Justice distinguished published congressional committee reports, held protected under the speech or debate clause in *Doe v. McMillan*,[25] from newsletters and press releases.[26] The latter, wrote the Court, were not part of the legislative function or process but were primarily means of informing those outside the congressional forum and represented only the views and will of a single member.[27]

In the next section of the majority opinion, the Court examined the reasons advanced by the district court and court of appeals in support of their finding that Hutchinson was a public figure.[28] The Chief Justice noted that the lower courts' conclusions were based on two factors: "[F]irst, Hutchinson's successful application for federal funds and the reports in local newspapers of the federal grants; second, Hutchinson's access to the media, as demonstrated by the fact that some newspapers and wire services reported his response to the announcement of the Golden Fleece Award."[29] The Court rejected these facts as a basis for holding Hutchinson to be a public figure[30] and held that those charged with alleged defamation could not by their own conduct make the claimant into a public figure, thereby creating their own defense.[31] The Court found the general concern about public expenditures insuffi-

21. 99 S.Ct. 2675 (1979).
22. *Id.* at 2686–87.
23. *Id.* at 2684–86.
24. *Id.* at 2686.
25. 412 U.S. 306 (1973).
26. 99 S. Ct. at 2687.
27. *Id.*
28. *Id.* at 2687–88.
29. *Id.* at 2688.
30. *Id.*
31. *Id.*

cient to convert Hutchinson into a public figure since he had never assumed any role of public prominence in that broad area of public concern.[32] The majority opinion concluded by noting that Hutchinson did not have the regular and continuing access to the media that is characteristic of one who is a public figure.[33]

In an opinion concurring in part and dissenting in part, Justice Stewart joined in all but one footnote of the majority opinion.[34] In doing so he asked whether the constitutional protection afforded by the speech or debate clause to a communication from a congressman or a member of his staff to a federal agency should depend on whether the communication was defamatory.[35] He felt it should not.[36] The majority thought otherwise.[37] Justice Stewart argued that telephone calls to federal agencies were a routine and essential part of the congressional oversight function and therefore should be protected by the speech or debate clause.[38]

Justice Brennan wrote a separate dissent in which he disagreed with the Court's conclusion that Senator Proxmire's newsletters and press release fell outside the protection of the speech or debate clause.[39] In his view, any form of public criticism by congressmen of unnecessary government spending was a legislative act entitled to speech or debate clause immunity.[40] Justice Brennan based his opinion on reasons expressed in his dissent in *Gravel v. United States*.[41]

In *Gravel*, Justice Brennan had argued that "speech or debate" en-

32. *Id.*

33. *Id.*

34. *Id.* at 2688–89 (Stewart, J., concurring in part and dissenting in part). Justice Stewart disagreed with footnote 10 of the majority opinion.

35. *Id.*

36. *Id.* at 2689.

37. *Id.* at 2681 n.10. The question was raised by the majority in its discussion of the follow-up calls made by Schwartz to governmental agencies. The Chief Justice concluded that an attempt to influence the behavior of executive agencies which involved libelous comments were not protected by the speech or debate clause.

38. *Id.* at 2689.

39. *Id.* at 2689 (Brennan, J., dissenting).

40. *Id.*

41. 408 U.S. 606, 648 (1972) (Brennan, J., dissenting). In *Gravel*, the government sought to subpoena a Senator's aide and compel him to appear before a grand jury investigating the release and republication of the Pentagon Papers. *Id.* at 608. The Senator had read extensively from the papers during a subcommittee meeting before inserting the entire 47-volume study into the Congressional Record and arranging for its republication by a private printer. *Id.* at 609. The Supreme Court, in a six to three decision, held that the speech or debate clause protected the Senator and his aide with respect to events involving preparation for and conduct of the subcommittee meeting but that his immunity did not extend to the Senator's arrangements for private republication of the papers. *Id.* at 622.

compassed more than acts necessary to the internal deliberations of Congress. The contrary interpretation given by the majority in *Gravel* represented a "far too narrow view of the legislative function."[42] He argued that the legislator's duty to inform the public about governmental matters lay at the heart of the democratic system.[43] In his view, the ongoing crisis of confidence in American government made the "informing function" not merely an "ordinary" legislative task, but an essential one. The preservation of our democratic institutions depended on its viability.[44]

Analysis

Consideration of the questions raised and resolved in *Hutchinson* can best be accomplished by a two-part analysis. First, the reasoning underlying the majority's rejection of Senator Proxmire's defenses will be examined. Second, this commentary will address the question of whether the Court's judgment is consistent with its prior decisions interpreting the speech or debate clause and determining the scope of the protection afforded speech by that clause and by the First Amendment.

The Supreme Court has passed directly on the speech or debate clause only a few times in our nation's history.[45] A literal reading of the clause would limit its protection to utterances made solely within the confines of either congressional house, but the Supreme Court has never given the clause such a literal interpretation.[46] In *Kilbourn v. Thompson*,[47] the first case in which the Supreme Court dealt with a challenge to the immunity granted by the clause, the Court held that the act of voting fell within the ambit of the privilege. Thus the Court created a "legitimate legislative activity" standard for invoking speech or debate clause immunity. It extended the clause to "things generally done in a session of the House by one of its members in relation to the

42. *Id.* at 649 (Brennan, J., dissenting).

43. *Id.* In support of his "informing function" argument, Justice Brennan cited congressional financial support for communications between legislators and the public, widely publicized congressional hearings and historical interpretation of the speech or debate clause. *Id.* at 650.

44. *Id.* at 652.

45. United States v. Helstoski, 99 S. Ct. 2432 (1979); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Doe v. McMillan, 412 U.S. 306 (1973); Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972); Dombrowski v. Eastland, 387 U.S. 82 (1967); United States v. Johnson, 383 U.S. 169 (1966); Kilbourn v. Thompson, 103 U.S. 168 (1881).

46. Hutchinson v. Proxmire, 99 S. Ct. 2675, 2683 (1979).

47. 103 U.S. 168 (1880).

business before it."[48]

The "legitimate legislative activity" standard has remained in effect since its inception in *Kilbourn*. A recent restatement of this standard was made in *Gravel v. United States*[49] where the Court stated that matters other than speech and debate are protected only if they are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings."[50] The issue in a speech or debate clause case thus becomes a question of whether or not to classify a legislator's disputed communicative acts as essential to the deliberative process.

In deciding this question with respect to Senator Proxmire's press release and newsletters, Chief Justice Burger reviewed the historical purpose of speech or debate clause immunity. As part of that review, he cited *United States v. Brewster*,[51] a case in which the history of the clause was traced back to its English roots. In *Brewster*, the Court emphasized that the clause must be interpreted in light of the American constitutional system of government rather than the English parliamentary scheme.[52] Thus, the *Brewster* Court held that the purpose of the speech or debate clause was "to preserve legislative independence, not supremacy."[53] It further held that speech or debate clause immunities were not "for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators."[54] The Chief Justice found the clause similarly interpreted in the writings of Thomas Jefferson and James Wilson, both of whom emphasized the limited nature of the immunity bestowed upon legislators.[55] As a result, the Chief Justice con-

48. *Id.* at 204.
49. 408 U.S. 606 (1972).
50. *Id.* at 625.
51. 408 U.S. 501 (1972).
52. *Id.* at 508.
53. *Id.*
54. *Id.* at 507.
55. 99 S. Ct. at 2683. Thomas Jefferson wrote: "[The privilege] is restrained to things done in the House in a Parliamentary Course, . . . For [the Member] is not to have privilege *contra morem parliamentarium*, to exceed the bounds and limits of his place and duty." T. JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE 20 (1854), *reprinted in* THE COMPLETE JEFFERSON 704 (S. Padover ed. 1943). In commenting upon the idea that Parliament's privileges were preserved by keeping them indefinite, James Wilson, a draftsman of the Constitution and a Supreme Court Justice, wrote: "Very different is the case with regard to the legislature of the United States . . . . The great maxims, upon which our law of parliament is founded, are defined and ascertained in our constitutions. The arcana of privilege, and the arcana of prerogative, are equally unknown to our system of jurisprudence." 2 THE WORKS OF JAMES WILSON 35 (J. Andrews ed. 1896).

cluded that the historical interpretation of the clause did not justify extending immunity to protect press releases and newsletters.[56]

In order to bolster this conclusion the Chief Justice quoted the Commentaries of Justice Story: "[A]lthough a speech delivered in the house of commons is privileged, and the member cannot be questioned respecting it elsewhere; *yet, if he publishes his speech, and it contains libellous matter, he is liable to an action and prosecution therefore, as in common cases of libel.*"[57] The same principles were said by Justice Story to be applicable to the privilege of debate and speech in Congress.[58] The Chief Justice then applied this doctrine to Senator Proxmire's press release and newsletters[59] and asserted that such communications were not "essential to the deliberations of the Senate."[60] While acknowledging that a legislator's published statements may bear some relationship to the legislative and deliberative process by influ-

56. 99 S. Ct. at 2684. In his review of the historical purpose of the clause, the Chief Justice omitted the purpose of alleviating Congressmen from the burden of litigation: "[L]egislators engaged 'in the sphere of legitimate legislative activity,' . . . should be protected not only from the consequences of the litigation's results but also from the burden of defending themselves." Dombrowski v. Eastland, 387 U.S. 82, 85 (1967). The purpose underlying the clause was reiterated by the Court in Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975). There the Court stated: "[A] private civil action, whether for an injunction or damages, creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation. Private civil actions also may be used to delay and disrupt the legislative function." *Id.* at 503. Although this purpose of the clause is mentioned in the majority opinion, it is not addressed in the section of the opinion reviewing the purpose of the clause.

57. 99 S. Ct. at 2684 (quoting J. STORY, COMMENTARIES ON THE CONSTITUTION § 863 at 329 (1833) (emphasis added)).

58. *Id.* Justice Story continued by writing: "No man ought to have a right to defame others under colour of a performance of the duties of his office. And if he does so *in the actual discharge of his duties in congress, that furnishes no reason, why he should be enabled through the medium of the press to destroy the reputation, and invade the repose of other citizens.* It is neither within the scope of his duty, nor in furtherance of public rights, or public policy." *Id.* at 2684-85 (Emphasis added).

59. *Id.* at 2685. After articulating Justice Story's opinion that the English doctrine denying immunity for republication was applicable to Congress, the Chief Justice cited Gravel v. United States, 408 U.S. 606 (1972), and Doe v. McMillan, 412 U.S. 306 (1973), for the proposition that the English doctrine had been accepted in the United States. The citation to *Doe* is curious. The Chief Justice dissented in that case, joined by Justices Blackmun and Rehnquist. The Chief Justice had argued in *Doe* that the speech or debate clause extended to protect the publication of any committee report authorized by Congress which had a valid legislative purpose. It is difficult to reconcile this position with the one he takes in the instant case which would deny immunity to a press release summarizing a congressional report. The Chief Justice's observation in *Hutchinson* that the committee report in *Doe* represents a collective legislative view while Senator Proxmire's press release is the view of a single legislator outside the congressional forum may indicate the basis of his reasoning. It does not explain, however, why the two situations should be treated differently.

60. 99 S. Ct. at 2686.

encing other votes in Congress, the Chief Justice cited *United States v. Brewster*[61] as precluding such a wide grant of immunity.[62] According to the Chief Justice, the issue was apparently well settled by the *Brewster* decision.[63]

Senator Proxmire's argument that press releases and newsletters were privileged as part of the informing function of Congress was also rejected in the majority's opinion.[64] The Chief Justice observed that "informing" may be used in two senses: first, Congress informs itself collectively through hearings of its committees, and second, legislators inform the public, through various means, about their activities.[65] He held that the latter form of "informing" is not part of the legislative function or deliberative process. In so holding, the Chief Justice examined the writings of Woodrow Wilson cited in Senator Proxmire's brief.[66] The Chief Justice interpreted Wilson's reference to the informing function of Congress as limited to the narrower sense of "informing" by which Congress informs itself through committee hearings.[67] He explained that Wilson referred only to the ability of Congress to acquaint itself with acts of the executive branch and that a distinction between the informing function and the legislative function was clearly implied.[68] Accordingly, he inferred the distinction to dismiss Senator Proxmire's arguments.

In his brief dissent Justice Brennan rejected the majority's restricted view of the legislative function for reasons expressed in his dis-

61. 408 U.S. 501 (1972).

62. 99 S. Ct. at 2686.

63. *Id.* The *Brewster* Court noted that in United States v. Johnson, 383 U.S. 169 (1966), the Court distinguished between acts "related to the due functioning of the legislative process" and acts "constituting legislative process entitled to Speech or Debate Clause protection." The *Brewster* Court explained that newsletters and press releases were not entitled to immunity merely because they were related to the legislative process, but that "only acts generally done in the course of the process of enacting legislation were protected." 408 U.S. at 514.

64. 99 S. Ct. at 2687.

65. *Id.* at 2686-87.

66. *Id.* at 2687. Woodrow Wilson wrote: "Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function. . . . [T]he only really self-governing people is that people which discusses and interrogates its administration." W. WILSON, CONGRESSIONAL GOVERNMENT 303 (1885).

67. 99 S. Ct. at 2687.

68. *Id.*

sent in *Gravel*.[69] Since the *Gravel* case forms the pivotal basis for Justice Brennan's rebuttal to the majority, his reliance on it demands some exposition. In *Gravel*, Justice Brennan, joined by Justices Douglas and Marshall, had argued that the speech or debate clause encompassed more than "acts necessary to the internal deliberations of Congress concerning proposed legislation."[70] This led him to conclude in *Hutchinson* that the informing function—the congressman's duty to inform the public—is central to the role of the legislator and therefore worthy of speech or debate clause protection.[71] How he relies on *Gravel* in so concluding is not, however, immediately apparent.

In his *Gravel* dissent, Justice Brennan did not distinguish between the two senses of "informing" as did the majority in the instant case. Although it is clear that he now wants to include the second sense of "informing" within the definition of legislative function, much of the authority he cites from *Gravel* actually refers to the first sense of the word. In transferring his *Gravel* dissent to the instant case, Justice Brennan loses much of the support for his reasoning.[72] A second argument offered in *Gravel* and ostensibly adopted in *Hutchinson* seems equally inadequate. Justice Brennan cites the congressional franking privilege and the crisis of confidence in the American system of government as support for his view that a legislator's communications with the public should receive speech or debate clause immunity.[73] Although logically sound, neither of these arguments is persuasive. The crisis in confidence demonstrates the vital need for a free flow of information between Congress and its constituents. The franking privilege shows congressional intent to foster such communication. The accomplishment of this goal does not require that such communications include defamatory material. Stronger, though unpersuasive, arguments

69. *Id.* at 2689 (Brennan, J., dissenting).

70. 408 U.S. at 649 (Brennan, J., dissenting).

71. 99 S. Ct. at 2689 (Brennan, J., dissenting).

72. Justice Brennan's wholesale adoption of his dissent in *Gravel* contradicts his position in *Hutchinson* in other ways as well. He cites a Woodrow Wilson passage about the informing function to support inclusion of a legislator's communications with the public as part of the legislative function. 408 U.S. at 650-51 (quoting W. WILSON, CONGRESSIONAL GOVERNMENT 303 (1885)). It is the identical passage which gives rise to the majority's distinction between the two senses of informing in the instant case and which the Chief Justice construes to refer only to Congress' ability to inform itself. Similarly, Justice Brennan's references to Watkins v. United States, 354 U.S. 178 (1957) and COMMITTEE OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION, THE REORGANIZATION OF CONGRESS 14 (1945), support an interpretation of the informing function as Congress' ability to inform itself.

73. 408 U.S. at 650 (Brennan, J., dissenting).

for granting immunity to such communications are found in Justice Brennan's historical analysis of the speech or debate clause.

In his *Gravel* dissent, Justice Brennan cited an essay by Thomas Jefferson, who, joined by James Madison, argued that communications between representatives and constituents "should be free from the cognizance or coercion of the co-ordinate branches, judiciary and executive. . . ."[74] On the basis of this essay and similar writings by James Wilson,[75] a member of the committee that drafted the speech or debate clause, Justice Brennan found "substantial evidence that the Framers intended the speech or debate clause to cover all communications from a Congressman to his constituents,"[76] including those made by Senator Proxmire.

This interpretation of the speech or debate clause was possibly relevant in *Gravel* where the allegedly defamatory communication was made about certain executive officials. In *Hutchinson*, however, the communication in dispute was made about a private citizen. This fact certainly seems to make a critical difference.

In his *Gravel* dissent, Justice Brennan had viewed the speech or debate clause immunity as part of the more fundamental issue of separation of powers. He had thus argued for a vigilant maintenance of that separation. In *Gravel* he wrote:

> The dialogue between Congress and people has been recognized, from the days of our founding, as one of the necessary elements of a representative system. We should not retreat from that view merely because, in the course of that dialogue, information may be revealed that is *embarrassing to other branches of government* or violates their notions of necessary secrecy. A Member of Congress who exceeds the bounds of propriety in performing this official task may be called to answer by other members of his chamber. We do violence to the fundamental concepts of privilege, however, when we subject the same conduct to judicial scrutiny at the instance of the executive.[77]

74. *Id.* at 654 (quoting 8 THE WORKS OF THOMAS JEFFERSON 322-27 (Ford ed. 1904)).

75. "[Congressmen] 'should enjoy the fullest liberty of speech, and . . . should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offense' . . . . 'That the conduct and proceedings of representatives should be as open as possible to the inspection of those whom they represent, seems to be, in republican government, a maxim, of whose truth or importance the smallest doubt cannot be entertained. That, by a necessary consequence, every measure, which will facilitate or secure this open communication of the exercise of a delegated power, should be adopted and patronized by the constitution and laws of every free state, seems to be another maxim, which is the unavoidable result of the former." *Id.* at 655-56 (quoting 1 WORKS OF JAMES WILSON 421-22 (R. McCloskey ed. 1967)).

76. *Id.* at 652.

77. *Id.* at 661-62 (emphasis added).

Justice Brennan's argument is undoubtedly persuasive if the information publicly disseminated concerns the activity of executive personnel. But where, as in this case, the challenge to the republication of embarrassing information is brought by a private citizen the argument seems misdirected. Criticism of the government is admittedly a cherished American right. There is no right to engage in unrestricted criticism of private individuals, however, and actions for defamation still lie. Justice Brennan acknowledged as much.[78] The fact that the government pays for a private person's academic research does not seem, on the face of it at least, reason enough to abrogate a citizen's traditional right to vindicate his reputation.

By adopting his *Gravel* dissent *in toto*, Justice Brennan makes no attempt to weigh and balance Professor Hutchinson's right to a good name against the need for a free flow of congressional communication with the public. To the extent the majority did in fact attempt such a balancing analysis its viewpoint seems more intellectually attractive.

In determining the standard of proof applicable to Professor Hutchinson's cause of action for defamation, the majority had to determine first whether Hutchinson was a public figure, a task which has been described as "trying to nail a jellyfish to the wall."[79] The Chief Justice devoted a brief section of the majority opinion to this task. In reaching the conclusion that Hutchinson was not a public figure,[80] the Chief Justice applied the general definition of a public figure announced in *Gertz v. Robert Welch, Inc.*:[81]

> For the most part those who attain this status [of a public figure] have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. Most commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.[82]

As a result, the Chief Justice dismissed both the argument that Hutchinson was a public figure for all purposes[83] and the lower courts'

78. "Different considerations may apply, of course, where the republication is attacked, not by the Executive, but by private persons seeking judicial redress for an alleged invasion of their constitutional rights." *Id.* at 662 n.2.

79. Rosanova v. Playboy Enterprises, Inc., 411 F. Supp. 440, 443 (S.D. Ga. 1976).

80. 99 S. Ct. at 2688.

81. 418 U.S. 323 (1974).

82. *Id.* at 345.

83. 99 S. Ct. at 2688.

holding that Hutchinson was a public figure in this case.[84]

In so doing, the Chief Justice observed that Hutchinson's writings reached only a small audience of professionals interested in behavioral research and that his public profile and activities were similar to those of numerous other members of his profession.[85] Consequently, Hutchinson was not viewed by the Chief Justice as one who had "thrust himself or his views into public controversy to influence others."[86] The majority rejected the argument that the general concern about public expenditures was sufficient to convert Hutchinson into a public figure.[87] They reasoned that under such a holding, anyone who received or benefitted from public grants for research would be a public figure, no doubt an undesirable outcome.[88] Therefore, inasmuch as Professor Hutchinson had never assumed any role of public prominence on a broad issue of public concern about public expenditures, had not invited public attention and comment on his grants,[89] nor had continuing access to the media,[90] the majority concluded that the actual malice standard of proof was not applicable. Hutchinson was not a public figure.[91]

In his dissent, Justice Brennan did not address the First Amendment issue. He did, however, affirm that portion of the decision below which held that Hutchinson was a public figure for purposes of the instant suit and that the actual malice standard applied.[92]

It is interesting to observe that neither Justice Brennan nor the majority discussed whether Professor Hutchinson was a public official rather than a public figure. Both the court of appeals and the district court had held Hutchinson to be a public figure because of his active solicitation of public funds and his access to the media. But the district court had also held him to be a public official owing to his status as director of research at a state mental hospital.[93] Under *New York*

84. *Id.*

85. *Id.*

86. *Id.* The Chief Justice did not consider the general concern about public expenditures to be in controversy.

87. *Id.*

88. *Id.* The Court cited Time, Inc. v. Firestone, 424 U.S. 448 (1976) for the proposition that the "use of such subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area." *Id.* at 456.

89. 99 S. Ct. at 2688.

90. *Id.*

91. *Id.*

92. *Id.* at 2689 (Brennan, J., dissenting).

93. Hutchinson v. Proxmire, 431 F. Supp. 1311, 1327 (W.D. Wis. 1977).

Times, Inc. v. Sullivan,[94] the actual malice standard of proof is required in defamation actions against public figures *and against public officials*.[95] The Supreme Court has never clearly defined the limits of the public official category or whether it is different from the public figure category. In *Hutchinson v. Proxmire*, the Court missed yet another opportunity to do so.

III. Freedom of Expression and the Media

Some of the most emotional and controversial cases decided by the Supreme Court in recent years have involved the First Amendment freedoms of expression; the 1978-79 Term was no exception. The Court decided three First Amendment cases of note, all of which involved the news media, and all of which were at least tangentially related to judicial proceedings. The predictable outcome was that the Court continued to balance the highly significant rights protected by the First Amendment against other important societal values.

In *Gannett Co. v. DePasquale*,[a] where the Court upheld the exclusion of the press and public from a pretrial suppression hearing, the First Amendment rights of the press and public were found to have been adequately protected by the trial judge's weighing those rights against the criminal defendant's right to a fair trial. In *Smith v. Daily Mail Publishing Co.*,[b] the Court was confronted with similar conflicting values: the right of the press to publish truthful information lawfully obtained and the state's interest in protecting the anonymity of juvenile offenders. Based on earlier cases, the Court found the balance in this situation dipped decidedly in favor of the press, and concluded that, because the state's interest was not of the "highest order," a state statute punishing the publication of a juvenile offender's name without the permission of the juvenile court was invalid. Finally, in *Herbert v. Lando*,[c] the Court encountered a situation where the balance between conflicting values had already been struck. In *New York Times v. Sullivan*,[d] the Court weighed the rights of free speech and free press under

94. 376 U.S. 254 (1964).
95. *See* note 3 *supra*.

a. 99 S. Ct. 2898 (1979).
b. 99 S. Ct. 2667 (1979).
c. 441 U.S. 153 (1979).
d. 376 U.S. 254 (1964).

the First Amendment against the individual's reputational interest, and determined that a public official must show "actual malice" to recover for defamation. By holding in *Herbert* that a public figure plaintiff in a libel action could compel a media defendant to answer pretrial discovery questions designed to establish "actual malice," the Court sought to preserve the compromise reached fifteen years earlier in *New York Times*.

When *Gannett* and *Herbert* were announced, a number of members of the news media decried those decisions as further instances of the Burger Court's attack on editorial autonomy. It appears, however, that these cases may be better viewed as the Court's attempt to strike some compromise between interests protected by the First Amendment and other important individual rights. Although the press will at times favor the result in a particular case and at times not, it is likely that the Court will continue to place First Amendment interests on a balancing scale of competing values.

*Gannett Co., Inc. v. DePasquale**

The petitioner, Gannett Company, Inc.,[1] publishes two newspapers in Rochester, New York. The two newspapers were covering an investigation arising out of the disappearance of a local resident, Wayne Clapp. Two men and a woman had been arrested in Michigan in connection with the disappearance. The Gannett Company newspapers published accounts of the investigation, the arrests and police theories concerning the apparent crime. The two men were brought to Seneca County, New York and charged with second-degree murder. The woman was charged with grand larceny. The defendants moved to suppress certain statements that they had made to the police, asserting that they had been made involuntarily. They also moved to suppress physical evidence seized as a result of the allegedly involuntary statements. The motions to suppress were made to Judge DePasquale. At the suppression hearing, the defense attorneys argued that the continuing buildup of publicity in the local papers was jeopardizing the defendants' ability to receive a fair trial. They requested that the press and public be excluded from the hearing. The motion was not opposed by the district attorney. A reporter employed by petitioner was present in the courtroom, but made no objection to the closure motion. Accordingly, the motion was granted.

* Commentary by Jonathan Howden, member, third-year class.

1. Gannett Co., Inc. v. DePasquale, 99 S. Ct. 2898 (1979).

The next day, the reporter wrote a letter to Judge DePasquale claiming "a right to cover [the] hearing"[2]and requesting access to the transcript. The judge responded that the hearing was over and reserved decision on any release of the transcript.

The petitioner then moved to set aside the exclusionary order. The judge granted a hearing on this motion and allowed the parties to file briefs. At the hearing, the judge found that the press did have a constitutional right of access to the pretrial proceedings and held that this right had to be balanced against the defendants' constitutional right to a fair trial. Finding that an open suppression hearing presented a reasonable probability of prejudice to the defendants, Judge DePasquale ruled that the defendants' right to a fair trial outweighed the interest of the press and public. The judge therefore refused to vacate the exclusion order or grant immediate access to the transcript.

The Lower Court Decisions

The following day, the petitioner initiated a proceeding in the nature of prohibition mandamus challenging the closure order on First, Sixth and Fourteenth Amendment grounds. The intermediate appellate court held that Judge DePasquale's exclusion order infringed upon the public's interest in open judicial proceedings and also constituted an unlawful prior restraint. Thus, the court vacated the order of the trial court.[3]

The New York Court of Appeals held that the case was technically moot but, because of the great importance of the issues presented, retained jurisdiction in order to reach the merits.[4] The court held that where prosecutorial or judicial accountability was not at stake and the chief public interest was one of active curiosity in a "notorious local happening," closure was proper because any First Amendment interests were protected by the availability of a transcript edited to exclude inadmissable matters.[5] The court also asserted that even though criminal trials are presumptively open to the public, the right to demand a public trial belongs to the defendant and not to the general public. Consequently, the court upheld the exclusion of the press and the public from the pretrial proceeding.[6] Citing "the significance of the consti-

2. *Id.* at 2903. In its opinion, the Court quoted from the letter sent by the reporter to Judge DePasquale.

3. Gannett Co., Inc. v. DePasquale, 55 A.D.2d 107, 389 N.Y.S.2d 719 (1976).

4. Gannett Co., Inc. v. DePasquale, 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977).

5. *Id.* at 381, 372 N.E.2d at 550-51, 401 N.Y.S.2d at 763.

6. *Id.*

tutional issues involved" in the case, the United States Supreme Court granted certiorari.[7]

The United States Supreme Court Decision

The Supreme Court, in an opinion written by Justice Stewart, first addressed the issue of mootness. Relying on *Nebraska Press Association v. Stuart*,[8] the Court stated that its jurisdiction was not defeated "simply because the order attacked has expired, if the underlying dispute between the parties is one 'capable of repetition, yet evading review' . . . ."[9] The Court held that the controversy was not moot because the challenged action was by its nature too short-lived to be fully litigated or reviewed on appeal and there was a reasonable probability that the complaining party would be subjected to the same action again.

Turning to the merits, Justice Stewart prefaced his analysis of the case by noting the importance of securing a fair trial for defendants in criminal trials. He emphasized that "a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity."[10] Justice Stewart pointed out that publicity concerning pretrial suppression hearings poses special risks of unfairness and that closure of such hearings "is often one of the most effective methods that a trial judge can employ to attempt to insure that the fairness of a trial will not be jeopardized by the dissemination of such information throughout the community before the trial itself has even begun."[11]

Addressing the terms of the Sixth Amendment,[12] Justice Stewart began by stating that "[t]he Constitution nowhere mentions any right of access to a criminal trial on the part of the public; its guarantee, like the others enumerated, is personal to the accused."[13] He cited *In re Oliver*[14] and *Estes v. Texas*[15] as support for this conclusion. In *Oliver*, the Court held that the secrecy of a criminal contempt trial violated the

7. 99 S. Ct. at 2904.

8. 427 U.S. 539 (1976).

9. 99 S. Ct. at 2904 (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 546 (1976) (quoting Southern Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 515 (1911)).

10. 99 S. Ct. at 2904. *See generally* Sheppard v. Maxwell, 384 U.S. 333 (1966).

11. 99 S. Ct. at 2905.

12. The Sixth Amendment right to a public criminal trial was made applicable to the states through the Fourteenth Amendment in *In re* Oliver, 333 U.S. 257 (1948).

13. 99 S. Ct. at 2905 (citing Faretta v. California, 422 U.S. 806, 846 (1975) (Blackmun, J., dissenting).

14. 333 U.S. 257 (1948).

15. 381 U.S. 532 (1965).

accused's right to a public trial. Conversely, in *Estes*, the Court held that a defendant was deprived of his right to due process of law by the televising and broadcasting of his trial. Justice Stewart asserted that "both the *Oliver* and *Estes* cases recognized that the constitutional guarantee of a public trial is for the benefit of the defendant. There is not the slightest suggestion in either case that there is a correlative right in members of the public to insist upon a public trial."[16] Stewart recognized that there exists a strong societal interest in public trials. However, he claimed that this interest did not amount to the creation of a constitutional public right.[17] Rather, it was his view that "our adversary system of criminal justice is premised upon the proposition that the public interest is fully protected by the participants in the litigation."[18]

Justice Stewart then turned to the petitioner's contention that the history of the public trial guarantee implicates a public right of access to judicial proceedings. His analysis followed two distinct lines. First, he acknowledged that a common law right of access did vest in the public and was in fact incorporated in some early state constitutions. No such explicit right was written into the Sixth Amendment, however. Moreover, even if the Framers intended that "the Sixth Amendment permits and even presumes open trials as a norm . . . [t]he issue here is whether the Constitution *requires* that a pretrial proceeding such as this one be opened to the public, even though the participants in the litigation agree that it should be closed to protect the defendant's right to a fair trial."[19]

Second, Justice Stewart distinguished a pretrial proceeding from the actual trial. He felt that even if the Sixth and Fourteenth Amendments could properly be viewed as embodying the common law right of the public to attend criminal trials, it would not necessarily follow that the same right would exist with regard to pretrial proceedings. Turning again to common law history, he found that such proceedings, in contrast to criminal trials, were often closed to the public. This practice

16. 99 S. Ct. at 2906. In a footnote to this statement, Justice Stewart cited numerous authorities supporting this view. The most prominent was an article written by Justice Powell while he was president of the American Bar Association. Powell, *The Right to a Fair Trial*, 51 A.B.A. J. 534, 538 (1965).

17. 99 S. Ct. at 2907.

18. *Id.* at 2908. In a footnote, Stewart cited Berger v. United States, 295 U.S. 78, 88 (1935), for the proposition that the prosecutor is the representative of the people and this position "surely encompasses a duty to protect the societal interest in an open trial." 99 S. Ct. at 2908, n.12.

19. 99 S. Ct. at 2908 (emphasis in original) (footnote omitted).

was carried over to the United States, and is still followed in a number of states.[20] Stewart concluded that "members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials."[21]

Finally, Stewart considered petitioner's First Amendment claims. He refused to break new ground by finding any First and Fourteenth Amendment right to attend trials. Rather, "assuming, *arguendo*, that the First and Fourteenth Amendments may guarantee such access in some situations," he found that "this putative right was given all appropriate deference by the state *nisi prius* court in the present case."[22] Thus, the majority gave its approval to the manner in which the trial court had handled the exclusionary proceeding. Judge DePasquale had provided petitioner's counsel with an opportunity to voice his objections to the pretrial proceedings. Further, the judge decided to exclude the press and public only after balancing the petitioner's constitutional rights against the defendants' right to a fair trial. Concluding that an open hearing and immediate access to a transcript would pose a "reasonable probability of prejudice to these defendants,"[23] the judge had closed the pretrial hearings. Justice Stewart noted that any denial of access was only temporary since once the danger of prejudice had passed, a transcript of the hearing was made available. Based on these facts, then, the Court held that any First and Fourteenth Amendment right of the petitioner to attend criminal trials was not violated.[24]

In summary, the majority rejected the notion that "the Constitution . . . gave the petitioner an affirmative right of access to this pretrial proceeding, even though all the participants in the litigation agreed that it should be closed to protect the fair trial rights of the defendants."[25] The Constitution, in their view, "provides no such

20. *Id.* at 2909-11. At least eight states presently follow the original Field Code provision permitting the closure of pretrial hearings to the public. *Id.* at 2911 n.23.

21. *Id.* at 2911.

22. *Id.* at 2912. Petitioner asked the Court to narrow its holdings in Pell v. Procunier, 417 U.S. 817 (1974), Saxbe v. Washington Post Co., 417 U.S. 843 (1974), and Houchins v. KQED, Inc., 438 U.S. 1 (1978), and recognize "a First and Fourteenth Amendment right to attend criminal trials." 99 S. Ct. at 2912. In the prior cases, the Court had denied the press and public any constitutionally protected right of access to prisons beyond that offered by the prison authorities. The petitioner in *Gannett* took the position that these earlier cases were distinguishable because court rooms, unlike prisons, have traditionally been open to the public. The Court found it unnecessary to consider this argument. *Id.* at 2912 n.24.

23. 99 S. Ct. at 2912 (quoting Judge DePasquale).

24. *Id.*

25. *Id.* at 2913.

right."[26]

Three members of the majority wrote separate opinions, each emphasizing a different aspect of the majority opinion.[27] Chief Justice Burger attached particular importance to the nature of the proceeding in question. While not recognizing a constitutional right of public access to criminal trials, Burger nonetheless acknowledged the strong common law tradition that "trials generally be public."[28] He contrasted this tradition with the common law treatment of pretrial proceedings. He found that the public did not enjoy a similar right of access to these proceedings. Since the Framers were aware of pretrial practice and procedure, their silence on the matter was of special significance.[29] Finally, the Chief Justice observed that during the last forty years, "pretrial processes have been enormously expanded," yet proceedings such as depositions and interrogatories have not been considered as other than "wholly private to the litigants."[30] He concluded that "the essence of all this is that by definition 'pretrial proceedings' are exactly that."[31]

Justice Powell, in his concurrence, reached the First Amendment issue which the rest of the Court reserved. Specifically, he asserted that "petitioner's reporter had an interest protected by the First and Fourteenth Amendments in being present at the pretrial suppression hearing."[32] This protection is not based on any special constitutional status of the press, but exists because the press acts as an agent for the public at large in providing the information necessary to intelligent public decisionmaking.[33] Justice Powell would balance the public's need for information against the defendant's right to a fair trial rather than place one interest above the other;[34] where a defendant moves for exclusion of the press and public, they must be given an opportunity to be heard. Justice Powell stated, however, that "this opportunity extends no farther than the persons present at the time the motion for closure is made, for the alternative would require substantial delays in trial and

26. *Id.*

27. Chief Justice Burger, Justice Powell and Justice Rehnquist joined the majority opinion along with Justices Stevens and Stewart. The first three, however, also concurred spearately.

28. 99 S. Ct. at 2913 (Burger, C.J., concurring).

29. *Id.* at 2914.

30. *Id.*

31. *Id.*

32. *Id.* (Powell, J., concurring) (footnote omitted).

33. *Id.* at 2914-15. Justice Powell had advanced this idea earlier in Saxbe v. Washington Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting).

34. 99 S. Ct. at 2915-16.

pretrial proceedings while notice was given to the public."[35] Moreover, at the hearing the defendant must make "some showing that the fairness of the trial likely will be prejudiced"[36] by public proceedings. If the state also supports closure, it must make a similar showing as to the potential for unfairness or likelihood of disclosure of confidential materials. Interested members of the press and public must show that there are alternative procedures available which will protect the interests of the defendant and the state.[37] Justice Powell concluded by endorsing the approach taken by the trial court, stating that the procedure "fully comported with that required by the Constitution."[38]

In the final separate concurrence, Justice Rehnquist emphasized that the Court was holding, "without qualification, that 'members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials.' "[39] In marked contrast to the Court's apparent reservation of the issue, Rehnquist thought it well established that the press and public have no right of access to judicial or governmental proceedings. He considered unnecessary the procedures employed by the trial court and those advanced by Justice Powell to protect First Amendment interests: "The lower courts are under no constitutional constraint either to accept or reject those procedures. They remain, in the best tradition of our federal system, free to determine for themselves the question whether to open or close the proceeding."[40] Thus, Justice Rehnquist would vest trial court judges with full discretion to determine whether a judicial proceeding should be closed upon the request of the parties involved. They may do as they please so long as the defendant requests that the proceedings be closed. While he hoped judges would decide the question "by accommodating competing interests in a judicious manner,"[41] he also emphasized that the First Amendment is not "some sort of constitutional 'sunshine law' that requires notice, an opportunity to be heard and substantial reasons

35. 99 S. Ct. at 2916 (Powell, J., concurring).

36. *Id.*

37. Justice Powell performed a similar balancing of competing interests in his concurring opinion in Branzburg v. Hayes, 408 U.S. 665, 709-10 (1972).

38. 99 S. Ct. at 2917.

39. *Id.* (Rehnquist, J., concurring) (quoting from the majority opinion, *id.* at 2912).

40. *Id.* at 2918-19 (Rehnquist, J., concurring) (footnote omitted). Justice Rehnquist cited numerous cases that, he maintained, repudiate the view that the press or public have a right of access to judicial or other governmental proceedings. *See, e.g.*, Nixon v. Warner Communications, Inc., 435 U.S. 589, 609 (1978); Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974); Pell v. Procunier, 417 U.S. 817, 834 (1974); Branzburg v. Hayes, 408 U.S. 665, 684-85 (1972).

41. 99 S. Ct. at 2919 (Rehnquist, J., concurring).

before a governmental proceeding may be closed to the public and press."[42]

Justice Blackmun, joined by Justices Brennen, Marshall and White, concurred in part and dissented in part.[43] The only portion of the majority's opinion with which Blackmun concurred was that dealing with the issue of mootness.[44] Aside from that issue, Justice Blackmun was in complete disagreement with the majority. In his view, even the Court's phrasing of the issue, and its description of the facts of the case, were unacceptable.

Criticizing the majority's surrender "to the temptation to overstate and overcolor" the pretrial setting, Justice Blackmun began by restating the facts, placing emphasis on the "placid, routine, and innocuous nature" of the articles concerning the murder investigation.[45] He also reviewed excerpts of the transcript of the initial suppression hearing, including the motion for closure,[46] and concluded that the Court's "colorful allusions to what it assumed took place when the motions were presented" were probably due to comments in the majority opinion of the New York Court of Appeals.[47]

Turning to the issues, Justice Blackmun did not share Justice Powell's concern with the First Amendment, stating that "this Court heretofore has not found and does not today find, any First Amendment right of access to judicial or other governmental proceedings."[48] Rather, in his view, any right of access had to emanate from the public trial provision of the Sixth Amendment.

Justice Blackmun began his analysis of the Sixth Amendment by conceding that, by its literal terms, the Amendment secures the right to a public trial only to the accused. However, he then reviewed several cases in which the Court had gone well beyond the literal terms of the

42. *Id.* at 2918.
43. *Id.* at 2919.
44. *Id.*
45. *Id.*
46. In Blackmun's view, the closure motion was only briefly argued to defense counsel and constitutional implications were discussed even less. The prosecution did not wish to be heard on the question and was content to leave the entire matter up to the defense. Justice Blackmun criticized the Court for characterizing the decision to close the suppression hearings as "an agreement by the accused, the prosecutor, and the trial judge to have closure 'in order to assure a fair trial. . . .'" *Id.* at 2920 (quoting from the majority opinion, *id.* at 2901). He also questioned the Court's description of the hearing "as one where . . . 'defense attorneys argued that the unabated buildup of adverse publicity had jeopardized the ability of the defendants to receive a fair trial.'" *Id.* (quoting from the majority opinion, *id.* at 2903).
47. *Id.* at 2921.
48. *Id.* at 2922.

Amendment in order to properly define the nature of its guarantees.[49] He noted that societal interests, common law practices and the structure and history of the constitutional text were all important factors in the definition.[50]

Justice Blackmun briefly traced the English common law surrounding public trials and found "strong evidence that the public trial . . . widely was perceived as serving important social interests, relating to the integrity of the trial process, that exist apart from, and conceivably in opposition to the interests of the individual defendant."[51] In fact, Justice Blackmun determined that the public interest was strong enough to preclude a defendant from being able to compel a private proceeding.[52] This strong public interest was carried over to the American colonies and was reflected in early colonial charters and declarations of rights. Justice Blackmun claimed that the terms of the Sixth Amendment, when compared with the language of those other contemporary documents, demonstrate only a minor difference in draftsmanship and not a conscious intent to create a right to compel a private proceeding.[53] Thus, in his view, there is no evidence in the development of the public trial that the Sixth Amendment allows a defendant to compel a private trial.[54]

Justice Blackmun reasoned that since a defendant has no absolute right to compel private proceedings, such a request should be granted only when the defendant's interest in securing a fair trial clearly outweighs the public interest in open proceedings. The public interest is a strong one, however, and not easily overcome. Public trials may protect against purjured testimony, insure the impartiality of the court, allow public scrutiny of the administration of criminal justice, preserve confidence in the judicial system and, most relevant to the present case, allow the public to "scrutinize the performance of police and prosecutors in the conduct of public judicial business."[55] The latter function acts as a check on governmental misconduct, ineptitude and collusion with defendants which might otherwise be successfully hidden from the

49. *E.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); In re Oliver 333 U.S. 257 (1948). *See also* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975).

50. 99 S. Ct. at 2925 (Blackmun, J., joined by Brennan, White, and Marshall, JJ., concurring in part and dissenting in part).

51. *Id.* at 2928.

52. *Id.* at 2928-29.

53. *Id.* at 2929.

54. *Id.* at 2930.

55. *Id. See also* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975).

public eye. Therefore, according to Justice Blackmun, the Sixth and Fourteenth Amendments prohibit courts from excluding the public from trial proceedings without affording full and fair consideration to the public interests involved.[56]

Before considering the circumstances under which a trial judge could exclude the public, Justice Blackmun explained why, in his view, certain pretrial proceedings, particularly suppression hearings, come within the scope of the Sixth Amendment. First, suppression hearings resemble and relate to the full trial in almost every respect.[57] Second, the outcome of the hearing is often the decisive factor in the final disposition of the case.[58] Third, the suppression hearing may be the only judicial proceeding of any substantial importance in course of the prosecution, as most cases are disposed of prior to trial.[59] Fourth, the pretrial proceeding often presents other issues of importance to the public, especially those relating to police and prosecutorial conduct.[60] Finally, the decision to suppress evidence is often highly controversial; therefore, the record upon which it is based should be open to public scrutiny and evaluation.[61] Even conceding that there existed no common law right of access to pretrial proceedings, the subsequent evolution of such proceedings requires the extension of Sixth Amendment guarantees at least to suppression hearings, which have become "the close equivalent of the trial on the merits."[62]

In Justice Blackmun's view, trials and suppression hearings should be closed only after the court draws a careful balance between the competing Sixth Amendment rights of the defendant and of the public at large. He delineated what he saw as the minimal procedure and allocation of burdens of proof required in this balancing process. The starting point is the presumption that the Sixth Amendment mandates that trials and suppression hearings be conducted in open court.[63] First, the

56. 99 S. Ct. at 2932-33 (Blackmun, J., joined by Brennan, White and Marshall, JJ., concurring in part and dissenting in part).

57. *Id.* at 2933.

58. *Id.*

59. *Id.* Justice Blackmun pointed out that in Seneca County in 1976, the year the case in question was prosecuted, every felony prosecution was terminated without a trial on the merits. He claimed that "[t]his statistic is characteristic of our state and federal criminal justice systems as a whole. . . ." *Id.* at 2934 (footnote omitted).

60. *Id.*

61. *Id.*

62. *Id.* The American Bar Association follows this position. *See* ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS. No. 8-3.2 at 15 & n.1 (Approved Draft 1978).

63. 99 S. Ct. at 2938 (Blackmun, J., joined by Brennan, White and Marshall, JJ., concurring in part and dissenting in part).

accused "should provide an adequate basis to support a finding that there is a substantial probability that irreparable damage to his fair trial right will result from conducting the proceeding in public."[64] Second, the accused should show that there is "a substantial probability that alternatives to closure will not protect adequately his right to a fair trial."[65] Third, the accused should show that there is a "substantial probability that closure will be effective in protecting against the perceived harm."[66] Only then can the presumption favoring a public trial be overcome, and any resulting restrictions upon public access should be narrowly drawn. Finally, any closure order, along with the appropriate findings of the trial court, should be included in the record for subsequent review.[67] Procedures falling short of these standards would, in Justice Blackmun's opinion, violate the Sixth Amendment rights of the general public. Because the trial court record before the Court failed to demonstrate that these minimum standards were met, Justice Blackmun dissented from the Court's approval of Judge DePasquale's closure order.

Analysis

Except for Justice Powell, the major point of contention between members of the Court was the scope of the Sixth Amendment's public trial clause. The majority read it narrowly, holding that its sole purpose was to protect the defendant. The dissent claimed that the Amendment has been read more broadly in other contexts and should be so read in the instant case.

The decision is most notable, however, for the alternative holdings present in the majority opinion, making it difficult to determine the ultimate holding of the Court. Each of these alternative holdings was emphasized by various members in separate concurring opinions. Chief Justice Burger endorsed the view that the Sixth Amendment does not apply to pretrial proceedings and preferred to limit the Court's holding accordingly.[68] Justice Powell would reach the merits of the First Amendment claims that the majority only considered *arguendo*. In Justice Powell's opinion, the trial court's determination was acceptable only because Judge DePasquale had given due deference to the

64. *Id.* at 2937.

65. *Id. See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562-65 (1976); Sheppard v. Maxwell, 384 U.S. 333, 354 n.1, 357-62 (1966).

66. 99 S. Ct. at 2937.

67. *Id.* at 2939.

68. *See* text accompanying notes 27-31 *supra*.

First Amendment concerns.[69] Finally, Justice Rehnquist favored a broad interpretation of the Court's decision: he would hold that the public has no Sixth Amendment right to attend criminal trials.[70]

The four dissenters who joined Justice Blackmun's opinion were a more cohesive group. These justices—Blackmun, Brennan, Marshall and White—represent a solid core of the Court who would find a Sixth Amendment public right to demand open trials and suppression hearings. Their strength, coupled with the narrow interpretations of Chief Justice Burger and Justice Powell, raise serious doubts as to the actual position of the Court as a whole. Any lower court seeking to apply the proper constitutional standard in a pretrial or trial closure proceeding would have difficulty in finding firm constitutional ground on which to stand. In his concurrence, Justice Powell warned that

> lower courts cannot assume after today's decision that they are "free to determine for themselves the question whether to open or close the proceeding" free from all constitutional restraint. For although I disagree with my four dissenting Brethren concerning the origin and the scope of the constitutional limitations on the closing of pretrial proceedings, I agree with their conclusion that there are limitations and that they require the careful attention of trial courts before closure can be ordered.[71]

The implication is that if faced with a situation in which the trial judge did not follow the minimal procedure delineated by Justice Powell before ordering closure, Powell would vote to reverse. Assuming the four *Gannet* dissenters would adhere to their somewhat stricter standard, a majority of the Court would then stand opposed to closure.

Other important questions remain. For one, Chief Justice Burger's concurrence emphasized the uncertainty surrounding closure of full trials.[72] Additionally, in his majority opinion, Justice Stewart failed to reach the merits of the petitioner's First Amendment claims, assuming,

69. *See* text accompanying notes 35-38 *supra*.

70. *See* text accompanying note 39 *supra*.

71. 99 S. Ct. at 2915 n.2 (Powell, J., concurring). Justice Rehnquist disputed Justice Powell's contention, arguing that the dissenters in the instant case may adhere in subsequent cases to the doctrine of *stare decisis*, rather than form an "odd quintuplet" by agreeing that there are limitations on the closing of judicial proceedings which stem from two different constitutional sources. Justice Rehnquist added that such a diverse, broadly-based holding would have little practical impact. In light of the various alternative holdings presented in the instant case, the latter criticism would seem of dubious merit.

72. However, in a case on appeal this term, Richmond Newspapers, Inc. v. Virginia, No. 79-243 (Va. Sup. Ct., July 9, 1979), the Court will have an opportunity to consider this question. At issue is a Virginia statute allowing a trial judge, at his discretion, to exclude from a trial "any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial should not be violated." VA. CODE § 19.2-266. Relying on this statute, the judge in a capital murder case excluded the press and public

arguendo, that if such rights did exist, they had been fully protected by the trial court. It is uncertain what the Court will do when faced with a procedure that does not comport with that followed by the trial court in *Gannett*.

The *Gannett* opinion has provoked much controversy both because it was less than well received by the press[73] and because the opinion is so difficult to interpret. Like so many of the Burger Court's opinions, the combination of concurrences and dissents serves to cloud and blunt the Court's holding. In this case, the resulting confusion has produced conflicting applications of *Gannett* at the trial court level.[74] To date, four Supreme Court justices have spoken out publicly concerning the proper interpretation of the case.[75] As with the decision itself, however, their comments have not been entirely consistent. The 1980 Term should provide an opportunity for the Court to clarify its position[76] and it will almost certainly do so.

When the Court does decide another trial closure case, any First Amendment right of access argument will probably fail. As Justice Stewart pointed out, the Court has rejected such claims of a right of access for press and public in a number of recent cases.[77] In *Gannett*, only Justice Powell chose to rest his argument on First Amendment grounds. Other members of the Court, recognizing that there is a public interest in attending judicial proceedings, looked to the Sixth Amendment for protection of this interest rather than to the First. By resting their arguments on Sixth Amendment grounds, Chief Justice Burger and Justices Blackmun and White avoided the issue of freedom of access to information under the First Amendment, an issue toward which none is favorably disposed.[78]

As Justice Powell has pointed out, the majority opinion should be interpreted narrowly until the Court has had an opportunity to clarify its position.[79] Until then, it remains to be seen whether courts will, as Justice Rehnquist had hoped, "accommodate competing interests in a

from the courtroom. The Virginia Supreme Court affirmed the order, citing *Gannett* as authority.

73. *See* TIME, Sept. 17, 1979, at 82.

74. *Id.*

75. *Id.* These four are Chief Justice Burger and Justices Blackmun, Powell and Stevens.

76. The Court will probably seize the opportunity in Richmond Newspapers, Inc. v. Virginia, No. 79-243 (Va. Sup. Ct., July 9, 1979). *See* note 72 *supra*.

77. 99 S. Ct. at 2911-12. *See also* note 40 and accompanying text *supra*.

78. Nor, it would seem, is a majority of the Court. *See* Houchins v. KQED, Inc., 438 U.S. 1 (1978); Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974).

79. *See* note 71 and accompanying text *supra*.

judicious manner."[80]

*Smith v. Daily Mail Publishing Co.**

Since the 1975-76 Term, the United States Supreme Court has decided a number of cases involving the issue of the extent of a state's power to restrict the publications of truthful information.[1] During the last Term, the Court had yet another opportunity to consider this question. In *Smith v. Daily Mail Publishing Co.*[2] the Supreme Court determined whether a West Virginia statute which made it a misdemeanor for a newspaper to publish the name of any youth charged as a juvenile offender without the written permission of the juvenile court[3] violated the First and Fourteenth Amendments of the United States Constitution.[4] The Court weighed the state's interest in protecting the anonymity of juvenile offenders against the newspaper's interest in publishing lawfully obtained truthful information and declared the statute unconstitutional. In so holding, the Court indicated that whether a statute is viewed as a prior restraint[5] or an attempt to punish publication after the event,[6] the state must demonstrate the necessity of its action in order to sustain the validity of the statute.

80. 99 S. Ct. at 2929 (Rehnquist, J., concurring).

* Commentary by Harry Chamberlain, member, third-year class.

1. *See* notes 50-58 and accompanying text *infra*.

2. 99 S. Ct. 2667 (1979).

3. W. VA. CODE § 49-7-3 (1976). This section provides in pertinent part: "[N]or shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court." The penalty provision is contained in West Virginia Code section 49-7-20: "A person who violates . . . a provision of this chapter for which punishment has not been specifically provided, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten nor more than one hundred dollars, or confined in jail not less than five days nor more than six months, or both such fine and imprisonment."

4. "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST., amend. I.

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST., amend. XIV. *See* Near v. Minnesota, 283 U.S. 697 (1931): "It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action." *Id.* at 707.

5. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); New York Times Co. v. United States, 403 U.S. 713 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Near v. Minnesota, 283 U.S. 697 (1931); *see also* notes 42–46 and accompanying text *infra*.

6. *See, e.g.*, Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

The Lower Court Decisions

On February 9, 1978, a fifteen year old student was fatally shot at a junior high school near Charleston, West Virginia.[7] Respondents, *The Charleston Daily Mail* and *The Charleston Daily Gazette*, learned of the shooting by routine monitoring of the police band radio frequency. Upon arrival at the school, reporters for both newspapers discovered the name of the alleged assailant, a fourteen year old classmate of the victim, by asking various witnesses, police and an assistant prosecuting attorney.

The *Daily Mail* published its article about the incident in its February 9 afternoon edition, omitting the name of the alleged attacker because of the West Virginia statutory prohibition. The *Daily Gazette*, on the other hand, published the juvenile's name and picture in its article that appeared in the February 10 morning edition. The juvenile's name was also broadcast over at least three radio stations on February 9 and 10. As the information was already public knowledge, the *Daily Mail* decided to publish the juvenile's name in its February 10 afternoon edition.

On March 1, both papers were indicted for violating the West Virginia statute.[8] The newspapers petitioned the West Virginia Supreme Court of Appeals for an original jurisdiction writ of prohibition to prevent the prosecuting attorney and circuit judges of Kanawha County from taking any action on the indictment. The newspapers alleged that the statute upon which the indictment was based violated the First and Fourteenth Amendments of the United States Constitution and several state constitutional provisions.

The West Virginia Supreme Court issued the writ,[9] holding that the statute operated as an unconstitutional prior restraint on freedom of the press under the First Amendment of the United States Constitution.[10] The West Virginia court did not decide the case on state constitutional grounds, stating: "[W]ith regard to the First Amendment it would be difficult to find a more expansive interpretation of freedom of the press than that developed by the Supreme Court of the United States."[11] Relying on recent United States Supreme Court decisions,[12]

7. The summary of facts is taken from the United States Supreme Court's majority opinion by Chief Justice Burger. 99 S. Ct. at 2669.

8. *See* note 3 *supra*.

9. State *ex rel.* Daily Mail Pub. Co. v. Smith, 248 S.E.2d 269 (1978).

10. *Id.* at 272.

11. *Id.* at 270.

12. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Oklahoma Pub. Co. v. District Court, 430 U.S. 308 (1977); Cox Broadcasting Corp. v. Cohn, 420 U.S.

West Virginia's highest court reasoned that the state's interest in protecting the identity of the juvenile offender did not overcome the "heavy presumption" against prior restraints.[13]

The United States Supreme Court Decision

The United States Supreme Court affirmed the West Virginia ruling.[14] Chief Justice Burger, however, writing for six other members of the Court,[15] did not follow the West Virginia Supreme Court of Appeals' reasoning, for he did not view the application of the West Virginia statute as a prior restraint. The respondent newspapers based their prior restraint argument on the West Virginia statute's requirement of court approval prior to publication of the juvenile's name.[16] The newspapers conceded that the statute was not a classic prior restraint, there being no prior injunction against publication.[17] They also acknowledged that a statutory provision requiring prior approval by the juvenile court judge was probably less oppressive to their free press rights than was a total ban on publication of the juvenile's name.[18] The respondents claimed, however, that since the statutory requirement of prior approval had the operation and effect of a licensing scheme, it was the functional equivalent of a prior restraint.[19] They asserted that the state's interest in protecting the identity of juvenile offenders was insufficient to overcome the heavy presumption against the constitutionality of such a scheme.[20]

Petitioners did not dispute whether the statutory provision was a prior restraint. Rather, they argued that even if the statute had such an

469 (1975). For further discussion of these cases, see notes 50-58 and accompanying text *infra*.

13. 248 S.E.2d at 271-72. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558 (1976); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (Burger, C.J.). "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Id.*

14. 99 S. Ct. 2667 (1979).

15. Justice Rehnquist filed a separate opinion concurring in the judgment. Justice Powell took no part in the consideration or decision of the case.

16. 99 S. Ct. at 2669. *See* note 3 and accompanying text *supra*.

17. 99 S. Ct. at 2670. *See also* notes 42-46 and accompanying text *infra*. Chief Justice Burger noted that the statute had deterred The Daily Mail from publishing the juvenile's name for 24 hours. *Id.* at 2669 n.1.

18. *Id.* at 2670.

19. *Id. See* Near v. Minnesota, 283 U.S. 697, 708 (1931). *See also* notes 42-46 and accompanying text *infra*.

20. 99 S. Ct. at 2670. *See* Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

effect, it was constitutionally defensible due to the state's interest in preserving the anonymity of alleged juvenile delinquents.

The Supreme Court eschewed the prior restraint analysis that had been the basis of the West Virginia court's holding below. Chief Justice Burger began his analysis by stating that whether the statute was viewed as a prior restraint or as a penal sanction for publishing information lawfully obtained was not dispositive "because even the latter action requires the highest form of state interest to sustain its validity."[21] While prior restraints had been accorded "the most exacting scrutiny in previous cases,"[22] the Chief Justice asserted that "even when a state attempts to punish publication after the event it must nevertheless demonstrate its punitive action was necessary to further the state interests asserted."[23]

Chief Justice Burger further claimed that recent decisions of the Court demonstrated that state action to punish the publication of truthful information could seldom satisfy constitutional standards.[24] In support of this proposition he cited three cases decided within the last three Terms: *Landmark Communications, Inc. v. Virginia*,[25] *Cox Broadcasting Corp. v. Cohn*,[26] and *Oklahoma Publishing Co. v. District Court*.[27] Chief Justice Burger found none of these cases controlling under the facts in *Daily Mail*,[28] but he contended that "all suggest strongly that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[29]

The Court held that the interest advanced by the state of protecting the anonymity of the juvenile offender was insufficient to justify

21. 99 S. Ct. at 2670.

22. *Id. See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 561 (1976); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); Near v. Minnesota, 283 U.S. 697, 716 (1931). *See also* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

23. 99 S. Ct. at 2670. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978). *See also* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975).

24. 99 S. Ct. at 2670.

25. 435 U.S. 829 (1978). For further discussion of the case, see notes 50-52 and accompanying text *infra*.

26. 420 U.S. 469 (1975). For further discussion of the case, see notes 53-55 and accompanying text *infra*.

27. 430 U.S. 308 (1977). For further discussion of the case, see notes 56-58 and accompanying text *infra*.

These were the cases upon which the West Virginia Supreme Court of Appeals also relied in reaching its decision. 248 S.E.2d at 271-72.

28. 99 S. Ct. at 2671. *See* note 60 and accompanying text *infra*.

29. 99 S. Ct. at 2671.

punishing the truthful publication of the alleged juvenile offender's name lawfully obtained through routine newspaper reporting techniques.[30] In finding that the state's interest was not of the "highest order," Chief Justice Burger pointed to the Court's decision in *Davis v. Alaska*,[31] where the state used similar arguments to justify preventing a criminal defendant from impeaching a prosecution witness on the basis of his juvenile record. *Davis* held that the state's policy of preserving the anonymity of the juvenile offender was subordinate to the defendant's Sixth Amendment right to confrontation.[32] The majority in *Daily Mail* found *Davis* persuasive authority in holding that the newspapers' First Amendment rights must prevail over the same interest as that asserted by the state in *Davis*.[33]

Although the Court determined that the state's interest was insufficient to justify the criminal penalty, its inquiry did not end there. The majority also held the statute failed to satisfy two additional constitutional requirements. First, the West Virginia statute did not accomplish its stated purpose, as it did not "restrict the electronic media or any form of publication, except 'newspapers,' from printing the names of youths charged in a juvenile proceeding."[34] Chief Justice Burger pointed out that at least three radio stations had broadcast the alleged assailant's name prior to the *Daily Mail's* February 10 publication.[35] In addition, the state had not demonstrated that criminal penalties were necessary to protect the confidentiality of juvenile proceedings.[36] As the respondents pointed out, while all fifty states provided in some way for confidentiality, only five, including West Virginia, imposed criminal penalties on nonparties for publication of the juvenile's identity.[37]

Justice Rehnquist concurred only in the judgment of the Court.[38] He disagreed with the majority's holding that preserving the anonymity of juvenile offenders was not a state interest of the "highest order."[39] Justice Rehnquist concurred because he agreed with the majority that the West Virginia statute " '[did] not accomplish its stated purpose.' "[40]

30. *Id.*
31. 415 U.S. 308 (1974).
32. *Id.* at 319.
33. 99 S. Ct. at 2671.
34. *Id.* at 2671-72.
35. *Id.* at 2672.
36. *Id.*
37. *Id.* The four other states were Colorado, Georgia, New Hampshire, and South Carolina. *Id.* at 2672 n.2.
38. *Id.* at 2672 (Rehnquist, J., concurring in the judgment).
39. *Id.* at 2673-74.
40. *Id.* at 2674.

He was quick to add, however, that a "generally effective ban on publication that applied to all forms of mass communication, electronic and print media alike, would be constitutional."[41]

Analysis

The original purpose of the speech and press clause of the First Amendment was to prevent prior restraint on speech by government[42] similar to the English licensing system under which nothing could be published without the prior approval of church or state authorities.[43] Such restraints on speech carry a heavy presumption of invalidity, placing a "heavy burden of showing justification" on any party seeking to impose such restraints.[44] By contrast, the presumption against limits on expression imposed by criminal penalties has been assumed to be less heavy.[45] This procedural preference for subsequent criminal and civil sanctions over prior restraints is due to a social policy which favors punishing those who abuse their rights to free speech after they break the law over suppressing those rights beforehand. An injunction's effects are immediate and irreversible; thus, "if it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."[46]

41. *Id.* at 2675. Because the case was decided on the broader First and Fourteenth Amendments issue, neither the West Virginia court nor the Supreme Court reached the issue of whether the statute violated equal protection by applying only to newspapers and not to other forms of journalistic expression. *See* 99 S. Ct. at 2672 n.4; 248 S.E.2d at 272 n.3. Justice Rehnquist asserted that the failure of a state statute to achieve its stated purpose was entitled to considerable weight in the balancing process used to resolve free expression issues arising under the First and Fourteenth Amendments, but that a similar inquiry is illusory when a statute is challenged on Fourteenth Amendment equal protection grounds. 99 S. Ct. at 2674 n.3 (Rehnquist, J., concurring in the judgment) (citing Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting).

42. A prior restraint is "any governmental order which restricts or prohibits speech prior to its publication." J. NOWAK, R. ROTUNDA, & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 744 (1978).

43. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 724 (1978); HANDBOOK ON CONSTITUTIONAL LAW, *supra* note 42, at 741; Emerson, *The Doctrine of Prior Restraint*, 20 L. & CONTEMP. PROB. 648, 650–51 (1955). *See also* Near v. Minnesota, 283 U.S. 697, 713 (1931) (antidefamation statute unconstitutional). In his now-famous dictum in *Near*, Chief Justice Hughes stated three possible exceptions to the prior restraint doctrine: (1) publication of troop movements during wartime, (2) obscenity and (3) incitements to violent overthrow of the government. *Id.* at 716.

44. New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

45. *See generally* J. NOWAK, R. ROTUNDA, & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 741-44 (1978).

46. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). *See also* Nebraska Press

Although the Supreme Court in *Daily Mail* purported not to decide whether the West Virginia statute was a prior restraint on publication or a subsequent punishment, Chief Justice Burger pointed out that "First Amendment protection reaches beyond prior restraints"[47] and framed the ultimate issue as whether a state has the power "to *punish* the truthful publication of an alleged juvenile delinquent's name lawfully obtained. . . ."[48] The rule applied by the Court was that even if the statute were viewed as a penal sanction, such action requires "the highest form of state interest to sustain its validity."[49] This rule had been established the previous term in *Landmark Communications, Inc. v. Virginia*.[50] The Court concluded that the West Virginia statute could not satisfy the constitutional standards defined in that case.[51]

In *Landmark Communications* the Court invalidated a Virginia statute which made it a crime to divulge or publish information about judges' disability or misconduct disclosed to a confidential judicial review commission authorized to hear such complaints. Addressing the issue of whether the state's interest in protecting the reputation of judges was sufficient to justify punishing third persons for divulging or publishing truthful information, the Court concluded: "[T]he publication Virginia seeks to punish under its statute lies near the core of the First Amendment, and the Commonwealth's interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom."[52]

Chief Justice Burger also cited the Court's 1975 decision in *Cox Broadcasting Corp. v. Cohn*[53] in support of this rule. In *Cox Broadcasting Corp.* the Court held that damages could not be recovered against a newspaper for publishing the name of a rape victim. The suit was based on a Georgia statute which imposed penal sanctions for publishing a rape victim's name. The purpose of the statute was to protect the privacy right of the injured individual and her family.[54] The name of

Ass'n v. Stuart, 427 U.S. 539, 589 (1976) (Brennan, J., concurring in the judgment); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975); A. BICKEL, THE MORALITY OF CONSENT 61 (1975).

47. 99 S. Ct. at 2670.

48. *Id.* at 2671 (emphasis added).

49. *Id.* at 2670.

50. 435 U.S. 829 (1978). This case is discussed at length in *Constitutional Review: Supreme Court, October 1977 Term*, 6 HASTINGS CONST. L.Q. 19, 20-34 (1978).

51. 99 S. Ct. at 2670.

52. 435 U.S. at 838.

53. 420 U.S. 469 (1975).

54. *Id.* at 474-75.

the victim had become public knowledge through official court records during the prosecution of the rapist. The Supreme Court, per Justice White, held the statute unconstitutional, reasoning that "[b]y placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. . . . States may not impose sanctions on the publication of truthful information contained in official court records."[55]

The Court found "one classic prior restraint case," *Oklahoma Publishing Co. v. District Court*,[56] "particularly relevant" to its inquiry.[57] The 1977 case was factually similar to *Daily Mail*. There, an Oklahoma court had enjoined the news media from publishing either the name or a photograph of an eleven year old boy on trial for murder in the juvenile court. The injunction was based on an Oklahoma statute requiring that juvenile proceedings be closed unless specifically ordered open by the juvenile court. The judge permitted reporters and other members of the public to attend a pretrial hearing without such an order and then tried to halt publication of the information obtained. In reversing the injunctions, the Supreme Court held that once that information was "publicly revealed" or "in the public domain," its dissemination could not be restrained by the state court.[58]

Chief Justice Burger claimed that *Landmark Communications, Cox Broadcasting Corp.* and *Oklahoma Publishing Co.* indicated strongly that if a newspaper published truthful information lawfully obtained it may not be punished, absent a "state interest of the highest order."[59] The Chief Justice submitted, however, that none of these decisions were directly controlling in *Daily Mail* because they involved situations where the government itself "provided or made possible press access to the information,"[60] whereas the reporters in *Daily Mail* "relied upon routine newspaper reporting techniques . . . ."[61]

This distinction seems superfluous and adds little to the prior holdings discussed in *Daily Mail*. Each of those cases had involved at least some investigative reporting, especially the publication of confidential information in *Landmark Communications*. Notably, *Daily Mail* and the three cases it relied on all involved restrictions on the publication of information concerning a judicial proceeding. Perhaps the Court

55. *Id.* at 495.
56. 430 U.S. 308 (1977).
57. 99 S. Ct. at 2671.
58. 430 U.S. at 311 (citing Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 471 (1975).
59. 99 S. Ct. at 2672.
60. *Id.* at 2671.
61. *Id.*

meant to indicate, without so stating, that the rules discussed in *Daily Mail* would apply beyond this context.[62]

Having determined the applicable standard, the Court decided whether the state interest advanced was sufficient to justify the criminal statute. The petitioners asserted that West Virginia's interest in the confidentiality of the juvenile's name was the furtherance of rehabilitation because "the publication of the name may encourage further antisocial conduct and also may cause the juvenile to lose future employment or suffer other consequences for this single offense."[63] By analogy to *Davis v. Alaska*,[64] the Court summarily dismissed this interest as inadequate to sustain the statute. The majority reasoned that the First Amendment right asserted in *Daily Mail* was equivalent to the Sixth Amendment right claimed in *Davis*. Therefore, the Court concluded, "the constitutional right must prevail over the State's interest in protecting juveniles."[65]

Justice Rehnquist disagreed with the majority's conclusion that "punishing publication of the identity of a juvenile offender can never serve an interest of the 'highest order . . . .' "[66] He agreed with the petitioners' contention that "[w]ithout providing for punishment of such unauthorized publications it will be virtually impossible for a State to ensure the anonymity of its juvenile offenders."[67] Justice Rehnquist concurred in the Court's judgment solely because the statute

62. "A free press cannot be made to rely solely upon the sufferance of government to supply it with information." *Id.* (citing Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978) (plurality opinion); Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).

63. 99 S. Ct. at 2671.

64. 415 U.S. 308 (1974). *See* text accompanying notes 31-33 *supra*.

65. 99 S. Ct. at 2671. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 561 (1976).

66. 99 S. Ct. at 2674 (Rehnquist, J., concurring in the judgment). Justice Rehnquist began with the proposition that First Amendment rights are not absolute and must be carefully weighed against conflicting public interests. *Id.* at 2672 (citing Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838, 843 (1978)); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976); American Communications Ass'n v. Douds, 339 U.S. 382, 400 (1950) (plurality opinion) (Congress may, under the National Labor Relations Act, withhold certain benefits from any labor organization the officers of which have not filed "non-Communist" affidavits with the NLRB)). He concluded that the state's interest in protecting the anonymity of juvenile offenders far outweighed the statute's "minimal interference with freedom of the press." 99 S. Ct. at 2673 (Rehnquist, J., concurring in the judgment).

67. *Id.* at 2674. Justice Rehnquist noted some empirical support for petitioners' argument that confidentiality has a rehabilitative effect on juvenile delinquents. *Id.* at 2673-74 & n.1. *See* Howard, Grisso & Neems, *Publicity and Juvenile Court Proceedings*, 11 CLEARINGHOUSE REV. 203, 210 (1977). *See also* Geis, *Publicity and Juvenile Court Proceedings*, 30 ROCKY MTN. L. REV. 101, 125-26 (1958). He also criticized the majority's reliance on *Davis v. Alaska*, asserting that "the minimal interference with the freedom of the press caused by the ban on publication of the youth's name can hardly be compared with the possible deprivation of liberty involved in *Davis*." 99 S. Ct. at 2674 n.2.

failed to achieve its purpose in banning only newspapers from publishing the information: "It is difficult to take very seriously West Virginia's asserted need to preserve the anonymity of its youthful offenders when it permits other, equally, if not more, effective means of mass communication to distribute this information without fear of punishment."[68]

Assuming the Court had found the state's interest to be of the "highest order," it probably still would have held the West Virginia statute invalid on the ground that other, less restrictive means were available to protect the asserted interest. The majority noted that while every state has asserted an interest in the confidentiality of juvenile proceedings, all but a handful have found ways other than criminal penalties to accomplish this purpose.[69]

In holding that the West Virginia criminal statute imposed an unconstitutional prior restraint, the West Virginia court saw "little distinction" between it and the criminal contempt sanction involved in *Oklahoma Publishing*.[70] By contrast, the United States Supreme Court indicated that it may be unnecessary to distinguish between prior restraint and subsequent punishment in deciding whether a particular publication is entitled to First Amendment protection.[71] The Supreme Court's statement that "*even* when a state attempts to punish publication after the event" it must further substantial state interests,[72] however, implies that "the most exacting scrutiny" is still reserved for prior restraints.[73] This is consistent with the underlying reason for the historical distinction: prior restraints do not just "chill" speech, but have a

68. *Id.* at 2674.

69. *Id.* at 2672. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841 n.12. *See generally Constitutional Review: Supreme Court, October 1977 Term*, 6 HASTINGS CONST. L.Q. 19, 32-33 (1978).

The majority gave implied approval to the approach advocated by the National Council of Judges of voluntary cooperation between the juvenile court and the press in declining to publish a juvenile's name. 99 S. Ct. at 2672 n.3.

The alternative means test has been argued successfully in prior restraint cases, even in the face of substantial state and constitutional interests. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563-65 (1976) (pretrial publicity which threatened a defendant's Sixth Amendment right to fair trial did not justify enjoining the press from publishing confessions made to police where alternative measures short of prior restraint would have protected defendant's rights). *Cf.* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975) (municipal theater's denial of application to perform live stage show alleged to be obscene held unconstitutional prior restraint absent procedural safeguards).

70. 248 S.E.2d at 272.

71. *See* 99 S. Ct. at 2670-71.

72. *Id.* at 2670 (emphasis added).

73. *See* notes 22-23 and accompanying text *supra*.

"freezing" effect on First Amendment rights.[74] Thus, even if a state interest was of the "highest order" and therefore sufficient to punish truthful publication, that interest may still not justify a prior restraint.

The narrow *Daily Mail* holding provides little guidance for determining what state interests will permit either type of restraint on freedom of the press. The Court specifically declined to comment on whether press access to confidential judicial proceedings could be prohibited.[75] The Court further stated that there was no issue of privacy or prejudicial pretrial publicity involved.[76] Another question unresolved by *Daily Mail* is, assuming a justifiable state interest, may a newspaper—as distinguished from its individual editors and reporters—be punished for publishing truthful information.[77]

In summary, *Daily Mail* and its precedent strongly indicate that once truthful information reaches the press, it will be difficult for the government to restrain or punish its publication.[78] It remains to future cases to determine what state interests of the "highest order" will justify such restraints.

*Herbert v. Lando**

The question before the Supreme Court in *Herbert v. Lando*[1] was whether a public figure plaintiff in a libel action could compel a media defendant to answer pretrial discovery questions designed to establish

74. *See* note 46 and accompanying text *supra*.

75. 99 S. Ct. at 2672. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978).

76. 99 S. Ct. at 2672. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

77. *Compare* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 849 (1978) (Stewart, J., concurring in the judgment) *and* New York Times Co. v. United States, 403 U.S. 713, 733-37 (1971) (White, J., concurring) *with* Smith v. Daily Mail Pub. Co., 99 S. Ct. 2667, 2672 (1979) (Rehnquist, J., concurring in the judgment). *See generally*, J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 748 (1978).

78. A recent case which illustrates this point is a federal court injunction of *Progressive Magazine's* publication of an article entitled "The H Bomb Secret—How We Got It and Why We're Telling It." The case became moot when Wisconsin's *Madison Press Connection* published an article containing similar information on how to build an H-bomb. The Justice Department, however, is reported to be considering whether anyone should be prosecuted for violation of the Atomic Energy Act (42 U.S.C. §§ 2011, 2271-2274 (1970). *See* NEWSWEEK, Dec. 10, 1979, at 24. If the information was in the public domain, as claimed by the publishers, issues include whether the government's asserted interest in national security could justify the injunction or the threatened prosecution and whether alternative means are available to protect this interest.

* Commentary by Robert Thorne, member, third-year class.

1. 441 U.S. 153 (1979).

actual malice as required by *New York Times Co. v. Sullivan*.[2] The problem the Court faced was choosing between the interests of protecting the editorial process against certain compulsory disclosure and ensuring a plaintiff's unfettered freedom to establish a cause of action based upon actual malice. The Court held that the First Amendment affords the media defendant no privilege against a public figure's pretrial inquiry regarding the editorial process where evidence material to establishing actual malice is sought.[3] Recognizing that *New York Times* had already struck the proper balance between the First Amendment and the law of defamation,[4] the Court believed that the editorial process is sufficiently protected by such traditional limitations on discovery as the requirement of relevance.[5] The decision in *Herbert* evidenced a desire to secure for plaintiffs in defamation actions an effective tool with which to satisfy constitutional requirements for recovery.

While on active duty in Vietnam, Anthony Herbert formally charged his superiors with covering up wartime atrocities.[6] Following his forced retirement and the official exoneration of his superiors, Herbert attracted widespread and sympathetic media coverage. In 1973, CBS broadcast an episode of "60 Minutes" which included a segment covering Herbert and his accusations. Barry Lando produced and edited the segment and later authored a related article that was published in the *Atlantic Monthly*. Both the program and the article cast serious doubt on Herbert's veracity. Herbert instituted a libel action against CBS, Lando, the *Atlantic Monthly* and others[7] in federal district court.[8] In his complaint, Herbert alleged that the program and article falsely and maliciously portrayed him as having fabricated the accusations against his superiors to explain his relief from command.

2. 376 U.S. 254, 279-80 (1964). Appellants, in their brief before the Court of Appeals for the Second Circuit, succinctly framed the issue before the court: "What effect should be given to the First Amendment protection of the press with respect to its exercise of editorial judgment in pretrial discovery in a libel case governed by *New York Times Co. v. Sullivan?*" Brief for Appellants, *quoted in* Herbert v. Lando, 568 F.2d 974, 979 n.14 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979).

3. 441 U.S. at 172.

4. *See* note 26 and accompanying text *infra*.

5. *See* note 43 *infra*.

6. This summary of the facts is taken from the opinion of the United States Court of Appeals for the Second Circuit. 568 F.2d at 980-84.

7. Mike Wallace, who narrated the broadcast report, and the CBS correspondent for the report were also named as defendants in the action.

8. 73 F.R.D. 387 (S.D.N.Y. 1977), *rev'd*, 568 F.2d 974 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979). Herbert alleged $44,775,000 in damages for injury to his reputation and to the literary value of his recently published book, *Soldier*.

Herbert conceded that because he was a public figure. The rule of *New York Times*[9] precluded recovery absent proof that the damaging falsehood was published with knowledge that it was false or with reckless disregard of whether it was false. He proceeded to depose Lando at length.[10] Lando refused, however, to answer questions relating to his beliefs, opinions, intent and conclusions in preparing his report, claiming that the First Amendment immunized him from such questions.[11]

The Lower Court Decisions

The district court granted Herbert's application for an order to compel discovery. The court rejected Lando's First Amendment claim on the ground that there was no authority for making more difficult the task of determining whether a libelous statement was published with actual malice. On defendants' motion, the Court of Appeals for the Second Circuit certified an interlocutory appeal of the district court's ruling.

A divided panel reversed the district court.[12] Displaying concern for press autonomy, the court of appeals held that the First Amendment, as interpreted by *New York Times*, placed the journalist's mental processes outside the scope of pretrial discovery.[13] Inquiries into the journalist's thoughts, opinions and conclusions would "chill" the editorial process, warned the court, for "reporters and journalists would be reluctant to express their doubts," preferring "the safe course of avoiding contention and controversy."[14]

The court suggested that a jury was capable of inferring malice

9. 376 U.S. at 279-80.

10. The deposition of Lando, which lasted over one year, filled 2903 transcript pages and entailed 240 exhibits.

11. The Court of Appeals for the Second Circuit summarized the "assertedly objectionable" questions as follows: "1. Lando's conclusions during his research and investigations regarding people or leads to be pursued, or not to be pursued, in connection with the '60 Minutes' segment and the Atlantic Monthly article; 2. Lando's conclusions about facts imparted by interviewees and his state of mind with respect to the veracity of persons interviewed; 3. The basis for conclusions where Lando testified that he did reach a conclusion concerning the veracity of persons, information or events; 4. Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication; and 5. Lando's intentions as manifested by his decision to include or exclude certain material." 568 F.2d at 983.

12. 568 F.2d at 974.

13. The court added: "Selective inquiry into the reporter's thoughts can be far worse than the discovery of all aspects of his mental process. In plumbing only particular facets of the reporter's mind, the libel plaintiff is more likely to distort the nature of the editorial process." *Id.* at 984 n.23.

14. *Id.* at 984. *See* note 25 *infra*.

from the deponent's responses to permissible inquiries.[15] In addition, the court cited several cases dealing with First Amendment protection of the editorial process, though none specifically addressed the discoverability or admissibility of state-of-mind evidence.[16] In view of the protection afforded the editorial process by *New York Times*, the court concluded that "[i]t makes little sense to afford protection with one hand and take it away with the other."[17]

The United States Supreme Court Decision

The Supreme Court reversed the judgment of the court of appeals.[18] Justice White, writing for the six-member majority,[19] rejected the intermediate court's conclusion that *New York Times* and its progeny afforded the media defendant a privilege against pretrial inquiries into the journalist's state of mind.[20] Justice White viewed the case as a request "to modify firmly established constitutional doctrine by placing beyond the plaintiff's reach a range of direct evidence relevant to proving knowing or reckless falsehood by the publisher of an alleged libel, elements that are critical to plaintiffs such as Herbert."[21] Recognizing the need to afford plaintiffs an opportunity to prove actual malice, the Court refused to create an editorial privilege which would, in effect, erect an "impenetrable barrier" to the use of evidence relating to a journalist's state of mind.[22]

Justice White observed that *New York Times* and *Curtis Publishing Co. v. Butts*[23] limited recovery in libel actions to instances where public official or public figure plaintiffs could prove with "convincing clarity" that a statement was made with knowledge of falsehood or reckless

15. *Id.*

16. Among the more notable cases cited were Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (newspaper need not accept editorial replies); Columbia Broadcasting Sys. Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (broadcaster need not accept paid political advertisements); Branzburg v. Hayes, 408 U.S. 665 (1972) (right of press to gather information); Baker v. F. & F. Inv., 470 F.2d 778 (2d Cir. 1972) (reporter need not disclose sources of article). Actually, the Supreme Court's decision in *Branzburg* was probably not supportive authority. That case resulted in an intrusion into the editorial process.

17. 568 F.2d at 984.

18. 441 U.S. 153 (1979).

19. Justice White's opinion was joined by Chief Justice Burger and Justices Blackmun, Powell, Rehnquist, and Stevens. Justice Powell filed a concurring opinion. Justice Brennan filed an opinion dissenting in part. Justices Stewart and Marshall filed dissenting opinions.

20. 441 U.S. at 169-70.

21. *Id.*

22. *Id.* at 170.

23. 388 U.S. 130 (1967). *Butts* extended the rule of *New York Times*, which applied to public official plaintiffs, to public figure plaintiffs.

disregard for the truth.[24] This substantial evidentiary burden, reflecting the conviction that self-censorship of the press is contrary to the public interest,[25] represents a judicial compromise between the First Amendment and the law of defamation.[26] *New York Times* and its progency clearly developed an obstacle to recovery. Justice White warned, however, that that obstacle must not become insurmountable.[27] It was an inevitable result of those important defamation decisions that "unless liability is to be completely foreclosed, the thoughts and editorial processes of the alleged defamer would be open to examination."[28] Justice White noted that even in the body of jurisprudence preceding *New York Times*, when the alleged defamer's state of mind was generally considered irrelevant for purposes of establishing liability[29] a showing of malice, as commonly defined,[30] was permitted for the purposes of overcoming a conditional privilege or recovering punitive damages.[31] "[C]ourts across the country have," White pointed out,

24. 376 U.S. at 285-86. *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 n.6 (1974) (the *New York Times* standard requires inquiry into the defendant's "subjective awareness of probable falsity"); St. Amant v. Thompson, 390 U.S. 727, 731 (1968). For a suggested jury instruction defining "clear and convincing proof," see Callahan v. Westinghouse Broadcasting Co., 363 N.E.2d 240, 242-43 (Mass. 1977).

25. Justice Brennan, writing the opinion of the Court in *New York Times*, discussed how strict liability for libelous statements could lead to self-censorship: "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . 'self-censorship.' Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all of its factual particulars. Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' The rule thus dampens the vigor and limits the variety of public debate." 376 U.S. at 279 (citations omitted). Justice Brennan's ardent concern about self-censorship was also evidenced in *Herbert*. *See* note 55 *infra*.

26. 441 U.S. at 169. More specifically, the compromise was to eliminate, on the one hand, the risk of undue self-censorship and on the other hand, to compensate for injury and deter publication of unprotected defamatory falsehoods. *Id.* The Court also recognized that such a compromise was generally not struck in the cases preceding *New York Times*. *Id.* at 159 & n.4.

27. *Id.* at 170.

28. *Id.* at 160.

29. *Id.* at 159 & n.4.

30. The common law definition of malice is ill-will or an equivalent. W. PROSSER, THE LAW OF TORTS 771-72 (4th ed. 1971). *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 78 (1964) ("ill-will, enmity, or a wanton desire to injure"); Coleman v. MacLennan, 78 Kan. 711, 741, 98 P. 281, 292 (1908) ("actual evil-mindedness"); Bromage v. Prosser, 107 Eng. Rep. 1051, 1054 (1825) ("ill-will").

31. 441 U.S. at 165-68. Justice White cited and briefly summarized 41 libel cases from

"long been accepting evidence going to the editorial processes of the media without encountering constitutional objections."[32]

Justice White expressly rejected the contention of the court of appeals that *Miami Herald Publishing Co. v. Tornillo*[33] and *Columbia Broadcasting System v. Democratic National Committee*[34] unequivocally protected the editorial process. *Tornillo* invalidated a statute requiring newspapers to publish editorial replies and *Columbia Broadcasting System* held that a broadcaster is not required to accept paid political advertisements. Editorial decisionmaking was protected, but no mention was made of protecting the editorial process from pretrial discovery. Justice White concluded that "holdings that neither a State nor the Federal Government may dictate what must or must not be printed neither expressly nor impliedly suggest that the editorial process is immune from any inquiry whatsoever."[35]

Noting that the law disfavors evidentiary privileges, Justice White cited *United States v. Nixon*[36] to illustrate that "the search for truth" often penetrates otherwise privileged matters.[37] In *Nixon*, the Court ruled that the President's powerful interest in confidentiality "must yield to the demonstrated, specific need for evidence in a pending criminal trial."[38] Justice White recognized the value of protecting editorial discussion from mere casual inquiry.[39] But such questioning is differ-

24 states in which editorial state of mind was held relevant and admissible evidence. *Id.* at 165-67 n.15.

32. *Id.* at 165.

33. 418 U.S. 241 (1974).

34. 412 U.S. 94 (1973).

35. 441 U.S. at 168. In the trial court below, Judge Haight rejected the contention that such cases supported the creation of an additional editorial privilege: "I find no substance in the argument defendants based upon the 'editorial judgment' concept. . . . These cases (*CBS, Tornillo, Branzburg*) have nothing to do with the proper boundaries of pre-trial discovery in a defamation suit alleging malicious publication." 73 F.R.D. at 396.

36. 418 U.S. 683 (1974) (the President does not have an absolute privilege against disclosure of materials subpoenaed for a judicial proceeding).

37. 441 U.S. at 175 & n.24.

38. 418 U.S. at 713. In *Nixon*, the Court was faced with the problem of choosing between competing interests. It chose "to resolve those competing interests in a manner that preserves the essential functions of each branch." *Id.* at 707. The Court took this same approach in *Herbert*, seeking to preserve what it believed to be an equitable preexisting balance between the First Amendment and the law of defamation. *See* note 26 and accompanying text *supra*.

39. Justice White explained: "There is no law that subjects the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest; and if there were, it would not survive constitutional scrutiny as the First Amendment is presently construed. No such problem exists here, however, where there is a specific claim of injury arising from a publication that is alleged to have been knowing or recklessly false." 441 U.S. at 174.

ent from direct inquiry into allegations of wrongful conduct. Justice White was unable to articulate any practicable scope of the proposed editorial privilege and thus feared that allowing the privilege would dangerously foreclose inquiry essential to the plaintiff's cause of action.[40]

The respondents also argued that absent the proposed editorial privilege, discovery would be so burdensome as to chill the editorial process in that the expense of responding continually to alleged litigation-related inquiries might well require editors to temper their reporting.[41] White responded that mushrooming litigation costs are a pervasive fact of jurisprudential life[42] and that the responsibility for tempering these costs must, just as in other contexts, be borne by the trial courts. Although "deposition-discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials" the Federal Rules of Civil Procedure empower the courts to restrict discovery where it involves irrelevant inquiries or unreasonably burdens a party or other person from whom it is sought.[43] Justice White was not convinced by the argument that actual malice could be shown indirectly by objective evidence.[44] He claimed that "[p]ermitting such plaintiffs as Herbert to prove their cases by direct as well as indirect evidence is consistent with the balance struck by our prior decisions."[45] Justice White concluded by noting that even if the Court created a privilege against direct inquiry into the editorial process, that would not relieve the press of the costs and burdens attendant to defending defamation actions. "Only

40. *Id.* at 170.

41. *Id.* at 176 & n.25.

42. Justice White observed that the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has proposed amendments to the Federal Rules of Civil Procedure designed to ameliorate this problem. *See id.* at 176-77 n.26.

43. *Id.* at 177. The Federal Rules of Civil Procedure are subject to the limitation of Rule 1 that they "be construed to secure the just, speedy, and inexpensive determination of every action." Rule 26(b)(1) requires that material sought in discovery be "relevant." Rule 26(c) assists a party or the person from whom discovery is sought by empowering the district court to issue any order which "justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ."

44. *Id.* at 172. *But see* Curtis Publishing Co. v. Butts, 388 U.S. at 156-58, where the Court held that actual malice may be inferred when the investigation for a story which was not "hot news" was grossly inadequate under the circumstances. *See also* Vandenburg v. Newsweek, Inc., 441 F.2d 378, 380 (5th Cir. 1971).

45. *Id.* Justice White added that direct inquiry might even help the defendant: "[D]irect inquiry from the actors, which affords the opportunity to refute inferences that might otherwise be drawn from circumstantial evidence, suggests that more accurate results will be obtained by placing all, rather than part, of the evidence before the decisionmaker." *Id.* at 172-73.

complete immunity from liability from defamation would effect this result," he pointed out, "and the Court has regularly found this to be an untenable construction of the First Amendment."[46]

Justice Powell joined the opinion of the Court but also wrote separately to elaborate on the majority's discussion of the supervisory power given the district courts under the Federal Rules of Civil Procedure. Trial judges, observed Justice Powell, "are now increasingly recognizing the 'pressing need for judicial supervision' "[47] of the discovery process, for "discovery techniques and tactics have become a highly developed litigation art—one not infrequently exploited to the disadvantage of justice."[48] While recognizing the value of allowing discovery of any evidence which may be relevant to a cause of action, Justice Powell emphasized that courts also have an affirmative duty under the First Amendment to protect the editorial process.[49] Thus, he urged district courts to carefully weigh the needs of private litigants against the public interest in the free flow of information protected by the First Amendment: "[W]hen a discovery demand arguably impinges on First Amendment rights a district court should measure the degree of relevance required in light of both the private needs of the parties and the public concerns implicated."[50] Apparently Justice Powell would have the district courts apply stricter standards of relevance in cases involving media defendants.[51]

Justice Brennan, dissenting in part, felt that the proposed editorial privilege should be allowed unless "a public-figure plaintiff is able to establish, to the prima facie satisfaction of a trial judge, that the publication at issue constitutes [a] defamatory falsehood . . . ."[52] This requirement would not unduly burden the plaintiff, Justice Brennan claimed, for such a showing must eventually be made if the plaintiff is to recover. He also noted that because the proposed editorial privilege would protect only "deliberating and policymaking processes," the plaintiff could always discover factual material relevant to the alleged

46. *Id.* at 176.

47. *Id.* at 180 (Powell, J., concurring) (*quoting* ACF Industries, Inc. v. EEOC, *cert. denied*, 99 S. Ct. 865, 869 (1979) (Powell, J., dissenting, joined by Stewart and Rehnquist, JJ.)).

48. *Id.* at 179 (Powell, J., concurring). Justice Powell noted the "widespread abuse of discovery that has become a prime cause of delay and expense in civil litigation." *Id.*

49. *Id.*

50. *Id.*

51. Justice Powell concluded: "I join the Court's opinion on my understanding that in heeding these admonitions, the District Court must ensure that the values protected by the First Amendment, though entitled to be constitutional privilege in a case of this kind, are weighed carefully in striking a proper balance." *Id.* at 180.

52. *Id.* at 197 (Brennan, J., dissenting in part) (footnote omitted).

falsehood.[53] Justice Brennan saw this requirement of establishing a prima facie case of falsity as the best means of preserving the balance struck by *New York Times* between the values of the First Amendment and society's interest in preventing and redressing attacks upon regulation . . . ."[54] He believed that this balance was delicate and that abuse of discovery would upset it by dangerously inhibiting the editorial process.[55] The threshhold requirement would protect the actions of responsible media defendants. Those at the margin, "who have some awareness of the probable falsity of their work but not enough to constitute actual malice . . . might be discouraged from publication. But this chill emanates chiefly from the substantive standard of *New York Times*, not from the absence of an editorial privilege."[56]

In his dissent, Justice Stewart assented that the majority had misperceived the issue. He believed the Court need not have decided the constitutional question of whether Lando was to be afforded an editorial privilege; inquiries into "the broad 'editorial process' " are "simply not relevant" to determining whether Lando knew the defamatory statements were untrue or published them in reckless disregard of their truth or falsity.[57]

Justice Stewart was also troubled by the use of the term "actual malice" in *New York Times* and its subsequent application. Determination of malice, as that term is commonly understood,[58] is best made

53. *Id.* at 198. *See also* Environmental Protection Agency v. Mink, 410 U.S. 73, 89 (1973).

54. *Id.* at 197. Justice White, writing the opinion of the Court, expressly criticized Justice Brennan's conclusion: "Mr. Justice Brennan would extend more constitutional protection to editorial discussion by excusing answers to relevant questions about in-house conversations until the plaintiff has made a prima facie case of falsity. If this suggestion contemplated a bifurcated trial, first on falsity and then on culpability and injury, we decline to subject libel trials to such burdensome complications and intolerable delay. On the other hand, if, as seems more likely, the prima facie showing does not contemplate a minitrial on falsity, no resolution of conflicting evidence on this issue, but only a credible assertion by the plaintiff, it smacks of a requirement that could be satisfied by an affidavit or a simple verification of the pleadings. We are reluctant to imbed this formalism in the Constitution." *Id.* at 174-75 n.23.

55. Justice Brennan warned of a particularly dangerous effect of abuse of discovery: "[P]ublic figures might bring harassment suits against the media in order to use discovery to uncover aspects of the editorial process which, if publicly revealed, would prove embarrassing to the press. In different contexts other First Amendment values might be affected. If sued by a powerful political figure, for example, journalists might fear reprisals for information disclosed during discovery. Such a chilling effect might particularly impact on the press' ability to perform its 'checking' function." *Id.* at 191 n.11 (citations omitted).

56. *Id.* at 193.

57. *Id.* at 199 (Stewart, J., dissenting).

58. *See* note 30 *supra*.

by asking why the person acted as he did. But the actual malice standard is a constitutional term of art which "has nothing to do with hostility or ill will, and the question 'why' is totally irrelevant."[59] Justice Stewart argued that both the Court of Appeals and the Supreme Court had overlooked this distinction; thus the editorial privilege issue was academic, for no inquiry into the motive behind a defamatory publication is necessary when "liability ultimately depends upon the publisher's state of knowledge of the falsity of what he published, not at all upon his motivation in publishing it."[60] Justice Stewart concluded that since the defendants' motivation was irrelevant to Herbert's cause of action, those discovery questions which inquired into the editorial process would likely fail the requirements of Rule 26(b)(1) of the Federal Rules of Civil Procedure.[61]

Justice Marshall, also dissenting, opted for a "limited" editorial privilege—one barring inquiry into "the substance of editorial conversation" but permitting relevant inquiry into the journalist's state of mind.[62] In not permitting all kinds of inquiry, Justice Marshall pointed out that "there are a variety of other means to establish deliberate or reckless disregard for the truth, such as absence of verification, inherent implausibility, obvious reasons to doubt the veracity or accuracy of information, and concessions or inconsistent statements by the defendant."[63] He asserted that broad discovery rules are inappropriate, perhaps dangerous, in defamation cases because of their potential inhibitory effect on the robust debate contemplated by *New York Times*.[64] Justice Marshall asserted that "the same constitutional concerns" which led the Court in *New York Times* to limit actionable defamation "also mandate some constraints on roving discovery."[65] He concluded "that a limited [editorial] privilege might deny recovery in some marginal cases, [but that would be] an acceptable price to pay for

59. 441 U.S. at 199 (Stewart, J., dissenting). *See also* Henry v. Collins, 380 U.S. 356 (1965); Garrison v. Louisiana, 379 U.S. 64, 78 (1964).

60. *Id.* at 200.

61. Rule 26(b)(1) provides in pertinent part: "Parties may obtain discovery regarding any matter not privileged which is relevant to the subject matter involved in the pending action . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

62. *Id.* at 209 (Marshall, J., dissenting).

63. *Id.* at 210.

64. *Id.* at 202-03. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). Justice Marshall warned: "Given the circumstances under which libel actions arise, plaintiffs' pretrial maneuvers may be fashioned more with an eye to deterrence or retaliation than to unearthing germane material." *Id.* at 204-05.

65. *Id.* at 206.

preserving a climate conducive to considered editorial judgment."[66]

Analysis

As a significant restriction on actionable defamation, *New York Times v. Sullivan*[67] was clearly a judicially-struck compromise between the rights of free speech and free press under the First Amendment and the individual's reputational interest. In *Herbert v. Lando*, the Supreme Court sought to preserve this balance when for the first time it discussed how the substantive requirements of *New York Times* were to be implemented. *Herbert* refined, but did not materially alter, *New York Times*; it simply permitted discovery calculated to meet the evidentiary burden of proving actual malice with "convincing clarity." With respect to the law of defamation, *Herbert* did nothing more.[68]

The law of defamation poses a threat of legal and precuniary reprisal that necessarily induces some degree of self-censorship. *Herbert* reaffirmed the Court's willingness in *New York Times* to accept the inevitability of this result. Indeed, one of the more notable features of *Herbert* is the Justices' unanimity in accepting the balance struck by *New York Times*. The reservations expressed by Justices Brennan, Powell and Marshall were addressed more to application than to reconsideration of the theory that some amount of liability for media defendants in defamation actions is harmonious with the First Amendment.

Refusing to "erect an impenetrable barrier" to the use of material evidence,[69] the *Herbert* Court declined, in effect, to abolish defamation actions against the media. Notwithstanding the warnings, *in terrorem*, of those who would limit discovery and perhaps deny justly deserved recovery so as to protect First Amendment interests, the requirement of relevance continues to be the only major barrier which the plaintiff

66. *Id.* at 210. Justice Marshall elaborated on the dangers of unlimited discovery: "Journalists cannot stop forming tentative hypotheses, but they can cease articulating them openly. If prepublication dialogue is freely discoverable, editors and reporters may well prove reluctant to air their reservations or to explore other means of presenting information and comment. The threat of unchecked discovery may well stifle the collegial discussion essential to sound editorial dynamics . . . . Society's interest in enhancing the accuracy of coverage of public events is ill-served by procedures tending to muffle expression of uncertainty. To preserve a climate of free interchange among journalists, the confidentiality of their conversations must be guaranteed." *Id.* at 208-09.

67. 376 U.S. 254 (1964).

68. Justice White, writing the opinion of the Court in *Herbert*, emphatically stated: "[T]he present construction of the First Amendment should not be modified by creating the evidentiary privilege which the respondents now urge." 441 U.S. at 175.

69. *Id.* at 170. *Cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). "Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test." *Id.* at 342 (Powell, J.).

must overcome to inquire into the media defendant's mental impressions.[70] To require more than a showing of relevance would be to depress the delicately balanced scales of *New York Times* in favor of the media defendant.

It is understandable, however, that *Herbert* should be interpreted by the press as yet another instance of the Burger Court's attack on editorial autonomy. Reporters cannot decline to answer questions put to them during a grand jury investigation.[71] Newspaper offices may be searched under authority of a warrant for evidence of a crime committed by a third party.[72] The press has been denied a right of access to sources of information greater than the right afforded the general public.[73] Notwithstanding that these intrusions into the editorial process have been deemed justified by important competing interests, the potential, if not probable, chilling effect of these intrusions might be too great a burden for society to carry. Without adequate safeguards against excessive intrusions, the press might well be unable to fulfill its constitutionally-designated function of informing the public.[74] The question implicitly answered in *Herbert*, but nevertheless open to debate, is whether society can afford to assume this risk as a consequence of protecting the rights of defamed individuals.

There are some who would contend that *Herbert* should not be viewed as part of a dangerous judicial trend. While in prior decisions the Court refused to grant the press certain privileges in recognition of its important role as a provider of information to the public, *Herbert* merely reaffirmed the limitations set out in *New York Times*. Content with the general status of the law of defamation, the Court was unwilling to deprive its earlier decision in *New York Times* of the limited utility it offered plaintiffs, fearing that otherwise that decision would remain "only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will."[75]

It is as yet unknown whether the contentions of those who would find *Herbert's* impact to be innocuous are in fact myopic. There is no

70. *See* note 43 and accompanying text *supra*.

71. Branzburg v. Hayes, 408 U.S. 665 (1972).

72. Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

73. *See* Houchins v. KQED, Inc. 438 U.S. 1 (1978) (prison facilities); Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978) (judicial records); Saxbe v. Washington Post Co., 417 U.S. 843 (1974) (prison facilities); Pell v. Procunier, 417 U.S. 817 (1974) (prison facilities).

74. *See* Mills v. Alabama, 384 U.S. 214, 219 (1966), New York Times v. Sullivan, 376 U.S. 254, 269 (1964); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

75. Edwards v. California, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

easy escape, however, from the conclusion that the media defendant can be compelled, pursuant to *Herbert*, to divulge in pretrial discovery what might otherwise be privileged under the First Amendment.

Herbert v. Lando is a useful guide for the defamation plaintiff who is required to meet the affirmative evidentiary burden of *New York Times*. It represents but another instance of judicial compromise—a weighing and balancing of First Amendment rights and the interests with which they must compete. The extent to which *Herbert* will contribute to what some view as an erosion of editorial autonomy is as yet unknown. But recent decisions of the Burger Court[76] suggest that, at least in the foreseeable future, this erosion will indeed continue.

IV. Freedom of Religion

During the 1978-79 Term, the Supreme Court once again dealt with the vexing question of the judiciary's function in settling intrachurch disputes in light of First Amendment limitations. The specific issue in *Jones v. Wolf*[a] was whether a civil court could apply "neutral principles of law" to decide a church property dispute between competing factions within a local congregation. The Court's holding that this approach comported with First Amendment principles appeared to be in line with prior cases involving church disputes which utilized a similar "neutral principles" analysis. As the four dissenters pointed out, however, the result reached by the Court was inconsistent with the decision in *Watson v. Jones*,[b] considered the forerunner of neutral principles analysis. In what might therefore actually have been a departure from precedent, the Court approved the use of "neutral principles of law" to resolve church property disputes—and presumably all intrachurch disputes—without identifying these principles or delineating the extent to which they may be applied by a civil court.

*Jones v. Wolf**

In *Jones v. Wolf*[1] the United States Supreme Court considered the

76. *See* notes 71-73 and accompanying text *supra*.

a. 99 S. Ct. 3020 (1979).
b. 80 U.S. (13 Wall.) 679 (1871).

* Commentary by Jon Escher, member, third-year class.
1. 99 S. Ct. 3020 (1979).

validity of the application of "neutral principles" of law upon the resolution of disputes involving the ownership of church property. Specifically, the Georgia Supreme Court[2] had upheld a trial court decision recognizing the schismatic majority faction of the Vineville Presbyterian Church of Macon, Georgia as the representatives of that congregation and owners of the church property. In affirming the basic approach of the Georgia courts, the United States Supreme Court ruled that a state may apply neutral principles of law in resolving church property disputes without running afoul of the religion clauses of the First Amendment.[3]

In 1904 the Vineville Presbyterian Church of Macon, Georgia was organized as a member of the Augusta-Macon Presbytery of the Presbyterian Church of the United States (PCUS). The property upon which the church was built was acquired in three separate transactions. These transactions were evidenced by conveyances to the "Trustees of or for Vineville Presbyterian Church and their successors in office."[4]

For sixty-nine years the Vineville Church existed peacefully within the hierarchical framework of the PCUS.[5] Under the polity of the PCUS, the government of the local church was committed to its session.[6] The actions of the session, however, were subject to review by the higher church courts. The responsibilities of each level of the hierarchy were set forth in the constitution of the PCUS.

On May 27, 1973 the Vineville Church held a meeting attended by a quorum of its members. At this meeting 165 of the members voted to separate from the PCUS. Ninety-four members opposed the resolution and remained loyal to the mother church. The majority of the members then united with another denomination known as the Presbyterian Church in America. The minority withdrew and ceased their religious activities at the Vineville Church.

Upon receiving notice of the schism, the Augusta-Macon Presbytery appointed a commission to investigate and resolve the conflict.

2. Jones v. Wolf, 241 Ga. 208, 243 S.E.2d 860 (1978).

3. The First Amendment provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

4. The funds used to acquire the property were provided entirely by local church members.

5. The PCUS has a hierarchical or correctional form of government. Under this form, the local church is a subordinate part of a larger church and is under the authority of the general church. The other type of church government is congregational, where authority over all church matters rests entirely in the local congregation or some body within it.

6. A "session" is defined as "the governing body of a local Presbyterian Church." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1305 (1966).

The commission ruled that the minority faction constituted "the true congregation of the Vineville Presbyterian Church."[7] Furthermore, the commission withdrew from the majority faction "all authority to exercise office derived from the [PCUS]."[8] The majority did not challenge or in any way appeal the ruling of the PCUS but retained possession of the property.

Representatives of the minority faction first sought relief in federal court; however, their complaint was dismissed for want of jurisdiction.[9] They then brought suit in a Georgia state court seeking declaratory and injunctive relief. They sought to establish the minority's exclusive right to possession of the Vineville Church property. The trial court, however, applying Georgia's "neutral principles of law" approach to church property disputes, granted judgment for the majority. The minority representatives appealed to the Georgia Supreme Court, challenging the lower court's ruling on the basis of the First and Fourteenth Amendments.

The Lower Court Decisions

The Georgia Supreme Court[10] began its analysis of the case by reviewing the state's historical approach to the resolution of church property disputes. Before 1969 the Georgia courts had applied an implied trust theory. Under this theory, the property of a local church affiliated with a hierarchical church organization was deemed to be held in trust in favor of the general church, provided the general church had not substantially abandoned those tenets and practices of faith which existed at the time of affiliation.[11] In 1969, however, the United States Supreme Court ruled that Georgia would be required to apply some other principle to help resolve church property disputes to the extent that the implied trust theory unconstitutionally entangled civil courts in ecclesiastical questions.[12] If a trust was to operate in favor of the hierarchical church, it must spring from some source other than the mother church's nondeparture from traditional doctrine.

On remand the Georgia Supreme Court determined that the separate source for a trust must be found through the application of neutral principles of law developed for use in all property disputes. These

7. 99 S. Ct. at 3023. The majority faction took no part in the commission's inquiry.
8. *Id.*
9. Lucas v. Hope, 515 F.2d 234 (5th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976).
10. Jones v. Wolf, 241 Ga. 208, 243 S.E.2d 860 (1978).
11. *Id.* at 209, 243 S.E.2d at 862.
12. *Id.* (citing Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969)).

principles may be applied in church property disputes without resolving underlying controversies over religious doctrine. As examples of neutral principles of law which the United States Supreme Court had sanctioned for use in resolving church property disputes, the Georgia court listed language in deeds,[13] applicable state statutes regarding religious corporations,[14] provisions in church constitutions[15] and the corporate charter of the local church.[16]

An application of these principles led the Georgia high court to conclude that the hierarchical church possessed no right to the use and enjoyment of the church property. First, an examination of the deeds revealed no language purporting to give the PCUS an interest in the property.[17] Second, the local church's corporate charter failed to show any interest in the corporation other than that of the congregation.[18] Finally, the Georgia statutes did not give a general church any rights in local church property unless those rights were set forth in the documents of church government.[19] The Book of Church Order, the church document governing the relationship between the hierarchical church and the local church, dealt only with faith and internal structure. No language within the Book of Church Order gave the PCUS rights in the local church property.[20]

Satisfied that the trial court had correctly applied neutral principles of law, the Georgia Supreme Court affirmed its ruling that, as a matter of law, the legal title to all church property of the Vineville Presbyterian Church was vested in the local church congregation represented by the majority.[21] The court also agreed that " 'more than a mere connectional relationship between the local and general churches must exist' to give rise to property rights in the general church."[22]

13. Here a court is concerned with the formal instrument of conveyance and to whom the deed transfers title.

14. A state may have special legislation which governs the conveyance of church property.

15. At this point in its examination a court attempts to isolate an express trust which is made part of the hierarchical relationship.

16. This refers to language within the organic document of the local church which subordinates property rights to the hierarchy.

17. 241 Ga. at 210, 243 S.E.2d at 863.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 212, 243 S.E.2d at 864.

22. *Id.* (quoting Carnes v. Smith, 236 Ga. 30, 222 S.E.2d 322 (1976)). It is important to note that the Georgia Supreme Court did not consider the effect of the PCUS finding that the members of the minority faction were the true representatives of the Vineville Presbyte-

The United States Supreme Court Decision

On appeal the United States Supreme Court vacated the Georgia Court judgment and remanded the case for further proceedings.[23] The five-member majority[24] held that a state is constitutionally entitled to adopt a neutral principles of law analysis as a means of adjudicating church property disputes.[25] It also held that if Georgia adopted a presumptive rule of majority representation, defeasible upon a showing that the identity of the local church is to be determined by some other means, this presumptive rule would be consistent with the neutral principles analysis and the First Amendment.[26] The cause was remanded because the Georgia Courts never explicitly stated that they were adopting a presumptive rule of majority representation, nor how that presumption could be overcome.[27]

In deciding which faction of the formerly united congregation was entitled to possess and enjoy the property, the Court encountered two primary issues: first, whether civil courts, consistent with the First and Fourteenth Amendments, may resolve church property disputes on the basis of neutral principles of law or whether they must defer to the resolution of an authoritative tribunal of the hierarchical church; and second, whether a presumptive rule of majority representation is consistent with both the neutral principles analysis and with the First Amendment. After briefly summarizing the neutral principles analysis followed by the Georgia Supreme Court, Justice Blackmun began his analysis by examining First Amendment restrictions on civil courts in resolving church property disputes. He conceded that the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes.[28] As a corrollary, Blackmun also acknowledged that the religion clauses require civil courts to defer the resolution of issues of religious doctrine or polity to the highest ecclesiastical court.[29] Justice Blackmun asserted, however, that the religion clauses do not prevent a state from adopting any one of various meth-

rian Church. Nor did the Court consider the true neutrality of the principle which it invoked, that of majority representation.

23. 99 S. Ct. at 3029.

24. Justice Blackmun wrote the Court's opinion. He was joined by Justices Brennan, Marshall, Rehnquist and Stevens.

25. 99 S. Ct. at 3026.

26. *Id.* at 3027.

27. *Id.* at 3028.

28. *Id.* at 3025 (citing Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969)).

29. *Id.* (citing Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 (1976) (a civil tribunal must adopt a posture of noninterference with respect to the internal

ods in order to resolve church property disputes.[30] So long as the chosen method does not involve a civil court in the determination of an essentially ecclesiastical dispute, then the purposes of the First Amendment have been served. Blackmun maintained that the neutral principles approach is consistent with the constitutional mandate. He claimed that this approach is completely secular in operation, "yet flexible enough to accommodate all forms of religious organization and polity."[31] The chief advantage of such an approach is that it frees civil courts from entanglement in questions of religious doctrine, polity and practice.

Justice Blackmun admitted, however, that the neutral principles analysis is not free from difficulty. As the approach had evolved in Georgia, a civil court had to examine certain church documents to determine if the relationship between the hierarchical church and the local church contemplated bestowing a property interest upon the hierarchical association. Blackmun pointed out that the civil court had to "take special care to scrutinize the document in purely secular terms and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust."[32] He also noted that a court might be called upon to resolve a religious controversy in order to interpret an instrument of ownership. Again, the court had to carefully avoid such involvement, but must "defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body."[33] Justice Blackmun concluded, however, that the nonentanglement and neutrality inherent in the neutral principles of law analysis outweigh these occasional problems in application.[34]

Justice Blackmun then responded to certain arguments raised in the dissent. He viewed the dissent as requiring states to abandon neutral principles and instead insisting on compulsory deference to the determination of the appropriate hierarchical church tribunal.[35] That would entail affirming the finding of the PCUS commission that the minority represented the local congregation. Justice Blackmun asserted that such a rule would invite even more entanglement in religious doctrine and organization, to the extent that a civil court would

organizational structure of religious associations in matters which involve the appointment of clergy)).

30. *Id.* at 3028.
31. *Id.* at 3025.
32. *Id.* at 3026.
33. *Id.*
34. *Id.*
35. *Id.*

be required to examine ecclesiastical doctrine and polity to determine where the church has placed ultimate authority over the use of church property.[36] While admitting that in some cases making such a determination would not prove too difficult, Justice Blackmun maintained that in others isolating the locus of control could involve the civil court in an unconstitutional consideration of religious doctrine.[37]

Justice Blackmun then addressed the argument that application of neutral principles would violate the free exercise rights of the hierarchical religious association. He determined that the neutral principles approach does not inhibit the free exercise of religion any more than do other neutral state laws governing church property, taxes or employment practices.[38] Furthermore, Blackmun pointed out that before a dispute arises, the parties may insure that the faction loyal to the hierarchical church will retain the church property.[39] One way is to modify deeds or corporate charters to include a right of reversion to the general church.[40] Alternatively, the general church constitution may recite an express trust in favor of the general church.[41]

It remained for the Court to determine whether the Georgia neutral principles analysis had been faithful to the promise of nonentanglement. Justice Blackmun recognized that the schism existing within the church injected a "complicating factor" into the analysis.[42] He rejected, however, the argument that the true representatives of the Vineville Church could only be determined by the mother church.[43] Blackmun believed that such a determination could be made by a civil court without deciding between competing doctrinal preferences. The respondents argued that this is what the Georgia Courts had done in applying the ordinary presumption that a voluntary religious association is represented by a majority of its members.[44] Blackmun responded that such a rule, if adopted by those courts, would be consistent with both neutral principles analysis and the First Amend-

36. *Id.* It would appear, however, that under the neutral principles analysis as outlined by the majority, this disadvantage is common to both approaches. Even under the neutral principles approach, a court must examine the appropriate documents in search of an express trust.

37. *Id.*

38. *Id.* at 3027. Justice Blackmun added that "[u]nder the neutral principles approach, the outcome of a church property dispute is not foreordained." *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

ment.[45] Majority rule is employed in most religious societies.[46] Moreover, the majority faction can generally be identified without reference to religious doctrine or polity.[47] Finally, and most importantly, the presumption of majority representation could be overcome under the neutral principles approach by providing in an appropriate instrument either that the local church's identity is to be established in some other way or that the church's property is held in trust for the general church and those who remain loyal to it.[48]

Blackmun pointed out, however, that the Georgia courts had failed to state explicitly that they were adopting a presumptive rule of majority representation.[49] Additionally, there were some indications that Georgia law required those courts to consider questions of religious doctrine in determining who represented the Vineville church.[50] Therefore, because the Court could not declare what the law of Georgia was and did not know the grounds for the Georgia courts' decision that the majority faction represented the church, the judgment of the Supreme Court of Georgia was vacated and the case remanded for further proceedings.[51]

Justice Powell wrote the dissent for the four-member minority.[52] He maintained that the dispute was not over the ownership of church property, as the deeds placed title in either the trustees or the church itself.[53] For Powell the real question was which faction had the right to control the actions of the titleholder and thereby to control the use of the property.[54]

Powell argued that in approving the neutral principles of law approach, the Court had departed from long-standing principles first established in the 1871 case of *Watson v. Jones*.[55] In *Watson* the Court held that in deciding disputes over the control of church property, civil courts should defer to the decisions of the church hierarchy's tribunals.

45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 3028.
49. *Id.*
50. *Id.* If such doctrine would have to be considered, Justice Blackmun explained, the First Amendment required the courts to defer to the presbyterial commission's determination of the church's true representatives. The PCUS had decided that the minority faction, not the majority represented the church.
51. *Id.* at 3029.
52. Justice Powell was joined by Chief Justice Burger and Justices Stewart and White.
53. 99 S. Ct. at 3029 (Powell, J., dissenting).
54. *Id.*
55. 80 U.S. (13 Wall.) 679 (1871).

It was the dissenters' view that the neutral principles analysis would inevitably require greater involvement of civil courts in church disputes, in violation of the First Amendment.[56]

According to Justice Powell the first stage of neutral principles analysis, wherein the court must examine various instruments to determine whether property titled to the local church is held in trust for the general church, operates as a restrictive rule of evidence.[57] Under the First Amendment, civil courts are deemed incompetent to resolve questions of ecclesiastical concern.[58] Hence, they may not consider certain evidence contained in church documents which are invariably drawn up in terms of religious precepts. Justice Powell pointed out that under the neutral principles approach, forcing a civil court to read these documents in purely secular terms is more likely to promote confusion than understanding.[59] Additionally, if religious polity has not been expressed in specific statements referring to the church property, the court will not recognize that polity but will impose rules derived from state law.[60] Justice Powell suggested that the restrictive rule of evidence inherent in the neutral principles approach prevented the Georgia courts from discovering the true relationship between the hierarchical organization and the local church.[61] As a result, the undisputed authority of the PCUS to resolve doctrinal differences within a member church was ignored by the Georgia Supreme Court. By thus limiting the evidence relative to church government, Powell argued that the Georgia courts had become more, rather than less, entangled in questions of religious doctrine, thereby violating the First Amendment:

> The schism in the Vineville Church, . . . resulted from disagreements among the church members over questions of doctrine and practice. . . . Under the Book of Church Order, these questions were resolved authoritatively by the higher church courts, which then gave control of the local church to the faction loyal to that resolution. The Georgia courts, as a matter of state law, granted control to the schismatic faction, and thereby effectively reversed the doctrinal decision of the church courts. This indirect interference by the civil courts with the resolution of religious disputes within the church is no less proscribed by the First Amendment than is the direct decision of questions of doctrine and practice.[62]

56. 99 S. Ct. at 3029 (Powell, J., dissenting).
57. *Id.*
58. Watson v. Jones, 80 U.S. (13 Wall.) 679, 713 (1871).
59. 99 S. Ct. at 3030 (Powell, J., dissenting).
60. *Id.*
61. *Id.*
62. *Id.* (footnote omitted).

When a civil court resolves an intrachurch dispute over church property, Justice Powell pointed out it will inevitably either support or oppose a particular faction representing a particular theology.[63] Justice Powell indicated that for this reason the neutral principles approach violated the establishment clause.[64] His view was that when the appropriate hierarchical tribunal had resolved an intrachurch dispute over control of church property, the constitutional requirement of neutrality meant that civil courts should defer to that body's decision.[65]

The second stage of the neutral principles analysis, according to Justice Powell, involves deciding which faction of a divided church should control the church property when the court's first-stage determination is that there should be local control. In making that decision the Court allowed the states to adopt a presumptive rule of majority representation, defeasible upon a showing that the identity of the local church is to be determined by some other means.[66] Justice Powell claimed that the petitioners had rebutted this presumption by demonstrating that the PCUS had committed to the presbytery the determination of the identity of the local congregation.[67] He also criticized the Court for failing to provide state courts with any guidance as to the constitutional limitations on the evidentiary rule which they may adopt.[68]

Relying on *Watson v. Jones*,[69] Justice Powell asserted that when faced with an intrachurch dispute of any nature, a civil court could avoid interfering with the free exercise of religion only by ascertaining and following the decision made within the church governance.[70] By following this course the court would refrain "from direct review and revision of decisions of the church on matters of religious doctrine and practice that underlie the church's determination of intrachurch controversies . . . ."[71] Additionally, "by recognizing the authoritative resolution reached within the religious association, the civil court avoids interfering indirectly with the religious governance of those who have formed the association and submitted themselves to its authority."[72]

63. *Id.* at 3031.
64. *See id.* at 3031-32.
65. *Id.* at 3032-33.
66. *Id.* at 3031 (quoting the majority opinion *id.* at 3027).
67. *Id.*
68. *Id.* at 3031-32.
69. 80 U.S. (13 Wall.) 679 (1871).
70. 99 S. Ct. at 3033 (Powell, J., dissenting).
71. *Id.*
72. *Id.*

Justice Powell concluded that in a case involving an intrachurch dispute over church property, the question which a civil court should decide is where within the religious association the members, prior to the schism, had placed ultimate authority over the use of the church property.[73] The Constitution requires this limitation on the object of the inquiry, rather than a restriction on the evidence to be considered; hence, courts should be able to examine and consider statements of polity unrelated to the church property.[74] Applying this analysis to the instant case, Justice Powell determined that the presbytery had ultimate authority over the use of the Vineville Church property and that the Georgia courts were required to adhere to the decision of the presbytery's commission granting use and control of the property to the minority faction.[75]

Analysis

The obvious and overriding question which this case raises is what are "neutral principles of law." Since *Watson v. Jones*,[76] civil courts have considered the validity of applying certain neutral principles of law in resolving particular church property disputes.[77] While in *Watson* the Court held such principles inapplicable to the facts in that case, the decision nevertheless is considered the forerunner of neutral principles analysis because of the Court's ruling that in the absence of a dispute within a hierarchical church organization,

> [r]eligious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraint. . . . [W]e enter upon . . . consideration [of this case] with the satisfaction of knowing that the principles on which we are to decide so much of it as is proper for our decision, are those applicable alike to all of its class, and that our duty is the simple one of applying those principles to the facts before us.[78]

In *Watson* rival claimants within the Presbyterian Church of the United States competed for control of church property located in Ken-

73. *Id.*
74. *Id.* at 3034.
75. *Id.*
76. 80 U.S. (13 Wall.) 679 (1871).
77. *See* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952).
78. 80 U.S. (13 Wall.) at 714.

tucky. During the Civil War a schism developed in a small church in Louisville between pro-slavery and abolitionist forces. The General Assembly of the PCUS recognized the abolitionist group as the trustee of the church property. The federal court in Kentucky accepted the General Assembly's decision. It found that the abolitionists were the true representatives of the church in that diocese and that they were the legal trustees of the church property. The United States Supreme Court affirmed this judgment, holding that whenever questions of discipline, of faith, or of ecclesiastical rule, custom or law have been decided by the highest church authority to which the matter has been submitted, legal tribunals must accept such decisions as final.[79] Consequently the determination by the General Assembly that the abolitionists were the trustees of the property was a decision incapable of being disturbed by the civil courts.[80] By accepting the validity of the church hierarchy's determination, the Court recognized the right of a religious association to settle internal ecclesiastical disputes without judicial interference.[81] Although the Courts' opinion never mentioned the First Amendment, the decision was based on a general acceptance of the proposition of separation of church and state.[82]

It would appear that *Watson* supports the dissenting justices' position in *Jones*. The majority mentioned the case as authority for limiting civil courts in passing on questions of religious doctrine or polity[83] and for requiring courts to enforce an instrument which expressly determines church property ownership.[84] The majority failed, however, to confront the approach taken by the Court in *Watson*, and followed by the *Jones* dissenters, of deferring to the decision of a church tribunal where a hierarchical church dispute of any nature, including property disputes, is involved. Rather, the majority adopted a "neutral principles of law" analysis which the *Watson* Court deemed applicable only when either an instrument expressly dedicated the property for a particular purpose or the dispute is among members of an independent church. Thus while *Watson* may have been the forerunner of neutral principles analysis,[85] it would seem that the Court's holding in that case would have required the Court in *Jones* to defer to the decision of the presbytery and that the *Jones* dissenters were correct in characterizing

79. *Id.* at 727.
80. *Id.*
81. *Id.*
82. *See id. See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 873 (1978).
83. 99 S. Ct. at 3025.
84. *Id.* at 3025 n.3.
85. *See* note 78 and accompanying text *supra*.

the majority's approach as a "depart[ure] from long-established precedents."[86]

It remains uncertain after *Jones* how far a civil court may go in employing neutral principles of law to resolve intrachurch disputes which tangentially involve church property. For instance, it is unconstitutional for a civil court to find that property of a local church affiliated with a hierarchical church organization is impliedly held in trust for the general church, provided that the general church has not "substantially departed" from the tenets of faith and practice existing at the time of the local church's affiliation.[87] On the other hand, under the ruling in *Jones*, a civil court, after examining in secular terms the relevant church documents, may apply a presumptive rule of law which effectively serves to resolve more than the mere ownership of local church property but incidentally recognizes one schismatic faction as the representative of the local church. By holding that a presumptive rule of majority representation is consistent with both neutral principles analysis and the First Amendment, however, the Court in *Jones* reached a result inconsistent with that in *Watson*, even though *Watson* is considered the origin of neutral principles analysis. The decision in *Jones* therefore leaves unclear just how a civil court is to determine what is a "neutral principle of law" which may be applied to church property disputes. In fact, one may well wonder if the neutrality of a particular principle is to be determined either by the policy which initiated its acceptance as law or by the fortuity of circumstance which presages its application.

V. Due Process

One of the burgeoning areas of constitutional law in recent years has involved the constitutional rights of minor children. Two cases decided during the 1978-79 Term tred into this relatively new, still uncertain field.[a] Both included due process challenges to statutes

86. 99 S. Ct. 3029.

87. Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969). The Court held that "the departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role." *Id.* at 450.

a. A third case, Secretary of Public Welfare v. Institutionalized Juveniles, 99 S. Ct.

restricting the freedom of minors. In *Parham v. J.R.*,[b] the Court upheld a procedure for the commitment of minor children to state mental institutions by their parents or guardians which provided for neither a preadmission or postadmission adversarial hearing. On the other hand, in *Bellotti v. Baird*,[c] the Court struck down a state statute which required either parental consent or judicial authorization before an abortion could be performed on unmarried women under age eighteen.

These decisions reflect an emerging approach towards minor children's constitutional rights. The Court recognizes that minors, like adults, are protected by the Constitution.[d] Yet, in applying constitutional principles, courts must take into account children's vulnerability and lack of maturity as well as the traditional authority role of parents in the child-rearing process. The result in a flexible approach towards minor children's rights, with the outcome in a particular case dependent upon the importance of the right asserted, the nature of the restriction on that right, and the respective interests of the state, the parents, and the child in connection with the restricted right.

*Parham v. J.R.**

In *Parham v. J.R.*,[1] the Supreme Court was faced with the question of what process is constitutionally due a minor committed to a state-administered mental health institution by his parents or guardi-

(1979), was consolidated with Parham v. J.R., 99 S. Ct. 2493 (1979). Relying chiefly on the principles set forth in *Parham*, the Court reached a similar conclusion.

b. 99 S. Ct. 2493 (1979).

c. 99 S. Ct. 3035 (1979).

d. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 74 (1976). *See, e.g.*, Bellotti v. Baird, 99 S. Ct. 3035 (1979) (state statute requiring parental consent before an unmarried woman under age eighteen could obtain an abortion held unconstitutional); Carey v. Population Services International, 431 U.S. 678 (1976) (right to privacy in connection with decisions affecting procreation extend to minors as well as adults); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976) (states may not condition a minor's right to obtain an abortion on securing parental consent); Breed v. Jones, 421 U.S. 519 (1975) (trial of a child in superior court for the same offense as he was tried for in an earlier juvenile proceeding violated the double jeopardy clause); Goss v. Lopez, 419 U.S. 565 (1975) (the suspension of a child from a public school without a hearing prior to the suspension or within a reasonable time thereafter violated the due process clause); Tinker v. Des Moines School District, 393 U.S. 503 (1967) (schoolchildren are entitled to First Amendment protection while within the school environment).

* Commentary by Kevin William Finck, member, third-year class.

1. 99 S. Ct. 2493 (1979).

ans. *Parham* was a class action suit brought by children placed in a Georgia state mental hospital, seeking a declaratory judgment that Georgia's statutory procedures for the voluntary commitment of children under age eighteen to the state mental hospitals violated the due process clause of the Fourth Amendment.[2] In an opinion by Chief Justice Burger,[3] a majority of the Court held that Georgia's statutory admission procedures comported with minimum due process requirements.[4] Chief Justice Burger acknowledged that a child has interests in freedom from unnecessary bodily restraints and from erroneous classifications due to improper admissions decisions.[5] He claimed, however, that those interests were adequately protected by: (a) a parent's or guardian's concern for the well-being of his or her child when making the admission request[6] and (b) Georgia's independent medical decision-making process.[7] Justice Stewart wrote a concurring opinion in which he emphasized that a fundamental principle in American society is that parents act in their child's best interests and have the authority to do so.[8] Eschewing a due process analysis, Justice Stewart asserted that, absent evidence of abuse or neglect, the courts should respect the exercise of parental discretion in a mental commitment context.[9] Justice Brennan, joined by Justices Marshall and Stevens, wrote an opinion concurring in part and dissenting in part.[10] He believed that while states are not obligated to treat children who are committed at the request of their parents in precisely the same manner as adults who are involuntarily committed, due process still requires formal post-commitment hearings.[11]

The Lower Court Decisions

When he was three months old, J.R. was declared a neglected child by the county and removed from his natural parents.[12] During the first seven years of his life, he was placed in seven different foster

2. *Id.* at 2496-97, 2496 n. 2.
3. The majority opinion was joined by Justices White, Blackmun, Powell and Rehnquist.
4. *Id.* at 2511.
5. *Id.* at 2503-04.
6. *Id.* at 2505.
7. *Id.* at 2505-07.
8. *See id.* at 2513-15 (Stewart, J., concurring in the judgment).
9. *Id.* at 2515.
10. *Id.* (Brennan, J., concurring in part and dissenting in part, joined by Marshall and Stevens, JJ.).
11. *Id.* at 2520-21 (Brennan, J., concurring in part and dissenting in part).
12. *Id.* at 2498.

homes. J.R. was so incorrigible and disruptive at school that he could not conform to normal behavior patterns. J.R. began receiving outpatient treatment at a county mental health center. Finally, J.R.'s seventh set of foster parents requested his removal from their home.

The Department of Family and Children Services then sought his admission to Central State Regional Hospital. The hospital's admission team determined that J.R. was borderline retarded and suffered from an "unsocialized, aggressive reaction to childhood."[13] The team unanimously recommended J.R.'s admission to the hospital.

J.R.'s progress was periodically reexamined by the medical staff. Furthermore, the Department of Family and Children Services made consistent but unsuccessful efforts to place J.R. in another foster home. Finally, J.R. filed suit requesting a court order placing him in a less drastic environment more suitable to his needs.

J.R.'s suit was a class action[14] based on 42 U.S.C. § 1983.[15] Another child, J.L., who was committed to a Georgia state mental hospital at the request of his natural parents, was also a named plaintiff.[16] The defendents were the Commissioner and the Mental Health Division Director of the Georgia Department of Human Resources as well as the Chief Medical Officer of Central State Regional Hospital. The plaintiffs sought a declaratory judgment that Georgia's voluntary commitment procedures for children under eighteen[17] violated the due

13. *Id.*

14. The class certified by the district court consisted "of all persons younger than 18 years of age now or hereafter received by any defendant for observation and diagnosis and/or detained for care and treatment at any 'facility' within the State of Georgia pursuant to" section 88-503.1 of the Georgia Code. Although testimony indicated that on any given day there may be 200 children in the class, there were only 140 in the class at the time the suit was filed. 99 S. Ct. at 2496. n.2.

15. 42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdictions thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

16. J.L. died while the case was awaiting review by the Supreme Court. 99 S. Ct. at 2496 n.1.

17. *See* GA. CODE §§ 88-503.1, 88-503.2. Section 88-503.1 provided: "The superintendent of any facility may receive for observation and diagnosis . . . any individual under 18 years of age for whom such application is made by his parent or guardian. . . . If found to show evidence of mental illness and to be suitable for treatment, such person may be detained by such facility for such period and under such conditions as may be authorized by law."

Section 88-503.2 provided: "The superintendent of the facility shall discharge any voluntary patient who has recovered from his mental illness or who has sufficiently improved that the superintendent determines that hospitalization of the patient is no longer desirable."

process clause of the Fourteenth Amendment. The plaintiffs also requested an injunction against further enforcement of the procedures.

Georgia Code section 88-503.1 outlined the procedure utilized in the voluntary admission of J.R. and J.L. into state mental institutions. Under this provision, admission commences upon an application for hospitalization signed by a parent or guardian. This application gives the superintendent of a hospital the authority to temporarily admit a child for observation and diagnosis. If after such observation, the superintendent finds evidence of mental illness and believes the child is suitable for treatment in the hospital, then the child may be admitted "for such period and under such condition as may be authorized by law."[18]

Georgia's mental health statute also provided that any child who has been hospitalized for more than five days may be discharged at the request of a parent or guardian.[19] Even without such a request, every regional hospital superintendent is under a statutory duty to release any child "who has recovered from his mental illness or who has sufficiently improved that the superintendent determines that hospitalization of the patient is no longer desirable."[20]

A three-judge district court was convened to consider the merits of the plaintiffs' allegations. After reviewing a considerable amount of testimony and exhibits and visiting two of the state's regional mental health facilities, the district court held that Georgia's statutory system was unconstitutional because it did not adequately protect the plaintiffs' due process rights.[21]

The district court's decision was based on the underlying premise that a child's commitment to a mental institution constitutes a severe deprivation of liberty.[22] This liberty interest was defined both in terms of a freedom from bodily restraint and a freedom from the "emotional and psychic harm" caused by institutionalization.[23] The court held that the procedural due process safeguards necessary to protect this liberty interest include "at least the right after notice to be heard before an impartial tribunal."[24]

18. GA. CODE § 88-503.1.
19. *Id.* at § 88-503.3(a).
20. *Id.* at § 88-503.2.
21. J.L. v. Parham, 412 F. Supp. 112, 139 (M.D. Ga. 1976).
22. *Id.* at 137.
23. *Id.* at 136-37. The district court found support for these arguments in *In re* Gault, 387 U.S. 1 (1967), which held that a state cannot institutionalize a juvenile delinquent without initially providing certain due process protections. *See* 99 S. Ct. 2501 n.7.
24. 412 F. Supp. at 137 (citation omitted).

In requiring an adversarial hearing, the court rejected Georgia's argument that such a hearing was unnecessary because the state was merely making available comparable treatment for children of parents who were unable to afford the services of private hospitals and private physicians. Although the court acknowledged that most parents who seek to have their children admitted into a state mental hospital do so in good faith, it emphasized a danger brought out in the testimony of one of the plaintiffs' witnesses, who stated "there are a lot of people who treat [mental hospitals] as 'dumping grounds.' "[25]

The district court also rejected the state's argument that periodic medical reexaminations by the superintendents of the hospitals and their staffs adequately safeguarded the committed children's liberty interest. The court reasoned that the inexactness of psychiatry and the questionable sources of information relied upon to make the commitment decision made a superintendent's determination too arbitrary to satisfy due process requirements.[26] As a result, the court enjoined future commitments based on the Georgia statutory procedures. The district court also ordered the state to appropriate and expend the resources necessary to provide nonhospital facilities for those members of the class "who could be cared for in a less drastic, nonhospital environment."[27]

The United States Supreme Court Decision

The Supreme Court reversed the district court's judgment and held Georgia's commitment factfinding processes reasonable and consistent with constitutional guarantees.[28] The majority opinion, authored by Chief Justice Burger and joined by Justices White, Blackmun, Powell and Rehnquist, was divided into two sections. The first part scrutinized the constitutionality of Georgia's commitment procedures governing parental requests to have a child admitted into a state hospital. The second section dealt with those situations in which a juvenile ward of the state is committed on the state's request.

In order to determine whether the challenged state procedures afforded due process, Chief Justice Burger asserted that the balancing of three factors was required:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest

25. *Id.* at 133 (footnote omitted).
26. *Id.* at 138.
27. *Id.* at 139.
28. 99 S. Ct. 2493, 2513.

> through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[29]

In applying these criteria, Chief Justice Burger first examined the child's interest in not being committed. He noted initially that "a child . . . has a substantial liberty interest in not being confined unnecessarily for medical treatment and . . . the State's involvement in the commitment decision constitutes state action under the Fourteenth Amendment."[30] Burger found that a child facing commitment possesses two constitutionally protectible interests: freedom from unnecessary bodily restraints and freedom from being erroneously labelled as mentally ill.[31] The appellees argued that "the constitutional rights of the child are of such magnitude and the likelihood of parental abuse is so great that the parents' traditional interests in and responsibility for the upbringing of their child must be subordinated at least to the extent of providing a formal adversary hearing prior to a voluntary commitment."[32] The majority found this argument unpersuasive:

> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. That some parents "may at times be acting against the interests of their child" . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests.[33]

Chief Justice Burger reasoned that the child's protectible interests were inextricably linked with the parents' interest in and obligation to the child's health and welfare. Therefore, he determined, the private interests under scrutiny should be viewed as a combination of the child's and the parents' concerns.[34] Burger concluded that parents may "retain a substantial, if not the dominant, role in the [commitment] decision, absent a finding of neglect or abuse, and that the traditional presumption that the parents act in the best interests of their child

29. *Id.* at 2502-03 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).
30. *Id.* at 2503 (citations omitted).
31. *Id.* at 2503-04.
32. *Id.* at 2504.
33. *Id.* (citations omitted).
34. *Id.* at 2503.

should apply."[35]

The potential for abuse in such an arrangement was not overlooked by the majority.[36] Chief Justice Burger conceded that the risk of error inherent in the parental decision to institutionalize a child was great enough to require some kind of inquiry by a neutral factfinder in order to determine whether the statutory requirements for admission had been satisfied.[37] He found, however, that due process does not require that the neutral factfinder be law-trained or a judicial or administrative officer.[38] Nor did he find it necessary that the admitting physician conduct a formal or quasi-formal adversary hearing,[39] or that such a hearing be conducted by someone other than the admitting physician.[40] Although Burger acknowledged the fallibility of medical and psychiatric diagnosis, he nevertheless concluded that Georgia's independent medical decision-making process, which included a thorough psychiatric investigation followed by additional periodic reviews of a child's condition,[41] was constitutionally sufficient to identify those children who should not be admitted.[42] The Chief Justice did concede, however, that

35. *Id.* at 2505. Chief Justice Burger was careful to point out, however, that "[p]arents in Georgia in no sense have an absolute right to commit their children to state mental hospitals, the statute requires the superintendent of each regional hospital to exercise independent judgment as to the child's need for confinement." *Id.*

36. *Id.* at 2506.

37. *Id.* Chief Justice Burger delineated several of the constitutional requirements for such an inquiry. The inquiry must carefully probe the child's background, utilizing all available sources. The child must be interviewed. The decisionmaker must have the authority to refuse to admit any child that does not satisfy the medical standards for admission. Finally, to protect against possible arbitrariness in the initial admission decision, the child's continuing need for commitment must be periodically reviewed. *Id.*

38. *Id.*

39. *Id.* at 2507.

40. *Id.*

41. Under Georgia's medical procedures, an admissions team composed of a psychiatrist and at least one other mental health professional examined and interviewed the child prior to actual admission. This team examined all available medical records and interviewed the parents. Based on this and any other available background information, the admissions team then determined whether the child suffered from mental illness and whether the child would benefit from institutionalized care. If either of these two conditions were not met, admission was refused.

After admission, the child's condition and continuing need for institutionalized care were reviewed periodically by at least one independent medical team of psychiatrists. These reviews occurred in some hospitals as frequently as weekly, but none occurred less often than once every two months. Additionally, the superintendent of each hospital was charged with an affirmative statutory duty to discharge any child who was no longer mentally ill or in need of further treatment. GA. CODE § 88-503.2.

42. 99 S. Ct. at 2510. The constitutionality of the independent medical decisionmaking process, according to Chief Justice Burger, was firmly buttressed by the state's significant

> [a]s with most medical procedures, Georgia's are not totally free from risk of error in the sense that they give total or absolute assurance that every child admitted to a hospital has a mental illness optimally suitable for institutionalized treatment. But it bears repeating that "procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.[43]

The majority did not believe that the risks of error inherent in Georgia's commitment process could be significantly reduced by a more formal judicial-type hearing.[44] In reversing the district court's holding, which required a formalized adversary hearing prior to a child's admission, the Court identified several problems that could be created by such an inquiry. For one, an adversary hearing would significantly intrude into the parent-child relationship by putting into question whether the parent's motivation was consistent with the child's interest.[45] Such an intrusion would only exacerbate whatever tensions already existed between parent and child.[46] This increased estrangement, in turn, might severely interfere with the parent's ability to assist in treatment both during and after the child's hospitalization.[47]

The majority also believed that the requirement of a prior adversary hearing would unnecessarily constrain two significant state interests. The state has a significant interest in avoiding any superfluous procedural obstacle that might discourage the mentally ill or their families from seeking needed psychiatric aid.[48] The majority was of the

---

interest in confining the use of its costly mental health facilities to cases of genuine need. *Id.* at 2505-06.

43. *Id.* at 2509-10 (quoting Mathews v. Eldridge, 424 U.S. 319, 344 (1976)).

44. Chief Justice Burger believed that parents seeking to "dump" their children on the state would not be able to conceal their motives and thereby deceive an admitting psychiatrist and other mental health professionals who periodically reviewed the initial admission decision: "It is elementary that one early diagnostic inquiry into the cause of an emotional disturbance of a child is an examination into the environment of the child. It is unlikely if not inconceivable that a decision to abandon an emotionally normal, healthy child and thrust him into an institution will be a discrete act leaving no trail of circumstances. Evidence of such conflicts will emerge either in the interviews or from secondary sources. It is unrealistic to believe that trained psychiatrists, skilled in eliciting responses, sorting medically relevant facts and sensitive to motivational nuances will often be deceived about the family situation surrounding a child's emotional disturbance. Surely a lay, or even law-trained factfinder, would be no more skilled in this process than the professional." 99 S. Ct. at 2509 (footnote omitted).

45. *Id.* at 2508.

46. *Id.*

47. *Id.* "A confrontation over such intimate family relationships would distress the normal adult parents and the impact on a disturbed child almost certainly would be significantly greater." *Id.* (footnote omitted).

48. *Id.* at 2505.

view that many parents, believing they were acting in good faith, would forgo state-provided hospital care if such care was contingent on participation in an adversary proceeding designed to probe their motives and other private family matters in seeking the voluntary admission.[49] The state also has a genuine interest in efficiently allocating its medical employees' working hours to the treatment of patients.[50] State psychiatrists would be of little help to their patients when engaged in preparing for and participating in pre-admission hearings.[51]

Having determined the due process requirements where a child's natural parents request his admission to a state mental hospital, the Court next examined those situations where the child is a ward of the state and the state requests his admission into a mental hospital.[52] Based on the premise that the state's application is made in good faith,[53] the majority concluded that the differences between the situation where the child is a ward of the state and the situation where the child has natural parents were insufficient to justify requiring different admission procedures.[54]

Based on the foregoing considerations, the Court held that Georgia's general administrative and statutory scheme for the voluntary commitment of children complied with minimum due process requirements.[55] On remand, the district court was accorded the discretion to examine two areas. First, the court could review the claims of individual children that their initial admission did not meet the due process standards set down by the Supreme Court.[56] Second, the district court was also allowed to consider whether the procedures utilized by the

49. *Id.*

50. *Id.* at 2506.

51. *Id.* Chief Justice Burger cited with approval the following statement by Judge Friendly: "It should be realized that procedural requirements entail the expenditure of limited resources, that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection, and that the expense in protecting those likely to be found undeserving will probably come out of the pockets of the deserving." Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1276 (1975). *See also* Wheeler v. Montgomery, 397 U.S. 280, 282 (1970) (Burger, C.J., dissenting).

52. 99 S. Ct. 2511-13.

53. Referring to the facts in the present case, Chief Justice Burger noted: "There is no evidence that the State, acting as guardian, attempted to admit any child for reasons unrelated to the child's need for treatment." *Id.* at 2512.

54. *Id.* The majority did believe, however, that it was possible that the procedures for reviewing a ward's need for continued institutionalized care should be different than those used for a child with natural parents. Consequently, the Court left it for the district court on remand to determine the procedures required to justify continuing a voluntary commitment. *Id.*

55. *Id.* at 2513.

56. *Id.* at 2511.

Georgia state hospitals for periodic review of a patient's need for institutionalized care were sufficient to justify continuing a voluntary commitment.[57]

Justice Stewart filed a short concurring opinion in which he emphasized that under American law "parents constantly make decisions for their minor children that deprive them of liberty, and sometimes even of life itself."[58] Nonetheless, the Fourteenth Amendment has not been held applicable when an informed parent decides to submit his child to major surgery, even in a state hospital.[59] Justice Stewart could perceive no basic constitutional difference between the commitment of one's child and other parental decisions that result in a child's loss of liberty.[60]

Justice Stewart did concede that a parent's decision to have his child committed resulted in a far greater loss of liberty than having the child operated on in a state hospital.[61] He believed, however, that the difference was one of degree, not of kind.[62] Furthermore, Justice Stewart asserted that even if this factual difference were one of constitutional proportions, the objective checks upon the parent's commitment decision included in the Georgia statute were more than constitutionally sufficient to protect a child's interest in not being committed.[63]

Justice Brennan wrote an opinion, joined by Justices Marshall and Stevens, concurring in part and dissenting in part.[64] Justice Brennan agreed with the majority that a child's commitment to a state mental institution constituted a massive curtailment of liberty which the state cannot accomplish without procedures consistent with due process.[65] He noted, however, that absent a voluntary, knowing and intelligent waiver, adults facing commitment to mental institutions are entitled to full and fair adversarial hearings in which the necessity for commitment must be established to the satisfaction of a neutral tribunal.[66] Brennan reasoned that since a child's commitment proceeding is initiated by a third party, and the child therefore lacks any control in the

57. *Id.* at 2512.
58. *Id.* at 2515.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 2515-22 (Brennan, J., concurring in part and dissenting in part).
65. *Id.* at 2515-16.
66. *Id.* at 2516. At these hearings, adults have the rights to be represented by counsel, to have an opportunity to be heard, to confront and cross-examine adverse witnesses, and to offer evidence on their own behalf. *See* Specht v. Patterson, 386 U.S. 605, 610 (1967).

decisionmaking process, a full and fair adversarial hearing should also be required in this situation.[67]

Justice Brennan conceded, however, that due to the special circumstances pointed out in the majority opinion,[68] states are not obligated to treat children who are committed at the request of their parents in precisely the same manner as adults who are involuntarily committed.[69] He believed that, unlike the situation where an adult is involuntarily committed, a state may legitimately postpone conducting a formal adversarial hearing regarding a child's commitment until after institutionalization.[70] Consequently, to the extent that the district court invalidated Georgia's juvenile commitment admission procedures and mandated preconfinement hearings in all cases, Justice Brennan agreed with the majority that the district court was in error.[71]

Justice Brennan dissented, however, from the rest of the majority opinion.[72] He believed that while a state "may postpone formal commitment hearings, when parents seek to commit their children, the

67. *Id.* at 2516-17. Justice Brennan asserted that children may be entitled to even more protection than adults, because children, on the average, are confined for longer periods than adults. *Id.* Moreover, lower court decisions have recorded many inadequacies in existing mental health facilities for children. *Id. See* New York State Ass'n. for Retarded Children v. Rockefeller, 357 F. Supp. 752, 756 (E.D.N.Y. 1973). Furthermore, Justice Brennan reasoned that since childhood is a particularly vulnerable period of life, children erroneously institutionalized during their formative years may well bear the scars of that experience for the rest of their lives. 99 S. Ct. at 2517.

68. The majority concluded, and Justice Brennan concurred, that the prospect of an adversarial hearing prior to admission might deter parents from seeking needed medical attention for their children. Justice Brennan also agreed that adversarial hearings conducted prior to commitment would directly challenge parental authority in a manner which might traumatize both parent and child, thereby making the child's eventual return to his family more difficult. He noted that the requirement of such hearings might delay the treatment of children whose home life is impossible and who are in immediate need of in-patient psychiatric treatment. *Id.* at 2519.

69. "The demands of due process are flexible and the parental commitment decision carries with it practical implications that States may legitimately take into account." *Id.*

70. "While as a general rule due process requires that commitment hearings precede involuntary hospitalization, when parents seek to hospitalize their children special considerations militate in favor of postponement of formal commitment proceedings and against mandatory adversarial preconfinement commitment hearings." *Id.*

71. *Id.* at 2520.

72. One of the main targets of Justice Brennan's opinion was the majority's presumption that parents act in their children's best interests when they apply for their commitment: "Numerous studies reveal that parental decisions to institutionalize their children often are the result of dislocation in the family unrelated to the children's mental condition. Moreover, even well-meaning parents lack the expertise necessary to evaluate the relative advantages and disadvantages of in-patient as opposed to out-patient psychiatric treatment." *Id.* at 2519 (footnote omitted).

State cannot dispense with such hearings altogether."[73] Justice Brennan viewed Georgia's postadmission procedures as insufficient to be classified as hearings, since they lacked all traditional due process safeguards.[74] He reasoned that the good faith and good intentions of Georgia's psychiatrists and social workers were insufficient to render constitutional the state's *ex parte* postadmission procedures, since their decisions were frequently based on the reports and advice of others.[75] Brennan believed that too often the classification of a child's conduct went undisputed.[76] He claimed that the risk of error inherent in Georgia's commitment procedures was not as trivial as the majority suggested.[77]

Justice Brennan asserted that the risk of erroneous commitment could be lessened, without prohibitive cost or interference with Georgia's mental health program, by modifying the state's postadmission review procedures.[78] He reasoned that the special considerations that militate against preadmission adversarial hearings when parents seek to institutionalize their children do not militate against reasonably prompt postadmission adversarial hearings.[79] Justice Brennan reflected on the benefit of such a hearing: "Secrecy is not congenial to

73. *Id.* at 2520. "Children incarcerated in public mental institutions are constitutionally entitled to a fair opportunity to contest the legitimacy of their confinement. They are entitled to some champion who can speak on their behalf and who stands ready to oppose a wrongful commitment. Georgia should not be permitted to deny that opportunity and that champion simply because the children's parents or guardians wish them to be confined without a hearing. The risk of erroneous commitment is simply too great unless there is some form of adversarial review. And fairness demands that children abandoned by their supposed protectors to the rigors of institutionalized confinement be given the help of some separate voice." *Id.* at 2522.

74. *Id.* at 2520. Justice Brennan objected to the *ex parte* nature of Georgia's commitment decisionmaking process. He found the informal postadmission procedures constitutionally deficient in that the institutionalized juveniles were not informed of the reasons for their commitment, nor were they accorded the right to be present at their commitment determination, the right to legal representation, the right to be heard, the right to confront and cross-examine adverse witnesses, and the right to offer evidence on their own behalf. "By any standard of due process," Brennan claimed, "these procedures are deficient." *Id.* *See* Wolff v. McDonnell, 418 U.S. 539 (1974), Morrissey v. Brewer, 408 U.S. 471 (1972), McNeil v. Director, 407 U.S. 245 (1972), Specht v. Patterson, 386 U.S. 605, 610 (1967). *See also* Goldberg v. Kelly, 397 U.S. 254, 269-71 (1970).

75. 99 S. Ct. at 2521.

76. *Id.*

77. *Id.*

78. *Id.* at 2520-21.

79. Justice Brennan pointed out that postadmission hearings would not delay the commencement of needed treatment because children could be cared for by the state pending the disposition decision. He also asserted that postadmission hearings are unlikely to disrupt family relationships because the doctors urging commitment, not the parents, would stand as the child's adversaries. *Id.*

truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."[80] Contrary to the majority's holding, Justice Brennan concluded that the due process clause requires a state to provide a child committed to a state mental institution on the request of his parents the opportunity to contest his commitment by way of a prompt postadmission adversarial hearing.[81]

Justice Brennan also examined the procedural due process rights of children committed by their state guardians. Again disagreeing with the majority, he distinguished the situation where a child is a ward of the state and the state requests his commitment from the situation where a child's natural parents request his commitment.[82] Brennan asserted that "[t]he rule that parents speak for their children . . . cannot be transmuted into a rule that state social workers speak for their minor clients."[83] He also claimed that the special circumstances which justify postponing formal commitment hearings until after admission when parents seek to hospitalize their children are absent when children are wards of the state and are being committed upon a social worker's recommendation.[84] Justice Brennan concluded that, in the absence of exigent circumstances, juvenile wards of the state who are committed to state mental institutions upon the recommendations of social workers are constitutionally entitled to preadmission adversarial commitment hearings.[85]

80. *Id.* at 2521 (quoting Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)).

81. 99 S. Ct. at 2522.

82. *Id.* Justice Brennan reasoned that the rule that parents speak for their children is designed to shield parental control of childrearing from state interference. *Id. See* Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). He considered it inappropriate to invoke this rule "in defense of unfettered state control of child-rearing or to immunize from review the decisions of state social workers." 99 S. Ct. at 2522. *See* O'Connor v. Donaldson, 422 U.S. 563 (1975); Wisconsin v. Yoder, 406 U.S. 205 (1972).

83. 99 S. Ct. at 2522.

84. *Id.* Justice Brennan believed that the prospect of preadmission hearings are unlikely to deter state social workers from recommending a child's commitment to a state mental institution when they consider such care appropriate. He also pointed out that since children are already in a form of state custody as wards of the state, children in need of treatment could receive state care during the pendency of a preadmission commitment hearing. Finally, Justice Brennan reasoned that hearings in which the decisions of state social workers are reviewed by other state officials are unlikely to traumatize juvenile wards of the state or hinder their eventual recovery. *Id.*

85. *Id.*

Analysis

The United States Supreme Court has recently begun to examine the impact of age and parental supervision on the existence and character of the constitutional rights of minors.[86] Do children have the same constitutional rights as adults, or are the constitutional rights of minors somewhat curtailed by society's belief that decisions which directly affect the life, liberty and property of children are properly subject to the dictates of parental authority? Although the answer to this question is not yet clear, the *Parham* decision provides some insight into the attitude of the current Supreme Court toward this increasingly controversial subject.

Upon initial examination, *Parham v. J.R.* appears to have some severe ramifications for the constitutional rights of minors. If Justice Brennan's analogy between adults facing involuntary commitment to a mental institution and children whose commitment is requested by their parents or the state acting *in loco parentis*[87] is correct, the Court's opinion may be interpreted as holding that children are, in some situations, entitled to less procedural due process than adults. This conclusion is inconsistent with recent Supreme Court decisions which have held that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the constitution and possess constitutional rights."[88]

Such an interpretation, however, would clearly go beyond the intention of the majority. The fundamental issue in *Parham v. J.R.* was the constitutional sufficiency of the process utilized in Georgia to protect a child committed to a state mental institution at the request of his parent or guardian,[89] not whether a child committed at the request of

86. *See, e.g.*, Bellotti v. Baird, 99 S. Ct. 3035 (1979) (state statute requiring parental consent before an unmarried woman under age 18 could obtain an abortion held unconstitutional); Carey v. Population Serv. Int'l, 431 U.S. 678 (1976) (right to privacy in connection with decisions affecting procreation extends to minors as well as adults); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (states may not condition a minor's right to obtain an abortion on securing parental consent); Breed v. Jones, 421 U.S. 519 (1975) (trial of a child in superior court for the same offense as he was tried for in an earlier juvenile proceeding violated the double jeopardy clause); Goss v. Lopez, 419 U.S. 565 (1975) (the suspension of a child from a public school without a prior hearing or within a reasonable time thereafter violated the due process clause); Tinker v. Des Moines School Dist., 393 U.S. 503 (1967) (school children are entitled to First Amendment protection while within the school environment).

87. *See* 99 S. Ct. at 2517 (Brennan, J. concurring in part and dissenting in part).

88. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) (citations omitted). *See* note 86 *supra*.

89. 99 S. Ct. at 2496.

his parents stands in the same position as an adult facing involuntary commitment. The majority viewed the two situations as distinguishable due to the legal presumption that parents act in their child's best interests.[90] The majority also claimed that the state's application for a juvenile ward's admission to a hospital should be presumed to be made in good faith; consequently, different admission procedures are not required between a juvenile ward and a child whose natural parents request his admission.[91] Moreover, the majority believed that Georgia's independent medical admission standards adequately protected against any risk of error inherent in the parental or guardian's decision to have a child institutionalized.[92]

In contrast, Justice Stewart felt that his brethrens' due process analysis was inappropriate and in conflict with the traditional American principle that parents act in their child's best interests and are empowered to do so.[93] Justices Brennan, Marshall and Stevens were of the view that a child's fundamental rights endangered by institutionalization could be protected only through an adversarial commitment hearing.[94] The majority, on the other hand, argued that while a state is free to require such a hearing, due process is not violated if a state uses informal medical investigative techniques instead.[95] The dissenters' approach was criticized by the majority as inconsistent with previous cases holding that "due process is *flexible* and calls for such procedural protections as the particular situation demands."[96] The majority believed that whether a person is mentally ill turns on the meaning of facts which must be interpreted by psychologists and psychiatrists.[97] Even if a hearing is conducted, a medical-psychiatric decision must be made.[98] While acknowledging the fallibility of medical and psychiatric diagnosis, the majority nevertheless asserted that medical professionals are better qualified than judges or administrative hearing officers to determine a child's mental and emotional condition and corresponding need for treatment.[99]

The majority, however, failed to consider whether a more formal,

90. *Id.* at 2504.
91. *Id.* at 2512.
92. *See id.* at 2506.
93. *See id.* at 2513-15 (Stewart, J., concurring in the judgment).
94. *Id.* at 2516-17.
95. *Id.* at 2508 n.18.
96. *Id.* at 2507 n.16 (quoting Morrisey v. Brewer, 408 U.S. 471, 481 (1972).
97. 99 S. Ct. at 2507.
98. *Id.* at 2508.
99. *Id.*

judicial-type hearing would be ineffective in reducing the risk of error in Georgia's commitment process; its opinion only claimed that the risk of error would not be "significantly reduced."[100] In thus refusing to require an adversarial commitment hearing, the majority weighed the cost to the state of providing increased due process safeguards against the likelihood that erroneous determinations will be prevented. Since the Court is concerned only with minimum due process requirements, economic realities may often dictate that certain maximum due process safeguards are constitutionally unnecessary or even excessive.[101]

Recent Supreme Court decisions have begun to erode the traditional ascendancy of parental discretion over the exercise of children's constitutional rights. In *Planned Parenthood v. Danforth*,[102] the Court held that states may not condition a minor's right to obtain an abortion on securing parental consent. In *Carey v. Population Services International*,[103] the Court ruled that the right to privacy in connection with decisions affecting procreation extends to minors as well as adults, and that a blanket prohibition on the distribution of contraceptives to minors is unconstitutional. In *Bellotti v. Baird*,[104] another case decided during the 1978-79 Term, the Court declared unconstitutional a Massachusetts statute requiring parental consent before an unmarried woman under the age of eighteen could obtain an abortion.

Parham v. J.R. should be viewed as a setback to this trend. Although notions of parental authority and family autonomy do not stand as immovable barriers to the assertion of constitutional rights by children, a majority of the Supreme Court Justices still believe that parents possess considerable authority in making decisions, outside the area of procreation, which directly affect a child's freedom.

100. *Id.* at 2509.

101. *See id.* at 2507-09. "As the scope of governmental action expands into new areas creating new controversies for judicial review, it is incumbent on courts to design procedures that protect the rights of the individual without unduly burdening the legitimate efforts of the states to deal with difficult social problems. The judicial model for factfinding for all constitutionally protected interests, regardless of their nature, can turn rational decisionmaking into an unmanageable enterprise." *Id.* at 2507 n.16.

102. 428 U.S. 52 (1976).

103. 431 U.S. 678. (1977).

104. 99 S. Ct. 3035 (1979).

*Bellotti v. Baird**

In *Bellotti v. Baird*[1] the Supreme Court addressed the constitutionality of a Massachusetts statute[2] which regulated a minor's access to abortions. The Supreme Court, by judgment of the Court, held unconstitutional a statute which required either parental consent or consent by judicial order before an abortion could be performed on an unmarried woman under age eighteen.[3] The *Baird* decision serves to underscore the Court's previously expressed view that a state cannot give a third party an absolute veto over the decision of the physician and his patient to terminate the patient's pregnancy.[4]

The Lower Court Decisions

On August 2, 1974, the Massachusetts legislature passed section 12 S, chapter 112, of the Massachusetts General Laws,[5] which made it a criminal offense to perform an abortion upon a minor without first obtaining consent to the abortion from both parents or by judicial order. A class action was brought to enjoin the enforcement of this statute (*Baird I*).[6] Plaintiffs in this action were Parents Aid Society, Inc., a clinic where abortions were performed; William Baird, founder and director of Parents Aid; Gerald Zupnick, M.D., medical director of Parents Aid and a physician who regularly performed abortions at the Parents Aid clinic and "Mary Moe,"[7] an unmarried minor who resided

* Commentary by Kester K. So, member, third-year class.

1. 99 S. Ct. 3035 (1979).
2. Now codified as MASS. GEN. LAWS. ANN. ch. 112, § 12S (West 1974).
3. 99 S. Ct. at 3035.
4. Planned Parenthood v. Danforth, 428 U.S. 52 (1976).
5. As originally propounded, section 12S was designated section 12P. It was not until 1977 that the provision was renumbered without any substantive change. This commentary will refer to the provision as section 12S. Section 12S provided in part: "If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents [to an abortion] is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother. If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient. The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files." MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1974).
6. Baird v. Bellotti, 393 F. Supp. 847 (D. Mass. 1975).
7. "Mary Moe" is a pseudonym. The district court in *Baird I* gave a clear descriptive summary of what her situation was at the time of the commencement of the litigation:

at home with her parents and who desired to have an abortion without informing them. Defendants in the suit were Francis Bellotti, the Attorney General of Massachusetts, and district attorneys of all counties in the state of Massachusetts.[8]

In *Baird I* the district court invalidated and enjoined defendants from enforcing section 12S of the statute. The court explicitly rejected plaintiffs' contention that all minors were capable of giving an informed consent to an abortion.[9] The court did recognize, however, that "a substantial number of females under the age of eighteen are capable of forming a valid consent."[10] Accordingly, the court's analysis centered on the determination of whether the statute impermissibly restrained the free exercise of that consent. The district court recognized that "there can be no doubt but that a female's constitutional right to an abortion in the first trimester does not depend upon her calendar age."[11] The court then proceeded to balance the minor's constitutional right to an abortion against various parental rights and concluded that the former outweighed the latter.[12] This outcome was due in large part to the court's observation that the statute was "cast not in terms of protecting the minor, . . . but in recognizing independent rights of parents."[13] In effect, the court interpreted the statute as giving parents certain substantive powers, particularly the right to veto a minor's decision to abort. Therefore the statute, according to the court, granted parental rights which could in fact be independent of the minor's best interests. Consequently, the parental consent requirement included in the statute was found to be constitutionally invalid.[14]

"Plaintiff Mary Moe is an unmarried minor residing at home with her parents in Massachusetts. At the time of the institution of the action, she was 16 years of age and about 8 weeks pregnant. She has not informed her parents of her condition, and does not wish to. Her father had told her, in connection with the pregnancy of a contemporary friend, that if that happened to her he would evict her and kill her boy friend. . . . Her reasons for not informing her parents were in part apprehension of what might happen to her as a result of their learning she had had intercourse, in part the fear of what would happen to her boy friend, and in part the desire to spare her parents' feelings." Baird v. Bellotti, 393 F. Supp. at 850 (citation omitted).

8. *Id.* at 849.

9. *Id.* at 854-55. The district court also remarked parenthetically that it was logically inconsistent for the state to provide that a minor could consent to intercourse at age 16 (MASS. GEN. LAWS ANN. ch. 265, § 23 (West Supp. 1979) (making the act of sexual intercourse with a child under the age of 16 a statutory offense)), yet prevent her from "get(ting) rid of the product until she is two years older." 393 F. Supp. at 855.

10. 393 F. Supp. at 855.

11. *Id.* at 855-56.

12. *Id.*

13. *Id.* at 856 (citations omitted).

14. *Id.* at 857.

The case was subsequently appealed to the United States Supreme Court.[15] In this first appeal, the Supreme Court noted that the section of the statute in question could be interpreted in such a manner so as to avoid constitutional challenge.[16] As a result, the Court vacated the district court's judgment. The district court on remand was instructed by the Supreme Court to certify certain questions to the Supreme Judicial Court of Massachusetts in order to ascertain that state court's interpretation of the statute.[17] In response to the district court's request, the Supreme Judicial Court, in *Baird v. Attorney General*,[18] answered the

15. Bellotti v. Baird, 428 U.S. 132 (1976).

16. *Id.* at 148.

17. In all there were nine questions which the district court certified to the Massachusetts Supreme Judicial Court. They were as follows: " '1. What standards, if any, does the statute establish for a parent to apply when considering whether or not to grant consent?

a) Is the parent to consider exclusively . . . what will serve the child's best interest?

b) If the parent is not limited to considering exclusively the minors best interests, can the parent take into consideration the 'long-term consequences to the family and her parents' marriage relationship'?

c) Other?

'2. What standard or standards is the superior court to apply?

a) Is the superior court to disregard all parental objections that are not based exclusively on what would serve the minor's best interests?

b) If the superior court finds that the minor is capable, and has, in fact, made and adhered to, an informed and reasonable decision to have an abortion, may the court refuse its consent based on a finding that a parent's, or its own, contrary decision is a better one?

c) Other?

'3. Does the Massachusetts law permit a minor (a) 'capable of giving informed consent,' or (b) 'incapable of giving informed consent,' 'to obtain [a court] order without parental consultation'?

'4. If the court answers any of question 3 in the affirmative, may the superior court, for good cause shown, enter an order authorizing an abortion, (a), without prior notification to the parents, and (b), without subsequent notification?

'5. Will the Supreme Judicial Court prescribe a set of procedures to implement c. 112, [§ 12S] which expedite the application, hearing, and decision phases of the superior court proceeding provided thereunder? Appeal?

'6. To what degree do the standards and procedures set forth in c. 112, § 12F (Stat. 1975, c. 564), authorizing minors to give consent to medical and dental care in specified circumstances, parallel the grounds and procedures for showing good cause under c. 112, [§ 12S]?

. . . .

'7. May a minor, upon a showing of indigency, have court-appointed counsel?

'8. Is it a defense to his criminal prosecution if a physician performs an abortion solely with the minor's own, valid, consent, that he reasonably, and in good faith, though erroneously, believed that she was eighteen or more years old or had been married?

'9. Will the Court make any other comments about the statute which, in its opinion, might assist us in determining whether it infringes the United States Constitution?'

Baird v. Bellotti, 450 F. Supp. at 1007-10.

18. 371 Mass. 741, 360 N.E.2d 288 (1977). Among the more important constructions given the statute by the Supreme Judicial Court were the following: (1) When determining whether or not to grant consent to their daughter's abortion, section 12S required parents to

certified questions regarding the statute.

Once the Supreme Judicial Court resolved the potential statutory ambiguities, plaintiffs again sought a stay against the operation of the statute pending final determination of its constitutionality by the district court. The stay was granted in *Baird II*.[19] After further deliberation, the district court in *Baird III*[20] again held the statute unconstitutional and permanently enjoined its enforcement.

The district court disapproved of three provisions of the statute. First, since the statute was interpreted by the Supreme Judicial Court to require parental notification in nearly every case, the district court found the statute went much further than merely stating a preference for parental consultation. So construed, the statute would prevent a mature minor from obtaining a court order permitting an abortion unless the minor first consulted with her parents.[21] The court went on to list the reasons it might be in the minor's best interest to keep her parents ignorant of her pregnancy.[22] Consequently the court held that "it is an improper burden in those cases where a court, if given free rein, would find that it was to the minor's best interests that one or both of her parents not be informed, but is forbidden by the statute to make this decision."[23]

Second, the district court noted not only was parental notification and consent required, but the minor was also required to submit to a judicial determination even if it was not in accord with her own decision.[24] The statute, in effect, rejected the use of Massachusetts' mature minor rule[25] in abortion cases. That rule would ordinarily permit a

consider only what would be in the minor's best interests. *Id.* at 748, 360 N.E.2d at 292-93. (2) Even though a judge may find the minor to be mature, the judge can withhold consent if he determines it is in the best interests of the minor not to have an abortion. *Id.* 360 N.E.2d at 293. (3) Generally, a minor desiring an abortion would not be able to obtain judicial consent without first seeking parental consent. *Id.* at 750, 360 N.E.2d at 294. (4) A parent must be notified of any judicial proceeding brought under section 12S. *Id.* at 756, 360 N.E.2d at 297. (5) The statute forecloses the viability in applying the state's common law mature minor rule. *Id.* at 749, 360 N.E.2d at 294.

19. Baird v. Bellotti, 428 F. Supp. 854 (D. Mass. 1977).

20. Baird v. Bellotti, 450 F. Supp. 997 (D. Mass. 1978).

21. *Id.* at 1000.

22. Some of these reasons are the child might become a victim of physical abuse or parental hostility, some parents would insist on an undesired marriage as punishment and some parents might obstruct or prevent the minor from obtaining judicial consent. *Id.* at 1001.

23. *Id.* at 1002.

24. *Id.* at 1003.

25. *Id.* The Supreme Judicial Court held the common law mature minor rule inapplicable to abortion decisions. "The Legislature has left no room to apply a mature minor rule

minor's informed consent to stand in certain situations where the best interests of the minor would be served. Finding no reasonable basis for this distinction between a mature minor and an adult, the court held the statutory restriction imposed by section 12S to be not only unduly burdensome but also a denial of equal protection.[26]

Finally, according to the court, the statute was defective because of what it termed "formal overbreadth."[27] In other words, the statute failed to give notice to parents that in determining whether or not to give their consent to an abortion, the parents could only take into consideration the minor's best interests. In its current form, the statute suggested that some form of parental rights existed. Therefore, when contemplating whether or not to give their consent, parents may very well have let their own interets conflict with the minor's interest. To do so would run counter to the Supreme Judicial Court's interpretation requiring that only the minor's best interest be taken into account. Consequently, the district court determined the statute in question was overbroad as well.[28]

The United States Supreme Court Decision

On direct appeal, the Supreme Court affirmed the district court's decision by a judgment of the Court.[29] Justice Powell announced the judgment of the Court[30] and delivered an opinion in which he found the statute in question constitutionally defective primarily for two reasons. First, the statute permitted judicial approval for an abortion to be witheld even if a minor was found to be mature. Second, the statute also required parental consultation in every case without allowing a pregnant minor to receive an independent judicial determination as to her maturity or an evaluation as to whether an abortion would be in

where an unmarried minor seeks an abortion without parental consultation." Baird v. Attorney General, 371 Mass. at 749, 360 N.E.2d at 294.

26. 450 F. Supp. at 1004.

27. *Id.* at 1004-05.

28. *Id.*

29. Bellotti v. Baird, 99 S. Ct. at 3037.

30. Chief Justice Burger and Justice Stewart joined in Justice Powell's opinion. Justice Rehnquist concurred, stating: "I join the opinion of Mr. Justice Powell and in the judgment of the Court. At such time as this Court is willing to reconsider its earlier decision in *Planned Parenthood of Missouri v. Danforth*, in which I joined the dissenting opinion of Mr. Justice White, I shall be more than willing to participate in that task. But unless and until that time comes, literally thousands of judges cannot be left with nothing more than the guidance offered by a truly fragmented holding of this Court." 99 S. Ct. at 3053 (citation omitted). Justice Stevens wrote a separate concurring opinion in which he was joined by Justices Brennan, Marshall and Blackmun. Justice White dissented.

her best interests.[31]

Justice Powell began his opinion with the general observation that the Constitution and the rights contained therein were applicable to minors.[32] Unlike the district court, however, he emphasized the unique role played by the family in American society.[33] As a result, constitutional principles had to be applied in a flexible manner by taking into account both adolescent and parental concerns. Justice Powell believed these concerns included the potential vulnerability of children, their inability to make informed and mature decisions, and the importance of parents in the child-rearing process.[34] According to Justice Powell, these three reasons supported the conclusion that constitutional rights belonging to children in reality were *not* coextensive with the rights belonging to adults.[35]

First, Justice Powell pointed out that many guarantees and procedures afforded an adult within the criminal justice system were also applicable to a minor within the juvenile justice system.[36] Justice Powell recognized, however, that juveniles may be treated somewhat differently than adults.[37] Justice Powell used this example to support his argument that the legal system has recognized that it must remain flexible in order to take into account a child's peculiar vulnerability. Justice Powell next addressed the authority of a state to limit a child's freedom in making certain choices which may result in potentially serious and irreversible consequences.[38] The justification for this authority was premised on the belief that "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[39] Finally, according to Justice Powell, the importance of the parental role in the child-rearing process provided a third reason for limiting a minor's complete freedom to make certain decisions.[40] It

31. *Id.* at 3051.
32. *Id.* at 3043.
33. *Id.*
34. *Id.*
35. *Id.*
36. These include the right to adequate notice, assistance of counsel, opportunity to confront their accusers and the privilege against compulsory self incrimination. *See, e.g., In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967).
37. In his opinion Justice Powell stated: "In order to preserve this separate avenue for dealing with minors, the Court has said that hearings in juvenile delinquency cases need not necessarily 'conform with all the requirements of a criminal trial or even of the usual administrative hearing.' " Bellotti v. Baird, 99 S. Ct. at 3044 (citations omitted).
38. *Id.*
39. *Id.*
40. *Id.* at 3045.

was felt parental consent was required to protect youths from their own immaturity. Moreover, parents had a duty to teach and guide their children so they could eventually become socially responsible citizens. In order to succeed in their mission, parents impliedly required a certain amount of authority over their children, an idea "deeply rooted in our nation's history and tradition . . . ."[41] According to Justice Powell, only if these restrictions on minors were maintained would the chances for growth and maturity increase, eventually leading to the making of an individual who would participate in society in a meaningful and rewarding manner.[42]

Against this background, Justice Powell addressed the constitutional questions involved in the case. He felt the crucial question was whether section 12S, as interpreted by the Massachusetts Supreme Judicial Court provided for parental notice and consent which would not unduly burden[43] the right to seek an abortion.[44]

The answer required a balancing of the constitutional right to an abortion with the state's interest in requiring that an unmarried pregnant minor seek the advice of her parents before making such a serious decision. As previously noted, Justice Powell recognized parental consent was required, or actively encouraged, in a myriad of other situations.[45] Additionally, and perhaps more importantly, minors might

41. *Id.*

42. *Id.* at 3046.

43. Justice Powell uses the undue burden test to determine constitutionality. It is likely the term was first used in Bellotti v. Baird, 428 U.S. 132 (1976), where the Court ordered the district court to certify certain questions to the Massachusetts Supreme Judicial Court in order to ascertain that state court's interpretation of the statute in question. While the exact meaning of the term is not clarified in *Baird*, it is arguable that the undue burden test logically follows principles announced in previous Supreme Court decisions. Specifically, the concept of an undue burden can be implicitly found in the *Roe v. Wade* requirement that burdens must be narrowly drawn. For example, if fundamental rights are involved, the state may regulate or burden these rights if justification to do so can be found in a compelling state interest. In effect, application of the undue burden test to the statute in question would require a two-step process. First, it must be determined whether the statute burdens the constitutional right to seek an abortion. Second, if such a burden is found to exist it must be determined whether the "legislative enactments [can] be [more] narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, 410 U.S. 113, 155 (1973).

44. 99 S. Ct. at 3046.

45. Mr. Justice Stewart, in his concurrence in Planned Parenthood v. Danforth, 428 U.S. 52 (1976), discussed the state's interest in requiring parental involvement in the abortion decision: "There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain counsel

lack the requisite ability to make an informed decision regarding these matters.

Even though these parental concerns were deemed important, Justice Powell recognized that abortion was qualitatively different from those situations, such as marriage, where parental consent was normally required. That is, the state must be aware of "the unique nature of the abortion decision . . . ."[46] As Powell noted, far from being able to postpone her decision, a pregnant adolescent had to make a decision requiring immediate action. The potential detriment and hardship facing an unmarried pregnant minor lacking employment skills, financial resources and maturity could be severe.[47] In short, "the abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences."[48]

Justice Powell next emphasized that for similar reasons, the Court in the prior decision of *Planned Parenthood v. Danforth* had held that "the State may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy."[49] Taking into account the *Danforth* holding and the uniqueness of the abortion situation, Justice Powell concluded, "*if the State decides to require a pregnant minor to obtain one or both parent's consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.*"[50] After stating this general requirement, Justice Powell discussed specific provisions of the statute which he found objectionable.[51] As with the district court, he disagreed with the section 12S provision requiring parental consent. Because the Massachusetts Supreme Judicial Court had interpreted section 12S to require parental consent and parental notification of any judicial proceeding, Justice Powell felt that the statute unduly burdened a minor's exercise of her right to seek an abortion.[52]

Justice Powell also agreed with the district court's finding that section 12S was constitutionally defective because it permitted judicial authorization for the abortion to be withheld even though the court found

and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place." *Id.* at 91.

46. Bellotti v. Baird, 99 S. Ct. at 3047.
47. *Id.* at 3048.
48. *Id.*
49. 428 U.S. at 74.
50. 99 S. Ct. at 3048 (emphasis added).
51. *Id.* at 3049-50.
52. *Id.* at 3049.

the minor mature enough to make the decision on her own.[53] As noted earlier, the Supreme Judicial Court, in answering certified questions, stated that although a minor is found to be mature, "the judge's determination should prevail, assuming that his conclusion is supported by the evidence and adequate findings of fact."[54] Emphasizing again the unique nature of the constitutional right to an abortion, Justice Powell held that if a minor is found to be mature, her decision to have an abortion must stand.[55]

Justice Powell could have ended his analysis with the conclusion that the statute was constitutionally infirm. He went on, however, to delineate the procedure he perceived a valid state regulation should provide: (1) Every minor must be able to go to court without having to notify her parents; (2) if the court is satisfied the minor is mature enough to make the abortion decision by herself, the court must authorize the abortion without parental consultation or consent; and, (3) if the court is not satisfied as to the minor's maturity, the minor must be permitted to show that an abortion would still be in her best interests.[56]

Concurring in the judgment of the Court, Justice Stevens wrote a separate opinion in which Justices Brennan, Marshall and Blackmun joined.[57] Justice Stevens' opinion was generally in accord with Justice Powell's views as to which specific aspects of section 12S were unconstitutional. The principal disagreement arose because Justice Stevens felt that Justice Powell's analysis went further than necessary.[58] Believing that prior case law was controlling, requiring the Court to hold section 12S unconstitutional, Justice Stevens thought the Court should have ended its analysis upon a finding of unconstitutionality. According to Justice Stevens, the Court should not have discussed the procedures an abortion statute of this nature should provide in order for the statute to pass constitutional muster. Justice Stevens believed Justice Powell's opinion was advisory in nature, addressing issues not in controversy.[59]

53. *Id.* at 3052.

54. Baird v. Attorney General, 371 Mass. at 748, 360 N.E. 2d at 293.

55. Justice Powell did not address the equal protection issue raised in the district court. He stated: "As we have concluded that the statute is constitutionally infirm for other reasons, there is no need to consider this question." 99 S. Ct. at 3052 n. 30. Justice Powell was equally concerned with which portions of section 12S withstood constitutional scrutiny. Those particular aspects of the statute which Justice Powell felt were valid will be discussed in the Analysis section of this commentary. *See* notes 71-89 and accompanying text *infra*.

56. *Id.* at 3050.

57. *Id.* at 3053.

58. *Id.* at 3055.

59. *See id.* at 3055 n. 4 (Stevens, J., concurring, joined by Brennan, Marshall and Blackmun, JJ.).

The substantive area of concern most troubling to Justice Stevens was the fact that the statute provided an opportunity for judicial veto of a minor's decision to have an abortion.[60] According to its terms, "no minor . . . no matter how mature and capable of informed decision-making, may receive an abortion without the consent of either both her parents or a Superior Court Judge. In every instance, the minor's decision to secure an abortion is subject to an absolute third-party veto."[61] Justice Stevens thought the Court's previous holding in *Planned Parenthood*, which prohibited an absolute third party veto, was dispositive of the issue.[62]

Unlike Justice Powell, however, Justice Stevens placed an emphasis on the privacy interests which underlie the constitutional right to an abortion. Justice Stevens cited *Whalen v. Roe*[63] for the proposition that an individual had an interest in avoiding disclosure of certain personal matters and an interest in independence when making important decisions.[64] He found section 12S "fundamentally at odds with [these] privacy interests."[65] Therefore, Justice Stevens agreed that section 12S was unconstitutional.

Justice White wrote the only dissenting opinion.[66] As for the parental consent provision of section 12S, Justice White stated he would not strike down the Massachusetts statute for the same reasons he expressed in his dissent in *Planned Parenthood*. His argument in *Planned Parenthood* centered around the existence of the state's interest in protecting an unmarried minor from making a decision not in her best interests.[67] In that case Justice White stated, "[t]he purpose of the [parental consent] requirement is to vindicate the very right created in *Roe v. Wade*, . . . the right of the pregnant woman to decide 'whether *or not* to terminate her pregnancy.' "[68] Therefore, the statute would presumably further the state's interest in protecting minors by insuring that their right to an abortion be exercised wisely.

Finally, Justice White criticized the Court for holding unconstitutional a state requirement of parental notification.[69] Apparently he felt

60. *Id.* at 3054.
61. *Id.* at 3053 (footnote omitted).
62. *Id.* at 3054.
63. 429 U.S. 589, 599-600 (1977).
64. 99 S. Ct. at 3054.
65. *Id.*
66. *Id.* at 3055.
67. 428 U.S. at 94-95.
68. *Id.*
69. 99 S. Ct. at 3055 (White, J., dissenting). Contrary to what Justice White believes, at

the *Baird* decision went beyond the holding of *Planned Parenthood*. He stated, "Until now, I would have thought inconceivable a holding that the United States Constitution forbids even notice to parents when their minor child who seeks surgery objects to such notice and is able to convince a judge that the parents should be denied participation in the decision."[70]

Analysis

In order to properly analyze the potential impact of the *Baird* decision, emphasis should be focused on two aspects of the case. Since the Court held the Massachusetts abortion statute unconstitutional, thereby invalidating its parental consent requirement, it appears the Supreme Court is at least reaffirming the position it took in *Planned Parenthood* concerning a similar parental consent provision. Moreover, the *Baird* decision may be read by some as an illustration of the Court's willingness to further diminish the concept of parental authority and parental control, a task some commentators feel was begun in the *Planned Parenthood* decision.[71] The first section that follows will discuss the merits of this latter interpretation. The second section will examine the predictive validity of the *Baird* decision in determining what types of statutory schemes might be acceptable to the Court in the future.

To fully understand the impact of *Baird*, two prior abortion decisions of great significance should be briefly reviewed . In the landmark decision of *Roe v. Wade*[72] the Court recognized that the right of privacy was sufficiently broad to encompass a woman's decision to terminate her pregnancy. Although recognizing that this right was of constitutional dimension, the *Roe* Court specifically reserved discussing the constitutionality of a parental consent requirement until such a provision was at issue.[73] The Court finally addressed the issue in *Planned Parenthood*.[74] In that case, a provision of the abortion statute in question required an unmarried minor to obtain written consent from her parents before the abortion could be performed. In finding the provision unconstitutional, the Court held that a state may not give

least four justices feel that *Baird* is not determinitive of the parental notification issue. *Id.* at 3053 n.1.

70. *Id.* at 3055.

71. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 987 (1978); J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 633-34 (1978).

72. 410 U.S. 113 (1973).

73. *Id.* at 165 n.67.

74. 428 U.S. at 52.

a third party an absolute veto over the minor's abortion decision.[75] In the *Planned Parenthood* decision, two Justices obliquely hinted that a *Baird*-type provision which generally required parental consent but also provided for the alternative of judicial resolution, might survive constitutional challenge.[76]

Bellotti v. Baird presented just this issue.[77] The abortion statute in question, however, did not survive constitutional challenge.[78] By invalidating the statute, the Court in essence weighed the minors' interests against parental and state concerns and found the minors interests to be of paramount importance. The Court in *Baird* reaffirmed its recognition and support of a minor's constitutional right to an abortion and arguably continued to undermine the concept of the parental role in American society. At least four members of the Court concluded in *Baird* that an abortion statute of this nature would be valid only if it allows the minor to go directly to court without having to consult or notify her parents.[79] If so, parents could be effectively foreclosed from ever discovering that their daughter desires, or has in fact had an abortion. Parents necessarily would be incapable of performing their advisory role, counseling and assisting their child in making a responsible decision. Hence, the criticism that traditional notions of parental authority and obligation are on the wane seems to have merit.

This interpretation, however, may not be entirely accurate. It cannot be overemphasized that *Baird* was decided by a judgment of the Court. While four Justices did expound the view stated above, four other Justices specifically reserved determining the constitutionality of a statute which did no more than require notice to the parents but did not afford them or anyone else the opportunity to absolutely veto the minor's abortion decision.[80] Those Justices believed parental notification was not at issue in *Baird*. In addition, a fifth Justice, the lone dissenter, thought it "inconceivable" that the Court would forbid notice to parents.[81] Therefore, it is more accurate to say the Court is probably moving in the direction of reducing parental control. Since four Justices believe parental notification cannot be required, however, the

75. The case also dealt with statutory prohibition against certain types of abortion procedures, the discussion of which is beyond the scope of this commentary.

76. *Id.* at 90-91 (Stewart, J., concurring).

77. 99 S. Ct. at 3035.

78. *Id.* at 3052.

79. *Id.* at 3050.

80. *Id.* at 3053 n.1 (Stevens, J., concurring, joined by Brennan, Marshall and Blackmun, JJ.).

81. *Id.* at 3055 (White, J., dissenting).

Court is very close to allowing an unmarried minor to foreclose parental involvement in her abortion decision, if she so desires.[82] As yet, the Court has not directly addressed the parental notification issue.

Nonetheless, the *Baird* decision in general and Justice Powell's opinion in particular give us some indication of other types of provisions which might survive future constitutional challenge. Both Justice Powell and Justice Stevens are in agreement that the parental consent requirement and the potential judicial veto of the minor's decision to have an abortion unduly burden the exercise by minors of the right to seek an abortion.[83] Justice Powell, however, goes even further to delineate how a state might constitutionally provide for parental involvement in the abortion decision process.[84]

First, Justice Powell believes a minor should be able to attempt to receive court authorization for her abortion without having to notify her parents.[85] At the same time, however, Justice Stevens specifically noted that Justice Powell's view on parental notification is not conclusive since the Court did not address that issue in *Baird*.[86] Therefore, the Court is actually undecided on the parental notification issue. Second, according to Justice Powell, if the court is satisfied that the minor is mature enough to make the abortion decision by herself, the court must authorize the abortion decision without parental consultation or consent.[87] If the court is not satisfied as to the minor's maturity, the minor must be permitted to show that an abortion would be in her best interests.[88] Third, while in *Baird* the statute provided for the superior court as the appropriate forum in which to make these decisions, Justice Powell noted that there is no reason to suggest that a juvenile court or administrative agency could not adequately perform this function.[89]

Finally, the fact that the statute in question requires the consent of both parents does not unduly burden a minor's right to seek an abortion. Given the unique nature of and the potential ramifications involved in the abortion decision itself, both parents have an interest in "helping to determine the course that is in the best interest of [their] daughter."[90] If for some reason the minor receives approval of one

82. *Id.* at 3035.
83. *Id.* at 3051, 3053-54.
84. *Id.*
85. *Id.* at 3050.
86. *Id.* at 3053 n.1.
87. *Id.* at 3050.
88. *Id.*
89. *Id.* at 3048 n.22.
90. *Id.* at 3051.

parent, that parent's support may be dispositive in a subsequent judicial determination.[91]

Baird is a significant decision because it reaffirms the constitutional principles previously applied by the Court in *Planned Parenthood*, which held that a state may not provide a third party with an absolute veto over a minor's abortion decision. In *Baird* the Court applied this principle to an abortion statute which required parental consent and provided for a judicial veto. The decision is also important because four of the Justices offer some guidance in determining what types of provisions future abortion statutes of this nature must contain in order to pass constitutional muster.

As to the constitutionality of a statute which requires parental notification but does not afford parents or any other third party an absolute veto, *Baird* leaves us in an uncertain position. Therefore, the inquiry begun by the Court in *Planned Parenthood* has yet to be fully resolved.

Equal Protection

Perhaps the single most dynamic—and hence among the most confusing—areas of Supreme Court decision making in recent years has been the equal protection area. This is well exemplified by the 1978-79 Term. So significant were the decisions in this rapidly changing field, over half of the cases in this Review are from the equal protection area. They involve classifications based upon gender, legitimacy, alienage and residency. Also included are two more cases in a long line of public school desegregation decisions.

Just as the equal protection area is uncertain, the most unpredictable of the equal protection cases seem to be those alleging gender-based discrimination. Although a majority of the Court has clearly accepted the middle-tier approach established in *Craig v. Boren*[a]—with the other justices now leaning towards accepting it—the members remain in conflict as to when and how to apply it. In holding in *Orr v. Orr*[b] that a state statute imposing alimony obligations on husbands but

91. *Id.* at 3051 n.29.

a. 429 U.S. 190 (1976).

In *Craig*, the Court held that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197.

b. 440 U.S. 268 (1979).

not wives was invalid, six members of the Court joined an opinion applying the *Craig* test. While in *Personal Administrator of Massachusetts v. Feeney*[c] the majority held that there was no showing that a state's veterans preference statute purposefully discriminated against women, the *entire* Court appeared to accept the *Craig* test; notably, however, the test was never actually applied by the majority. In *Caban v. Mohammed*,[d] five members of the Court found that a state statute which allowed an unwed mother, but not an unwed father, to block the adoption of their mother was invalid under the *Craig* standard. The dissenters followed a different track, asserting that unwed mothers and unwed fathers are generally not similarly situated, and that the legislature was not required to provide for those infrequent instances where they are so situated. Finally, the various opinions in *Parham v. Hughes*[e] which upheld a state statute precluding the father of an illegitimate child who has not legitimated the child from recovering for his or her wrongful death, demonstrate the basic differences in approach toward equal protection cases among the members of the Court. A plurality found that there was no discrimination based upon illegitmacy or gender, and applied the deferential rational basis test to the statutory classification; one justice found gender-based discrimination, and concluded that one of the asserted state interests met the *Craig* test; and the other four justices, applying the *Craig* standard, determined that none of the asserted state interests justified the discriminatory statute.

While there is less controversy among the Court regarding the proper standard to be applied in cases of discrimination based upon illegitimacy, the justices are divided on how that standard should be applied. In *Lalli v. Lalli*,[f] the Court upheld a state statute allowing an illegitimate child to inherit from his or her intestate father only if there has been a judicial declaration of paternity during the father's lifetime. The third of a trilogy of seeming irreconcilable cases involving similar statutes, nearly all of the justices applied the middle-tier standard which the Court had utilized in *Trimble v. Gordon*, [g] but only the four dissenters concluded, as in *Trimble*, that the statute was invalid. Three justices determined that the middle-tiered standard had been satisfied; one applied a rational relation test in upholding the statute, and another asserted that *Trimble* should be expressly overruled in favor of

c. 99 S. Ct. 2282 (1979).
d. 441 U.S. 380 (1979).
e. 441 U.S. 347 (1979).
f. 439 U.S. 259 (1978).
g. 430 U.S. 762 (1977).

the principles set forth in the first of the three cases, *Labine v. Vincent*.[h] These different approaches seem to have made it even more difficult for lower courts to determine the proper rule to apply to intestacy statutes limiting inheritance by illegitimates.

In *Ambach v. Norwick*,[i] a case involving discrimination based upon alienage, the lines between the justices were more clearly drawn, yet the Court was just as equally divided. In upholding a state statute forbidding certification as elementary and secondary school teachers aliens who are eligible for United States citizenship but refuse to seek naturalization, the five-man majority expanded the "governmental function" exception established in earlier alienage-based discrimination cases[j] to include all jobs which "go to the heart of representative govenment." The Court thus further narrowed the scope of application of the "close judicial scrutiny" standard set forth in *Graham v. Richardson*.[k]

Similarly, in *Holt Civic Club v. City of Tuscaloosa*,[l] the opposite conclusions reached by the majority and the dissenters were due to different readings of earlier cases, resulting in the application of different standards of scrutiny. The case involved a state statute which extended the police jurisdiction of a municipality, including its police and safety regulations, licensing requirements, and some of its planning authority, to persons residing outside the city's geographic boundaries without permitting those persons to vote in municipal elections. Interpreting the Court's decision in *Dunn v. Blumstein*[m] as allowing a governmental unit to restrict participation in its political processes to those residing within its geographic borders, the majority applied a rational relation test in upholding the statute. The dissenters, on the other hand, viewed *Dunn* as permitting only residential restrictions designed to preserve a "political community," and therefore utilized "exacting judicial scrutiny" in finding that the statute violated equal protection.

Finally, on the last day of the term, the Court announced its decisions in two public school desegregation cases, *Columbus Board of Education v. Penick*[n] and *Dayton Board of Education v. Brinkman*.[o] These

h. 401 U.S. 532 (1971).
i. 441 U.S. 68 (1979).
j. *See* Foley v. Connelie, 435 U.S. 291 (1978); Sugarman v. Dougall, 413 U.S. 634 (1973).
k. 403 U.S. 365 (1971).
l. 439 U.S. 60 (1978).
m. 405 U.S. 330 (1972).
n. 99 S. Ct. 2941 (1979).
o. 99 S. Ct. 2971 (1979).

decisions broke little new ground. Aside from allowing foreseeability of segregative effects as evidence in establishing discriminatory intent, the Court otherwise merely reaffirmed the principles set forth in *Keyes v. School District No. 1.* [p] In fact, what is probably most noteworthy about these decisions is that they demonstrated that the justices remain committed to the use of the federal courts to desegregate the nation's public schools, despite public criticism and ever growing doubts about the effectiveness of these efforts among the Supreme Court members themselves.

*Orr v. Orr**

In *Orr v. Orr*,[1] the Supreme Court found that Alabama alimony statutes relying on gender-based classification[2] violated the equal protection clause of the Fourteenth Amendment. The statutes provided that husbands, but not wives, may be required to pay alimony upon divorce. The Court concluded that use of the gender classification produced "perverse results"[3] by generalizing need according to sex.

The Lower Court Decisions

The factual context from which this case arose was uncomplicated and undisputed. On February 26, 1974, a divorce decree dissolving the marriage of William and Lillian Orr was entered in Alabama state court. The decree directed appellant, William, to pay appellee, Lillian, $1,240 per month in alimony. On July 28, 1976, Lillian initiated a contempt proceeding in Circuit Court of Lee County, Alabama, alleging

p. 413 U.S. 189 (1973).

* Commentary by Seyda Varol, member, third-year class.

1. 440 U.S. 268 (1979).

2. The statutes provide: "If the wife has no separate estate or if it be insufficient for her maintenance, the judge, upon granting a divorce, at his discretion, may order to the wife an allowance out of the estate of the husband, taking into consideration the value thereof and the condition of his family.

"If the divorce is in favor of the wife for the misconduct of the husband, the judge trying the case shall have the right to make an allowance to the wife out of the husband's estate, or not make her an allowance as the circumstances of the case may justify, and if an allowance is made, it must be as liberal as the estate of the husband will permit, regard being had to the condition of his family and to all the circumstances of the case.

"If the divorce is in favor of the husband for the misconduct of the wife and if the judge in his discretion deems the wife entitled to an allowance, the allowance must be regulated by the ability of the husband and the nature of the misconduct of the wife." ALA. CODE tit. 30, §§ 30-2-51 to 30-2-53.

3. 440 U.S. at 282.

that William was in arrears in his alimony payments.[4] Subsequently, on August 19, 1976, at the hearing on Lillian's petition, William submitted a motion in his defense alleging that Lillian's petition was based on an illegal decree in that it relied on Alabama statutes which should be declared unconstitutional because they authorize courts to order the payment of alimony by husbands but never by wives.[5]

The trial court denied his motion, and judgment was entered against William for the arrearages and attorneys' fees.[6] The Alabama Court of Civil Appeals affirmed, finding a fair and substantial relationship between the object of the legislation, that of cushioning the financial impact of divorce, and the differential treatment afforded the sexes. "It is the wife of a broken marriage who needs financial assistance for whom the alimony statutes of Alabama were designed,"[7] the court said. Thus the state statutes were reasonably designed to further the state policy of cushioning the financial impact of divorce upon the sex for whom that loss imposes a disproportionally heavy burden. William's appeal on writ of certiorari to the Supreme Court of Alabama, initially granted, was later quashed as improvidently granted.[8] In a strong dissent, Justice Jones noted that "[g]iven the legal inhibition against sexual discrimination, the fact that statistically a wife is much more likely to be an alimony recipient cannot mean, as a matter of law, that a husband should be excluded altogether from access to alimony."[9] This dissent foreshadowed, in great part, the logic which would be applied by the Supreme Court.

The United States Supreme Court Decision

Before turning to the merits, the Supreme Court, per Justice Brennan,[10] addressed three preliminary questions which, although not raised by the parties or the Alabama courts, were considered on the Court's own motion because of their jurisdictional implications.[11] The first concerned appellant's standing to assert in his defense the unconstitutionality of the Alabama statutes. William's challenge in the state

4. *Id.* at 270-71.
5. *Id.* at 271.
6. *Id.*
7. Orr v. Orr, 351 So. 2d 904, 905 (1977).
8. *Id.* at 906.
9. *Id.* at 909.
10. 440 U.S. at 270. Justice Brennan was joined by Justices Stewart, White, Marshall, Blackmun and Stevens, with concurring opinions from Justices Blackmun and Stevens. Justices Powell and Rehnquist, joined by Chief Justice Burger, filed two dissenting opinions.
11. *Id.* at 271.

courts had not included a claim that he was entitled to alimony. He had only contended that he should not be required to pay alimony if similarly situated wives could not be ordered to pay. It was argued that it was possible for William to prevail in the Supreme Court and yet obtain no relief from the outstanding state contempt judgment. "The state could respond to a reversal by neutrally extending alimony rights to needy husbands as well as wives."[12] Thus the only proper plaintiff would be a husband who requested alimony for himself.[13]

Justice Brennan found that "[t]his argument quite clearly proves too much."[14] He noted that in every equal protection attack upon a statute challenged as underinclusive, the state could remedy the constitutional infirmity either by extending benefits to the previously disfavored class or by denying benefits to both parties. Thus, unless the Court were to hold that underinclusive statutes could never be challenged because any plaintiff's success theoretically might have been thwarted, William must have had standing.[15]

In addition, the Court noted that there was no question that Mr. Orr bore a burden he would not have borne were he female. Transposing the issue into the sphere of race, Justice Brennan stated that "[t]here is no doubt that a state law imposing alimony obligations on blacks but not whites could be challenged by a black who was required to pay. The burden alone is sufficient to establish standing."[16]

Returning to his first point, Justice Brennan noted that the Court's resolution of a statute's constitutionality often did not finally resolve the controversy between appellant and appellee: "We do not deny standing simply because the 'appellant, although prevailing here on the federal constitutional issue, may or may not ultimately win [his] lawsuit.' "[17] In Justice Brennan's view, the Alabama decisions stood as a total bar to relief for appellant and his constitutional attack held the

12. *Id.* at 272.

13. *Id.*

14. *Id.*

15. *Id.* Alabama could validate its divorce statutes, if held unconstitutional, by amending them either (1) to permit awards to husbands as well as wives or (2) to deny alimony to both parties. Under the first alternative, it is possible for William to gain nothing from success in the Supreme Court, although the hypothetical "proper" plaintiff would. Under the second alternative, however, William would benefit. Thus, as the Supreme Court has no way of predicting how a state will respond, it must find standing. *Id.*

Justice Brennan also noted that the Court on several occasions had considered this inherent problem of challenges to underinclusive statutes and never denied standing on this ground, citing Craig v. Boren, 429 U.S. 190, 210 n.24 (1976) and Stanton v. Stanton, 421 U.S. 7, 17 (1975).

16. 440 U.S. at 273.

17. *Id.* (quoting Stanton v. Stanton, 421 U.S. at 18).

only promise of relief from the burden imposed by the challenged statute. Accordingly, he concluded that William had " ' "alleged such a personal stake in the outcome of the contoversy as to assure that concrete adverseness which sharpens the presentation of issues upon which [this] court so largely depends for illumination of difficult constitutional questions." ' "[18]

The second preliminary question concerned the timeliness of appellant's challenge to the constitutionality of the statutes. Mr. Orr had not made his constitutional challenge until his ex-wife had sought the contempt judgment. This "unexcused tardiness might well have constituted a procedural default under state law," and left the Court without jurisdiction to consider the challenge.[19] As neither Mrs. Orr nor the Alabama courts had objected at any time to the timeliness of the constitutional challenge and had deemed the federal constitutional question properly before the court, " 'we could not treat the decision below as resting upon an adequate and independent state ground even if we were to conclude that the state court might properly have relied upon such a ground to avoid deciding the federal question.' "[20] This conclusion was "merely the application" of the elementary rule that it is irrelevant to inquire whether a federal question was raised in a court below when such question was actually considered and decided.[21]

The final preliminary question arose from indications in the record that William's alimony obligation was part of a stipulation—entered into by the parties, and which had been incorporated into the divorce decree. The end result, therefore, as in the second question, might have been that despite the unconstitutionality of the statutes, Mr. Orr might have had a continuing obligation based upon the stipulation—"in essence a matter of state contract law."[22] If the Alabama courts had based their judgment upon such a ground, the Court might have been without power to hear the constitutional argument because an in-

18. *Id.* (quoting Linda R.S. v. Richard D., 410 U.S. 614, 616 (1973) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962))). Justice Brennan noted that on indistinguishable facts, the Court has upheld standing. In *Linda R.S. v. Richard D.*, the Court stated that "the parent of a legitimate child who must by statute pay child support has standing to challenge the statute on the ground that the parent of an illegitimate child is not equally burdened." 410 U.S. at 619 n.5 (Marshall, J.).

19. 440 U.S. at 274 (citing C. WRIGHT, FEDERAL COURTS 541-42 (3d ed. 1976)).

20. 440 U.S. at 274 (quoting Beecher v. Alabama, 389 U.S. 35, 37 n.3 (1967)).

21. 440 U.S. at 274-75 (quoting Manhattan Life Ins. Co. v. Cohen, 234 U.S. 123, 134 (1914)). *Accord*, Harlin v. Missouri, 439 U.S. 459 (1979); Jenkins v. Georgia, 418 U.S. 153, 157 (1974); Raley v. Ohio, 360 U.S. 423, 436 (1959). *See* C. WRIGHT, FEDERAL COURTS 542 (3d ed. 1976).

22. 440 U.S. at 275.

dependent and adequate state ground might have existed.[23] At no time, however, was the stipulation raised as a possible alternative ground in support of the contempt judgment. Based on that record, therefore, the Court could not " 'refuse jurisdiction because the state court might have based its decision, consistently with the record, upon an independent and adequate non-federal ground.' "[24]

Having found proper jurisdiction over Mr. Orr's constitutional challenge and recognizing a properly presented article III "case or controversy," the Court turned to the merits of the case.[25] Justice Brennan stated that because Alabama's statutory scheme of imposing alimony payments on husbands but not wives provided that different treatment be accorded on the basis of sex, it " 'establishes a classification subject to scrutiny under the Equal Protection Clause.' "[26] The majority found no protection from scrutiny because the classification discriminated expressly against men rather than women.[27] Rather, they relied on *Califano v. Webster*,[28] in which the Court held *per curiam* that gender-based differentials in old-age Social Security benefits were allowable since there was proof that "the statute was deliberately enacted to 'redres[s] our society's longstanding disparate treatment of women',[29] and was not 'the accidental byproduct of a traditional way of thinking about females.' "[30] The Court in *Califano v. Webster* had, in turn, relied heavily on its earlier pronouncement in *Craig v. Boren*[31] that to withstand constitutional challenge under equal protection principles "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[32]

The Court then considered the three governmental objectives that Alabama's statutory scheme might serve.[33] Appellant viewed the

23. *Id.* at 276. *See* Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); Fox Film Corp. v. Muller, 296 U.S. 207 (1935).

24. 440 U.S. at 276 (quoting Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 98 (1938)).

25. 440 U.S. at 276.

26. *Id.* at 278-79 (quoting Reed v. Reed, 404 U.S. 71, 75 (1971)). The Court in *Reed* held violative of equal protection a mandatory provision of the Idaho probate code giving preference to men over women when otherwise equally situated individuals apply for appointment as administrator of a decedent's estate. *Id.*

27. Craig v. Boren, 429 U.S. 190 (1976).

28. 430 U.S. 313 (1977).

29. *Id.* (quoting Califano v. Goldfarb, 430 U.S. 199, 209 n.8 (1977)).

30. 430 U.S. at 314 (quoting Califano v. Goldfarb, 430 U.S. at 223 (Stevens, J., concurring in the judgment)).

31. 429 U.S. 190 (1976).

32. *Id.* at 197.

33. 440 U.S. 279.

state's statutes as demonstrating the state's preference for an allocation of family responsibilities where the wife played a dependent role and as reinforcing that model among its citizens.[34] Justice Brennan agreed with appellant's assertion that prior cases established that this purpose could not sustain the statutes. In *Stanton v. Stanton*,[35] the Court had held that "old notions" imposing the primary financial responsibility on the man could no longer justify gender-based discrimination.[36] This objective could not support the statute since the Court was persuaded that "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."[37]

Two other possible objectives for the statute were gleaned from the opinion of the Alabama Court of Civil Appeals.[38] The first was to provide help for needy spouses, using sex as a proxy for need.[39] The statutes, however, would not be justified even if sex were a reliable proxy for need and even if the institution of marriage did discriminate against women, because "[u]nder the statute, individualized hearings at which the parties' relative financial circumstances are considered *already* occur."[40] There was thus no reason to use sex as a proxy for need.

The second legislative purpose, the goal of compensating women for past discrimination during marriage, which assertedly has left them unprepared to fend for themselves in the working world following divorce, was dismissed on similar grounds "since individualized hearings can determine which women were in fact discriminated against vis-à-vis their husbands, as well as which family units defied the stereotype and left the husband dependent on the wife."[41] Recognizing that as-

34. *Id.*

35. 421 U.S. 7 (1975).

36. *Id.* at 10.

37. *Id.* at 14-15.

38. 440 U.S. at 280. Justice Brennan quotes the lower court's opinion that the statutes were "designed [for] the wife of a broken marriage who needs financial assistance," 351 So. 2d at 905. He extracts from this opinion two possible legislative objectives. *Id.*

39. 440 U.S. at 280. *See* Russell v. Russell, 24 So. 2d 124, 126 (1945); Ortman v. Ortman, 203 Ala. 167, 82 So. 417 (1919). In dismissing this purpose the Court began the analysis of the "needy spouse" objective by considering whether sex was a sufficiently "accurate proxy" for dependency to establish that the gender classification rests " 'upon some ground of difference having a fair and substantial relation to the object of the legislation.' " Reed v. Reed, 404 U.S. 71, 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (citation omitted)).

40. 440 U.S. at 280.

41. 440 U.S. at 281-82. The Court recognized the " '[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women . . . as . . . an important governmental objective . . . .' " *Id.* (quoting Califano v. Webster, 430 U.S. 313, 317 (1977)). The majority approached this "compensa-

sisting needy spouses is a legitimate and important governmental objective, the majority concluded that the compensatory purpose in the Alabama statues could be satisfied without placing burdens solely on husbands.[42]

Justice Brennan pointed out that as compared to a gender-neutral law placing alimony obligations on the spouse best able to pay, the gender-based classification produced "perverse results"; in the instant case only financially secure wives with needy husbands derived an advantage.[43] The Court concluded that "[a] gender-based classification which, as compared to a gender-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny."[44] This conclusion was buttressed by the Court's concern that stereotypes about the "proper place" of women and their need for "special protection" ran the risk of reinforcement by legislative classifications which distributed benefits and burdens on the basis of gender.[45]

Having found Alabama's alimony statutes unconstitutonal, the Court reversed the lower court decision and remanded the case.[46] Thus, on remand, the question remained open as to whether the stipulated agreement to pay, or other grounds of gender-neutral state law, bound Mr. Orr to continue alimony payments.[47]

Brief concurrences were filed by Justices Blackmun and Stevens. Justice Blackmun joined the Court on the assumption that the Court did not mean to imply that society-wide discrimination was always ir-

---

tion" rationale by asking whether women had in fact been discriminated against in the context of the sex-based classification, leaving them " '*not* similarly situated with respect to opportunities' " in that context. 440 U.S. at 281 (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)). *Compare* Califano v. Webster, 430 U.S. 313, 318 (1977) *and* Kahn v. Shevin, 416 U.S. 351, 353 (1974) *with* Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975).

42. 440 U.S. at 282.

43. *Id.*

44. *Id.* at 282-83.

45. *Id.* at 283. *Cf.* United Jewish Organizations v. Carey, 430 U.S. 144, 173-74 (1977) (concurring opinion). The Court was especially cautious because the gender-based classifications did not enhance the state's "compensatory and ameliorative purposes" any more than gender-neutral classifications would have. Additionally, the majority was struck by the inconsistency in allowing benefits mainly to "those without need for special solicitude." 440 U.S. at 283.

46. *Id.* at 283-84.

47. *Id.* (citing Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 109 (1938)). There, the Indiana state courts had to choose between two potential grounds to uphold the dismissal of a public school teacher. The Indiana courts decided the question on the basis of the contracts clause of the Federal Constitution, not passing upon a question of pure state law. Thus, the Supreme Court had jurisdiction to "reach the merits of the constitutional question without relying on the potential state ground." 440 U.S. at 284 n.13.

relevant to the determination whether the classification at issue was substantially related to achievement of important governmental objectives, and on the further assumption that the Court did not intend to "cut back" the decision in *Kahn v. Shevin*.[48]

In his brief concurring opinion, Justice Stevens rejected both alternative suggestions Justice Rehnquist "seem[ed] to be making" that the Court should decide the state law issue or direct the Supreme Court of Alabama to decide that issue before deciding the federal constitutional issue.[49] In the judgment of Justice Stevens, to accept either of these alternatives "would violate principles of federalism that transcend the significance of this case."[50]

Two dissents were filed, the second by Justice Rehnquist, with Chief Justice Burger joining.[51] This dissent attacked Mr. Orr's standing to bring suit.[52] Justice Rehnquist argued that Mr. Orr had no personal stake in the controversy which would satisfy article III, and that there was no " 'causal connection' " between the injury-in-fact and the challenged government action.[53] Mr. Orr's standing to raise the equal protection claim was analyzed within the framework of two separate gender classifications: "that between needy wives, who can be awarded alimony under the statutes, and needy husbands, who cannot; and that between financially secure husbands, who can be required to pay alimony under the statutes, and financially secure wives, who cannot."[54] Justice Rehnquist found that Mr. Orr would derive no benefit from a sex-neutral statute, as the parties had agreed to the amount of alimony and Mr. Orr could not claim alimony because he was not a "needy husband."[55] Relying on *Linda R.S. v. Richard D.*[56] and advocating the enforceability of the alimony obligation under state contract law,[57] Justice Rehnquist recognized no undue burden to Mr. Orr because he "[had] failed to show a 'substantial likelihood'[58] that the requested re-

48. 416 U.S. 351 (1974). *See* 440 U.S. at 284.
49. 440 U.S. at 284.
50. *Id.* at 285.
51. *Id.* at 290-300.
52. *Id.*
53. *Id.* at 292-93.
54. *Id.*
55. *Id.* at 293-95.
56. 410 U.S. 614 (1973).
57. Justice Rehnquist relied here on the following pronouncement in Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 75 n.20 (1978): " 'Our recent cases have required no more than a showing that there is a 'substantial likelihood' that the relief requested will redress the injury claimed to satisfy the second prong of the constitutional standing requirement.' " 440 U.S. at 298 n.5.
58. 440 U.S. at 298.

lief [would] result in termination of his alimony obligation."[59]

Nor could Justice Rehnquist justify Mr. Orr's standing merely because the state courts had decided his claim on its constitutional merits. He emphasized that "Article III is a jurisdictional limitation on federal courts, and a state court cannot transform an abstract or hypothetical question into a 'case or controversy' merely by ruling on its merits."[60]

Justice Powell's dissent paralleled that of Justice Rehnquist, agreeing that the majority had "dealt too casually with the difficult [article III] problems."[61] He would have abstained in order to provide the state courts an opportunity to settle the underlying state law questions, any of which might have eliminated the necessity of deciding the equal protection issue.[62] Moreover, he noted that since the alimony arrangements were part of a comprehensive agreement not made subject to approval by the divorce court, there might also have been a "question as to the binding effect of the divorce itself."[63]

Analysis

Although opposed by two lengthy dissents, the majority in *Orr* took a firm stand in deciding to reach the constitutional claims despite unanswered underlying state questions. Six members of the Court,[64] recognizing Mr. Orr's standing to bring this case, declared unconstitutional the Alabama statutes requiring husbands, but not wives, to pay alimony as violative of the equal protection clause of the Fourteenth Amendment. Neither of the dissents took up the equal protection question, choosing to ignore it in favor of an emphasis on Mr. Orr's lack of standing or the underlying state law question.[65]

The main issue separating the majority from the dissenters is how far the article III "case or controversy" requirement can be stretched to allow an appellant standing in the federal courts.[66] The majority favors

59. *Id.*

60. *Id.* at 299 (citing Doremus v. Board of Educ., 342 U.S. 429 (1952)). Based on similar reasoning, the Court in *Doremus* held that a state statute requiring Bible reading in public schools could not be challenged by a taxpayer who lacked the "requisite special injury" in the outcome of a First Amendment challenge. 342 U.S. at 435.

61. 440 U.S. at 285.

62. *Id.* (citing Harris County Comm'rs Court v. Moore, 420 U.S. 77, 83 (1975)).

63. 440 U.S. at 288.

64. The six members were Justices Brennan, Stewart, White, Marshall, Blackmun and Stevens.

65. Justice Powell's dissent did not deal with either of the constitutional questions, expressing a reticence to entertain such questions unnecessarily. 440 U.S. at 285-90 (Powell, J., dissenting).

66. *Id.*

an interpretation of *Linda R.S.* which sustains Mr. Orr's standing, finding his status similar to that of the parent of a legitimate child who must by statute pay child support while that of an illegitimate child is not equally burdened.[67] However, Justice Rehnquists's dissent derives a different result from *Linda R.S.*, finding instead that the " 'direct' relationship between the alleged injury and the claim sought to be adjudicated, which previous decisions of this Court suggest is a prerequisite of standing, is absent in this case"[68] because Mr. Orr had failed to prove to a "substantial likelihood" that his alimony obligations would terminate with the requested relief.[69]

Similarly, whereas the majority relied upon *Califano v. Webster*[70] to justify its examination of the governmental objectives that might be served by the Alabama statutes,[71] the dissent by Justice Rehnquist did not discuss that case in the context of the substantial relationship test discussed in *Webster*.[72] Rather, he used *Webster* to illustrate that "[s]tanding to raise these constitutional claims was not destroyed by the fact that . . . Congress . . . [was] capable of frustrating a victory in this Court by merely withdrawing the challenged statute's benefits from the favored class rather than extending them to the excluded class."[73] Additionally, he relied on *Califano v. Goldfarb*,[74] for his finding that Mr. Orr did not suffer from the effects of a statute which placed a burden on members of one sex, but not on the similarly situated members of the other sex.[75] Although the majority gave some credence to the notion that Mr. Orr's motion challenging the constitutionality of Alabama's statutes might be interpreted as constituting an alimony claim,[76] Justice Rehnquist disagreed with the majority's construction.[77]

67. *Id.*, at 273 (citing Linda R.S. v. Richard D., 410 U.S. at 619 n.5 (Marshall, J.)).
68. 410 U.S. at 618.
69. 440 U.S. at 298.
70. 430 U.S. 313, 316-17 (1977).
71. 440 U.S. at 278-81.
72. *Id.* at 291-92.
73. *Id.* at 292.
74. 431 U.S. 199 (1977). This case declared unconstitutional a provision of the Social Security Act that burdened widowers, but not widows, with proof of dependency upon the deceased spouse before survivors' benefits would be allowed.
75. 440 U.S. at 292.
76. *Id.* at 271 n.2.
77. *Id.* at 295 n.3. He based his confusion on three points: 1) that Mr. Orr's contentions regarding the archaic nature of the Alabama statutes' characterization of women went to the merits of his equal protection claim and not to his standing to raise it, 2) that Mr. Orr's alimony payments were fixed by a contract between the parties, and 3) that Mr. Orr's claim is patently meritless since, by definition, a gender-neutral statute treats men and women the same. *Id.*

Justice Powell's dissent, like that of Justices Rehnquist and Burger, did not reach the same issues as the majority opinion. In fact, Justice Powell's dissent was even narrower in scope because it refused to consider *either* of the constitutional questions.[78] Instead, this opinion concentrated on the necessity of deciding the underlying state law questions prior to reaching the constitutional issues.[79] In this connection, Justice Powell emphasized that the Alabama Court of Civil Appeals, in a case subsequent to its decision in *Orr*, held that a claim identical to appellant's would not be considered, where the husband raised it for the first time on a motion for a new trial.[80] This dissent also recounted the probable validity of the contract enforcing Mr. Orr's alimony obligation.[81]

The vast differences of opinion among the Justices in *Orr* illustrates the Court's difficulty in reaching a unanimous decision in the area of federal standing. Despite a six to three majority opinion, the Court is still divided without a favored view of article III for "case or controversy." It is regrettable that the Court could not create a more solid front in its decision supposedly clarifying a complex area of constitutional law. Perhaps more significant is the fact that a majority of the Court was willing to extend article III over the strong dissent of three of its members in order to reach the merits of another gender-based, equal protection claim. In light of the other equal protection opinions handed down during the 1979-80 Term, the Court's holding in *Orr v. Orr* would seem to confirm their acceptance of a "middle tier" analysis in equal protection cases.

*Personnel Administrator of Massachusetts v. Feeney**

In *Personnel Administrator of Massachusetts v. Feeney*[1] the Supreme Court held that the Massachusetts Veterans' Preference Statute,[2] which gives veterans a hiring preference for certain state civil

78. *Id.* at 285-86 (Powell, J., dissenting).

79. *Id.* at 286-90.

80. Hughes v. Hughes, 362 So.2d 910 (1978), *cert. dismissed as improvidently granted*, 362 So.2d 918 (Ala. 1978).

81. 440 U.S. at 288.

* Commentary by Benjamin G. Davidian, member, third-year class.

1. 99 S. Ct. 2282 (1979).

2. MASS. GEN. LAWS ANN. ch. 31, § 23 (West Supp. 1977) (current version at MASS. GEN. LAWS ANN. ch. 31, § 26 (West 1979)). The general Massachusetts Civil Service law, MASS. GEN. LAWS ANN. ch. 31, was recodified on Jan. 1, 1979, and the veterans' preference is now found at MASS. GEN. LAWS ANN. ch. 31, § 26 (West 1979). Citations in this commen-

service jobs, does not discriminate against women in violation of the equal protection clause of the Fourteenth Amendment.

Under the Massachusetts Veterans' Preference Statute, all veterans who qualify for state civil service positions must be considered for appointment ahead of any qualifying nonveterans. The preference operates to the overwhelming advantage of males. Veterans' preference statutes have long been used by the federal government and virtually all state governments as a means of rewarding returning veterans and assisting their assimilation into nonmilitary jobs. Although these statutes vary widely in design and application, Massachusetts' is among the most generous.[3] All applicants for positions in Massachusetts' official[4] service must take competitive examinations. Applicants are then graded according to a formula which gives weight both to objective test results and to training and experience. The provisions of the statute require that disabled veterans, veterans, surviving spouses and parents of veterans be ranked above all other candidates according to their respective examination scores.[5] The Massachusetts statute grants veterans a permanent preference that may be exercised at any time and as many times as the veteran may wish to use it and is applicable to all but the lowest-level state civil service positions.

Appellee Helen B. Feeney, a widow, was not a veteran. She entered the state civil service work force in 1963 as a senior clerk stenographer in the Massachusetts Civil Defense Agency and worked in that capacity for four years. In 1967 she was promoted within the agency to federal funds and personnel coordinator. The agency and her job were eliminated in 1975. Feeney worked as a public employee for twelve years. During her tenure she took a number of open competitive civil service examinations. She did very well on several of them, achieving the second highest score on an examination for the Board of Dental Examiners in 1971 and the third highest score on an examination for a position as an administrative assistant with a mental health center in 1973. Her high scores failed to qualify her for a place on the certified

tary, unless otherwise indicated, are to the chapter 31 codification in effect when this litigation was commenced.

3. The Massachusetts statute defined a veteran as "any person, male or female, including a nurse," who was honorably discharged from the nation's armed forces after at least 90 days active service, at least one day of which was during "wartime service." MASS. GEN. LAWS ANN. ch 4, § 7 (West 1974).

4. State civil service positions in Massachusetts are divided into two categories: labor and official. The statute involved in the instant case deals only with procedures employed in recruitment for official positions.

5. MASS. GEN. LAWS ANN. ch. 31, § 23 (West Supp. 1977).

eligible list,[6] however, because of the veterans preference statute. She was ranked sixth behind five male veterans on the Dental Examiners list and the job was given to a lower scoring veteran. On the 1973 examination Feeney was placed on the list behind twelve male veterans, eleven of whom had received lower scores.

The Lower Court Decisions

Appellee Feeney brought this action pursuant to 42 U.S.C. § 1983,[7] arguing that the statute's absolute preference formula excludes women from consideration for the best civil service jobs, thereby denying women equal protection of the law.[8] The three-judge district court agreed with her claim, one judge dissenting.[9] The district court found that the goals of the preference were worthy and legitimate and that the statute had not been enacted for the purpose of discriminating against women, but that the distinction between veterans and nonveterans drawn by the statute was so severe as to require the state to further its goals through a more limited form of preference. The court declared the statute unconstitutional and enjoined its further operation.

On appeal, the United States Supreme Court vacated the judgment and remanded the case for consideration in light of *Washington v. Davis*.[10] On remand, the district court reaffirmed its earlier decision, one judge concurring, one dissenting.[11] The district court concluded

6. 99 S. Ct. at 2288. When an official civil service position becomes available, the applicable public agency receives a list of "certified eligibles" from the state personnel division. Unless the person whose name is highest on the list is selected to fill the position, the agency must file a written statement of reasons. If only one position is open, there are usually three candidates' names placed on the list. Veterans who qualify are placed above all others even though their examination scores may be considerably lower than nonveterans. Thus it is virtually impossible for a nonveteran to be selected. MASS. GEN. LAWS ANN. ch. 31, § 25 (West 1979).

7. 42 U.S.C. § 1983 (1974).

8. No statutory claim was brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e (1974).

9. Anthony v. Massachusetts, 415 F.Supp 485 (D. Mass. 1976) (Murray, J., dissenting in part). Feeney's case had been consolidated with that of Carol B. Anthony, a lawyer whose efforts to secure a civil service job were similarly thwarted by the veterans' preference statute. But in 1975 Massachusetts exempted all attorney positions from the preference, thereby rendering Anthony's claim moot.

10. Massachusetts v. Feeney, 434 U.S. 884 (1977). In Washington v. Davis, 426 U.S. 229 (1976), the Supreme Court held that a neutral law does not necessarily violate the equal protection clause of the Fourteenth Amendment simply because it results in a *racially* disproportionate impact. Secondly, the Court required that any disproportionate impact must be traced to a specific legislative purpose to discriminate on the basis of race. *Id.* at 238-44.

11. Feeney v. Massachusetts, 451 F.Supp 143 (D. Mass. 1978) (Campbell, J., concurring; Murray, J., dissenting).

that a veterans' hiring preference is inherently non-neutral because it favors a class from which women have traditionally been excluded and that the results of the Massachusetts absolute preference formula were too inevitable to have been "unintended."[12] The Attorney General again appealed the district court decision.[13]

The United States Supreme Court Decision

Mr. Justice Stewart delivered the majority opinion, reversing the judgment of the district court and remanding the case for further proceedings.[14] The Court began its analysis with a review of the statutory history of chapter 31, section 23. The Court determined that although the preference did not guarantee that the veteran would always be appointed, it gave an almost absolute advantage to veterans who acquired passing scores.[15] Justice Stewart reasoned that the veterans' hiring preference was a traditionally justified method with which to "reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations."[16] Justice Stewart analyzed the historical aspects of the veterans preference statute in Massachusetts and, in a footnote, added that veteran preference laws had been challenged so often that the supporting rationale had beome "essentially standardized."[17] The instant case, however, was the first to challenge the Massachusetts scheme on the grounds that it discriminates on the basis of gender.[18]

12. *Id.*

13. 99 S. Ct. at 2286.

14. The opinion was joined by Burger, C.J., and White, Powell, Blackmun, Rehnquist and Stevens, JJ. Stevens, J., wrote a concurring opinion, joined by White, J. Marshall, J., wrote a dissenting opinion, in which Brennan, J., joined.

15. *See* note 6 *supra.*

16. 99 S. Ct. at 2288. *See also* Hutcheson v. Director of Civil Serv., 361 Mass. 480, 281 N.E.2d 53 (1972).

17. *Id.* at 2288 n.12. *See, e.g.*, Rios v. Dillman, 499 F.2d 329 (5th Cir. 1974); August v. Bronstein, 369 F. Supp. 190 (S.D.N.Y.), *aff'd mem.*, 417 U.S. 901 (1974); Koelfgen v. Jackson, 355 F. Supp. 243 (Minn. 1972), *aff'd mem.*, 410 U.S. 976 (1973). *Cf.* Mitchell v. Cohen 333 U.S. 411, 419 n.12 (1948) (argued in favor of special consideration for veterans). *See generally* Blumberg, *DeFacto and DeJure Sex Discrimination Under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment*, 26 BUFFALO L. REV. 3 (1977).

18. Similar challenges have been made in other states. *See* Branch v. Du Bois, 418 F. Supp. 1128 (N.D. Ill. 1976) (sustaining Illinois' modified point preference); Wisconsin Nat'l Organization for Women v. Wisconsin, 417 F. Supp. 978 (W.D. Wis. 1976) (sustaining Wisconsin's point preference); Feinerman v. Jones, 356 F. Supp. 252 (M.D. Pa. 1973) (sustaining Pennsylvania point preference); Ballou v. Department of Civil Serv., 75 N.J. 365, 382 A.2d 1118 (1978) (sustaining New Jersey's absolute preference).

The Court established that Massachusetts had historically defined the term "veteran" in gender-neutral language, as "any person, male or female, including a nurse" and "any person who served in the United States army or navy."[19] Justice Stewart illustrated how women who had served in the armed services during wartime had long enjoyed the benefits of the veteran preference. The Court noted, however, that despite Massachusetts' attempts to include military women as well as men, the statute still operated to the benefit of an overwhelmingly male class. The result was largely attributable to a number of federal statutes, regulations and policies that limited the number of women serving in the nation's armed services and precluded women from being subject to the military draft.[20] When the instant case was initiated, over 98% of the veterans in Massachusetts were male and only 1.8% were female. Over one quarter of the state's entire population were veterans at that time.

The state conceded that for " 'many of the permanent positions for which males and females have competed [the veterans' preference has] resulted in a substantially greater proportion of female eligibles than male eligibles' " not being certified for consideration.[21] For this reason the Court concluded that the impact of the statute upon the right of women to seek public employment had been severe and therefore lay at the heart of the appellees' federal constitutional claim.

Justice Stewart began the analysis of the equal protection question with an exploration of the Court's position on equal protection challenges to state legislation.[22] The Fourteenth Amendment did not deny the states all powers of classification.[23] When basic classifications were rationally drawn, a law's uneven effects on certain groups were not usually of constitutional concern.[24] The only question for the judiciary in such matters was whether the legislative classification itself was valid.[25]

The Court noted that certain classifications, such as those involving race, were particularly suspect. Racial classifications have been

19. MASS. GEN. LAWS ANN. ch. 4, § 7 (West 1974).

20. 99 S. Ct. at 2290-91. *See generally* M. BINKIN & S. BACH, WOMEN AND THE MILITARY 4-21 (1977).

21. 99 S. Ct. at 2292.

22. *Id.* at 2292-93.

23. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976).

24. New York Transit Auth. v. Beazer, 440 U.S. 568 (1979); Jefferson v. Hackney, 406 U.S. 535, 548 (1972). *Cf.* James v. Valtierra, 402 U.S. 137 (1971) (equal protection challenge to a California law requiring a referendum to approve low-rent housing projects).

25. *See* Railway Express Co. v. New York, 336 U.S. 106 (1949); Barrett v. Indiana, 229 U.S. 26, 29-30 (1913). *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969). *See generally* Vance v. Bradley, 440 U.S. 93 (1979).

held presumptively invalid regardless of their purported motivation and could be upheld only if supported by an extraordinary justification.[26] Moreover, a statute ostensibly neutral on its face still could be held unconstitutional if the Court established that it is an obvious pretext for discrimination.[27] The dispositive question was not whether the law causes a disproportionately adverse effect upon a particular group, but whether that impact could be traced to a discriminatory purpose.[28] Only then would it run afoul of the equal protection clause of the Fourteenth Amendment.

Although race classifications have long been the central focus of such inquiries, gender classifications have themselves been a touchstone for various forms of discrimination.[29] The *Feeney* Court adopted, perhaps more clearly than ever before, the standard established in *Craig v. Boren*[30] whereby the Court determined that gender classifications must bear a close and substantial relationship to important governmental objectives.[31] Failure to meet the test necessarily rendered the statute unconstitutional.[32] Justice Stewart extended this standard to public employment[33] and determined that "any state law overtly or covertly designed to prefer males over females in public employment would require an *exceedingly persuasive justification* to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment."[34]

The opinion next discussed the Supreme Court decisions in *Wash-*

26. McLaughlin v. Florida, 379 U.S. 184 (1964); Brown v. Board of Educ., 347 U.S. 483 (1954).

27. Guinn v. United States, 238 U.S. 347 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886). *Cf.* Gomillion v. Lightfoot, 364 U.S. 339 (1960) (black citizens challenged a state gerrymander law which prohibited blacks from voting in municipal elections); Lane v. Wilson, 307 U.S. 268 (1939) (a constitutional challenge to racially discriminatory voter registration laws).

28. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

29. *See* Caban v. Mohammed, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting).

30. 429 U.S. 190 (1976).

31. *Id.* at 197.

32. *See* Caban v. Mohammed, 441 U.S. 380 (1979); Orr v. Orr, 440 U.S. 268 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

33. There is no constitutional right to employment in either the federal or state civil service. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976). It is generally for the states to prescribe employee qualifications and they have wide discretion in doing so. *See, e.g.*, New York Transit Auth. v. Beazer, 440 U.S. 568 (1979).

34. 99 S. Ct. at 2293 (emphasis added).

ington v. Davis[35] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[36] as cases which recognized that an unconstitutional purpose may have been at work when an otherwise neutral law was shown to have had a disparate impact on a group that historically had been the victim of discrimination. *Washington v. Davis* upheld a police department's written personnel test in which a higher percentage of blacks failed than whites. The *Davis* Court found no evidence that racial discrimination tainted either the establishment or fomulation of the test. *Arlington Heights* upheld a zoning board's decision which resulted in a racially disproportionate impact, thereby perpetuating racially segregated housing patterns. The Court determined that the zoning board's decision was nothing more than an application of a constitutionally neutral zoning policy. Justice Stewart concluded that the two cases did nothing to affect the well-settled rule that the Fourteenth Amendment guarantees "equal laws, not equal results."[37] The two cases did, however, form the basis for evaluating gender discrimination cases.[38]

Justice Stewart enunciated the two-fold inquiry that should be used when a statute, which is gender-neutral on its face, is challenged on the ground that its effects are disproportionately adverse to women: "The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert of [*sic*] overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination."[39] Justice Stewart offered this two-fold inquiry as the basis for analyzing the merits of Feeney's claim as to the presence or absence of purposeful discrimination within the statute.

Applying this two-fold inquiry, the Court first considered whether chapter 31, section 23, which was clearly gender-neutral on its face, was nonetheless gender-based in its purpose.[40] The majority opinion agreed with the district court's central findings that chapter 31, section 23 served legitimate purposes and that the statute had not been estab-

35. 426 U.S. 229 (1976).

36. 429 U.S. 252 (1977).

37. 99 S. Ct. at 2293.

38. *Id.*

39. *Id.* Justice Stewart noted that a finding of adverse impact is, in itself, only a starting point. It is the *purposeful discrimination* that is offensive to the Constitution. *Id. See also* Swann v. Board of Educ., 402 U.S. 1, 16 (1971).

40. Appellee Feeney admitted that the veterans' hiring preference was gender-neutral on its face. She further acknowledged that such hiring statutes were not per se invalid and she limited her attack to the Massachusetts "absolute preference." 99 S. Ct. at 2293-94.

lished for the *purpose* of discriminating against women. The Court thereby determined that the distinction between veterans and nonveterans, as drawn by the statute, had not been *originated* for the purpose of gender discrimination.[41]

Turning next to the statute's impact, the Court explored whether the statute's "real classification" was in fact neutral.[42] The seminal question here was whether significant numbers of women were precluded by the statute from obtaining preferred state civil service jobs because they were women, or rather, because they were nonveterans. The Court again noted that Massachusetts had consistently defined "veterans" in gender-neutral language and had always included women who served in the nation's military forces. Since veteran status was not "uniquely male" and the nonveteran class was not substantially all-female, the fact that few women benefit from the preference statute was not conclusive of a gender-based discriminatory purpose. Conversely, the Court found that the statute's disadvantages affected *all* nonveterans, male as well as female. The Court concluded: "Too many men are affected by ch. 31, § 23 to permit the inference that the statute is but a pretext for preferring men over women."[43]

Viewing the statute's purposes as the surest explanation of its impact, the Court held: "Just as there are cases in which impact alone can unmask an invidious classification . . . there are others, in which—notwithstanding impact—the legitimate noninvidious purposes of a law cannot be missed. This is one. The distinction made by ch. 31, § 23, is, as it seems to be, quite simply between veterans and nonveterans, not between men and women."[44] Consequently, the dispositive question became "whether the appellee has shown that a gender-based discriminatory purpose has, at least in some measure, shaped the Massachusetts veterans' preference legislation."[45]

Feeney argued that chapter 31, section 23 could not fall within the "neutral" rubric of *Washington v. Davis* and *Arlington Heights* for two reasons. First, she contended that the nature of the preference was "demonstrably gender-biased" because "it favors a status reserved under federal military policy primarily to men."[46] Second, she argued that the statute's impact upon the employment opportunities for women was

41. *Id.* at 2294. *See also* note 16 and accompanying text *supra*.

42. *Id. See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976).

43. 99 S. Ct. at 2294.

44. *Id.*

45. *Id.*

46. *Id.* This argument was premised on federal regulations that restricted the number

simply too inevitable to have been unintended. She concluded that by coupling these factors with the statute's lack of any relevance to actual job performance, she had clearly proved a discriminatory intent forbidden by the Constitution. But the majority of the Court could not agree with her conclusions.

Justice Stewart dimissed Feeney's contention that the veterans' preference was "inherently non-neutral" or "gender-biased." He concluded that such a presumption must necessarily assume that the legislature's intention in passing the statute was to incorporate into its civil service employment policies the array of allegedly discriminatory federal laws that limited the number of women who could acquire veteran status.[47] The Court did not agree with that contention for two reasons.[48] First, it was at odds with the district court's finding that Massachusetts had not purposefully discriminated against women by offering the veteran preference. Second, it could not be reconciled with the assumption made by both the appellee and the district court that a less extensive veteran preference could have been sustained. "Taken together," the majority concluded, "these difficulties are fatal."[49]

Justice Stewart admitted that veterans' hiring preferences, however modest or extreme, were inherently gender-biased.[50] But, he opined, the dispositive issue was whether the intent was to benefit veterans, or instead, to discriminate against women. He concluded that if it were the latter, the discriminatory intent, no matter how slight or small, would mandate that the preference statute be struck down. Justice Stewart stated: "Invidious discrimination does not become less so because the discrimination accomplished is of a lesser magnitude. Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not."[51] Concurring with the reasoning of the district court that the preference statute was not originally enacted or subsequently reaffirmed for purposes of sex discrimination, the majority concluded that "the State . . . intended nothing more than to prefer 'veterans.' "[52]

The majority opinion next addressed what Justice Stewart termed the appellee's "ultimate argument." The argument rested on the pre-

of women in the military to no more than 2% of the total force. Such limitations have since been abolished.

47. *Id.*
48. *Id.* at 2294-95.
49. *Id.* at 2295.
50. *Id.*
51. *Id.* (footnote omitted).
52. *Id.*

sumption, common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions.[53] The Massachusetts legislature was clearly aware that most veterans are men and that passage of the preference statute would have had an adverse effect on women candidates for the more desirable state civil service positions. But the term "discriminatory purpose" means more than intent as volition or intent as awareness of consequences.[54] It implies that the legislature selected or reaffirmed a course of action at least in part because of, not merely in spite of, the adverse effects it would have on an identifiable group.[55] The Court could not discern such a purpose in the instant case. Instead, the legislative history showed that the preference was consistently offered to "any person," rather than just to males. Justice Stewart, applying the *Washington v. Davis*[56] rationale, found that: "the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women."[57]

The opinion concluded with a short dissertation on the awkwardness of veterans' hiring preferences as an "exception to the widely shared view that merit and merit alone should prevail in the employment policies of government."[58] There is no question that veteran hiring preferences enjoy more public support in wartime than in peacetime and that absolute and permanent preferences are thought by some to give the veteran more than a square deal. But as the Court determined "the Fourteenth Amendment 'cannot be made a refuge from ill-advised . . . laws.' "[59] The Court made no attempt to advocate the Massachusetts law. It simply concluded that Appellee Feeney failed to demonstrate that the law reflected a discriminatory purpose on the basis of gender.

The judgment of the district court was reversed and the case remanded for further proceedings consistent with the opinion.[60]

53. *Id.* Justice Stewart cited the concurring opinion in the district court decision, Feeney v. Massachusetts, 451 F. Supp. 143, 151 (D. Mass. 1978), for a definitive statement of appellee's argument.

54. *Id.* at 2296. *See also* United Jewish Organizations v. Carey, 430 U.S. 144, 179 (1977) (Stewart, J., concurring).

55. *Id.*

56. 426 U.S. 229, 242 (1976).

57. 99 S. Ct. at 2296.

58. *Id.* at 2296-97. This commentary will not explore the political ramifications of a literal interpretation of the Court's phase "merit and merit alone" on various government equal opportunity policies.

59. *Id* at 2297 (quoting District of Columbia v. Brooke, 214 U.S. 138, 150 (1909)).

60. *Id.* On remand, the United States District Court, Massachusetts, held that plaintiffs'

Justice Stevens wrote a one-paragraph concurrence, joined by Justice White. Justice Stevens had difficulty with the majority's treatment of classifications that were determined not to be *overtly* based on gender. For such cases, Justices Stevens and White felt that the question whether the classification is *covertly* gender-based was the same as the question whether the classification's adverse effects reflected invidious gender-based discrimination. Regardless of which approach was taken, the concurrence found sufficient numbers of disadvantaged males in the instant case to refute any claim that the veteran hiring preference was intended to benefit males as a class and to disadvantage females as a class.[61]

Justice Marshall wrote a vigorous dissent and was joined by Justice Brennan. The dissent found that a clear discriminatory intent behind the statute was to be inferred from the inevitable or foreseeable impact of the preference. Justice Marshall concluded: "In my judgment, Massachusetts' choice of an absolute veterans' preference system evinces purposeful gender-based discrimination. And because the statutory scheme bears no substantial relationship to a legitimate governmental objective, it cannot withstand scrutiny under the Equal Protection Clause."[62]

The dissent asserted that when a legislature sought to advantage one group, it was not illogical that they also sought to disadvantage another group. Further, they asserted that it was often impossible to ascertain a sole or even dominant intent behind any given statute.[63] The critical constitutional inquiry, then, should not be "whether an illicit consideration was the primary or but-for cause of a decision, but rather whether if had *an appreciable role* in shaping a given legislative enactment."[64] The dissent acknowledged that in analyzing such cases, it is often necessary to use inferences based on objective factors since

equal protection *and* due process claims were rendered insubstantial by the Supreme Court's decision. *Feeney* v. *Commonwealth of Massachusetts*, 475 F. Supp. 109 (1979) (Tauro, J. dissenting). The district court refused to review plaintiff's newly-raised due process argument that non-veterans substantive liberty interest in public employment is subverted by the veteran's preference statute. 475 F. Supp. at 111. The United States Supreme Court affirmed. *Feeney* v. *Personnel Administrator of Massachusetts* (79-953, February 25, 1980).

61. *Id.* (Stevens, J., concurring).

62. *Id.* (Marshall, J., dissenting).

63. *Id.* at 2297-98. *See* McGinnis v. Royster, 410 U.S. 263, 276-77 (1973); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1214 (1970).

64. *Id.* at 2298 (emphasis added). *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977).

reliable evidence of subjective intentions is seldom available.[65] Justice Marshall cited several cases in which the Court had considered the underlying degree, inevitability and foreseeability of a statute's disproportionate impact, as well as the reasonable alternatives to the statute.[66]

The undisputed impact of the Massachusetts statute had been to render desirable civil service employment an almost exclusively male prerogative.[67] Justice Marshall concluded that when a statute reserves a major sector of public employment for one class, 98% of whom were males, the foreseeable impact of the "neutral" policy was so disproportionate that the burden should rest on the state to establish that gender-based considerations did *not* enter into the enactment of the legislative scheme.[68] It was this burden, the dissent insisted, that the state should have been required to satisfy.

Justice Marshall asserted that the Massachusetts statute created a gender-based civil service hierarchy, with women holding low grade clerical and secretarial jobs and men holding the more prestigious higher paying positions.[69] He concluded that the wide range of less discriminatory alternatives available to assist veterans and the predictably adverse effects of the statute on women rendered it anything but gender-neutral.[70] This statutory scheme, the dissent asserted, perpetuated the type of archaic assumptions about women's roles that had previously been held unconstitutional by the Supreme Court.[71]

In the second section of Justice Marshall's dissent, he revisited the equal protection test from *Craig v. Boren*,[72] whereby any statute reflecting gender-based discrimination must be substantially related to the achievement of important governmental objectives.[73] The dissent next

65. *Id. See* Beer v. United States, 425 U.S. 130, 148-49 n.4 (1976) (Marshall, J., dissenting).

66. *See* Monroe v. Board of Comm'rs, 391 U.S. 450, 459 (1968); Goss v. Board of Educ., 373 U.S. 683, 688-89 (1963); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Griffin v. Illinois, 351 U.S. 12, 17 n.11 (1956).

67. 99 S. Ct. at 2298 (Marshall, J., dissenting).

68. *Id.* at 2298-99. *See generally*, Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. L. REV. 95, 123.

69. 99 S. Ct. at 2299. *See* Feeney v. Massachusetts, 451 F. Supp. 143, 148 n.9 (D. Mass. 1978); Anthony v. Massachusetts, 415 F. Supp. 485, 488 (D. Mass. 1976).

70. *Id.*

71. *Id. See* Orr v. Orr, 440 U.S. 268 (1979); Califano v. Goldfarb, 430 U.S. 199, 210-11 (1977); Stanton v. Stanton, 421 U.S. 7, 14 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975).

72. 429 U.S. 190, 197 (1976).

73. 99 S. Ct. at 2299 (Marshall, J., dissenting). *See* Califano v. Webster, 430 U.S. 313, 316-17 (1977); Craig v. Boren, 429 U.S. 190, 197 (1976); Reed v. Reed, 404 U.S. 71, 76 (1971).

examined the three salient interests proposed by Massachusetts to support the absolute veterans' preference: (1) assisting veterans to readjust to civilian life; (2) encouraging military enlistment by providing a "headstart" to substantial employment upon leaving the service; and (3) rewarding those individuals who have served their country.[74]

Justice Marshall asserted that the interest in facilitating veteran transition to civilian status was overinclusive.[75] This effect was due to the large number of veterans who enjoyed the benefits of the statute but who were discharged from the armed services many years before. Justice Marshall contended that such veterans had no need for readjustment assistance. The disseent also attacked the state's second asserted justification for the statute, that of encouraging military enlistments. Justice Marshall pointed out that the majority of those affected by the statute were drafted into the service. If the statute's purpose was to encourage enlistment, he opined, it was ill-suited for its purpose.[76]

Finally, the dissent attacked Massachusetts' third proposed justification, that of rewarding veterans for service to their country. Justice Marshall wrote: "Where a particular statutory scheme visits substantial hardship on a class long subject to discrimination, the legislation cannot be sustained unless 'carefully tuned to alternative considerations.' "[77] He then discussed a number of less discriminatory alternatives such as a points system or an absolute preference of limited duration.[78] Finally, he addressed a number of Massachusetts programs that already assisted the veteran in various ways such as tax abatements, educational subsidies and special programs for needy veterans.

The dissent concluded: "In its present unqualified form, the Veterans Preference Statute precludes all but a small fraction of Massachusetts women from obtaining any civil service position also of interest to men. . . . Given the range of alternatives available, this degree of preference is not constitutionally permissible. I would affirm the judgment of the court below."[79]

74. 99 S. Ct. at 2300 (Marshall, J., dissenting).

75. *Id.* The dissent argued that the statute conferred a permanent preference, which could be invoked repeatedly, thus negating its justification as an aid to readjustment to civilian life.

76. *Id. See* Califano v. Webster, 430 U.S. at 317; Weinberger v. Wiesenfeld, 420 U.S. at 648.

77. 99 S. Ct. at 2300 (quoting Trimble v. Gordon, 430 U.S. 762, 772 (1971)). *See* Caban v. Mohammed, 441 U.S. 380 (1979); Mathews v. Lucas, 427 U.S. 495 (1976).

78. 99 S. Ct. at 2300.

79. *Id.*

Analysis

The Supreme Court has long treated state classification by race, national origin or alien status as suspect and therefore subject to strict scrutiny.[80] Gender discrimination, however, has never been held to the high standards of review characteristic of the Supreme Court's handling of the other forms of stereotypic classification and legislation. Not until its decision in *Reed v. Reed*[81] did the Court choose to review political judgments respecting the role of women.[82] In *Reed*, the Court unanimously invalidated an Idaho statute requiring that a male be appointed to administer an estate if two individuals, one male and one female, were otherwise equally entitled to the appointment. Although the Court purported to use its traditional rational relationship test, it stated that "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, [was] to make the very kind of arbitrary legislative choice forbidden by [the guarantee of equal protection]."[83]

It became clearer in later decisions that the Court was indeed assuming a special sensitivity to gender as a classifying factor. In *Frontiero v. Richardson*[84] a plurality of the Court discussed support for holding classifications based on gender to be suspect.[85] In *Weinberger v. Wiesenfeld*[86] and *Stanton v. Stanton*,[87] the Court continued searching for a clear test with which to analyze gender classifications. These cases dealt with laws affecting behavior: "All either prevented, or economically discouraged, departures from 'traditional' sex roles, freezing biology into social destiny."[88]

In 1976 the Court decided *Craig v. Boren*,[89] which invalidated a

80. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1060 (1978).

81. 404 U.S. 71 (1971).

82. TRIBE, *supra* note 80, at 1063.

83. 404 U.S. at 76. *See* TRIBE *supra* note 80, at 1063. *See also* Gunther, *The Supreme Court 1971 Term: Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 34 (1972).

84. 411 U.S. 677 (1973).

85. *Id.* at 682. Justices Douglas, Marshall and White joined Justice Brennan's plurality opinion, announcing the judgment of the Court. Justice Stewart concurred in the judgment but did not join the plurality opinion. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, also concurred in the judgment of the Court, but determined that it was unnecessary to decide whether gender constituted a suspect classification.

86. 420 U.S. 636 (1975).

87. 421 U.S. 7 (1975).

88. TRIBE, *supra* note 80, at 1065. *See also* Davis v. Passman, 439 U.S. 925 (1979) (holding United States Congressman's dismissal of female staff member on basis of gender violative of Fifth Amendment).

89. 429 U.S. 190 (1976). Justice Brennan wrote the opinion for a seven-to-two Court.

state statute forbidding the sale of 3.2% beer to males under twenty-one, but permitting such sales to females over eighteen. The *Craig* majority adopted a new intermediate standard of review in which they determined that gender classifications must serve *important* governmental objectives and must be *substantially related* to the achievement of those objectives.[90] This new intermediate test falls short of the strict scrutiny test employed in *Regents of the University of California v. Bakke*[91] and sets a new standard for analysis of statutory gender classifications. In *Feeney*, decided two years after *Craig v. Boren*, the entire Court appeared to adopt the intermediate standard of review for gender classifications. What this may mean in the future is open to speculation, but the instant case, like *Vorchheimer v. School District*,[92] strongly suggests that a new pragmatism is on the horizon for cases involving gender classifications. The standard of review is now clearer, but the future judicial interpretation of that standard is not. Without strict scrutiny the cases may well be filled with appellate review of essentially factual determinations.

The intermediate standard for judicial review of statutory gender classifications provides that any law overtly or covertly designed to prefer males over females, or vice versa, requires an *important governmental objective* and must be *substantially related* to the achievement of that objective. The instant case further defines the Court's position by requiring an *exceedingly persuasive justification* to support such a statute.[93] The Court must also discern the purpose behind statutes which, on their face, appear neutral. The disparate impact of such statutes upon groups that have historically been the victims of discrimination is of particular concern. But the important consideration is the discriminatory *purpose* behind the law, not the disparate impact or result. Unequal results merely point to the possibility of an unconstitutional purpose; they are not conclusive evidence of such a purpose. In the instant case the unequal result of the veterans' preference was not the principal issue. The dispositive determination in *Feeney* was that the intent was to benefit veterans rather than to discriminate against wo-

Justices Powell, Stevens, Stewart and Blackmun each wrote separate concurring opinions. Chief Justice Burger and Justice Rehnquist both filed dissenting opinions.

90. TRIBE, *supra* note 80, at 1066.

91. 439 U.S. 265 (1978).

92. 430 U.S. 703 (1977) (per curiam) (4-4) (Rehnquist, J., not participating). An evenly divided Court upheld the Philadelphia School District's maintenance of two sexually segregated senior high schools where the education and facilities were determined to be *equal*, although *separate*.

93. *See* notes 34-37 and accompanying text *supra*.

men.[94]

The Court appears to have had some difficulty in justifying the statute's obviously non-neutral nature in that it overtly prefers one class of people, veterans, over others. This problem is compounded somewhat in that the statute does not attempt to define a job-related characteristic.[95] The statute simply confers upon veterans—a class evidently perceived to be deserving—a competitive, if not overwhelming, head start. The Court makes no attempt to defend the enlistment policies of the armed forces and even admits that they may have discriminated on the basis of gender.[96] But, as Justice Stewart concludes, "the history of discrimination against women in the military is not on trial in this case."[97]

The Court clearly indicated displeasure with the awkwardness and permanence of the Massachusetts preference and admitted that the state legislature may have been following an unwise policy.[98] Interestingly, the majority alluded to the "widely shared view that *merit and merit alone* should prevail in the employment policies of government."[99] This is curious language coming from a Court so concerned with the success of a myriad of equal opportunity and affirmative action policies which serve to supplement the merit system in governmental procedures for employment and administration. The Court insisted, however, that it would not make the Fourteenth Amendment a "refuge from ill-advised . . . laws."[100]

The dissent merely reflects the antithesis of the majority's findings concerning the existence of a discriminatory intent behind the veterans' preference statute, that it is to be inferred from its inevitable and foreseeable impact.[101] This approach is a logical result of the intermediate test, whereby some justices discern the facts in one manner, some in another. But the dissent seems to want to move the intermediate test closer to the strict scrutiny analysis of *Regents of the University of California v. Bakke*.[102] Justice Marshall's desire to alter the causative con-

94. *See* notes 47-50 and accompanying text *supra*.

95. 99 S. Ct. at 2295. For example, in Washington v. Davis, 426 U.S. at 229, the written test at issue was defended as a gauge with which certain human characteristics desired in police officers could be measured.

96. 99 S. Ct. at 2295. *See* Frontiero v. Richardson, 411 U.S. 677 (1973).

97. 99 S. Ct. at 2295.

98. 99 S. Ct. at 2297. *See* notes 58, 59 and accompanying text *supra*.

99. *Id.* (emphasis added).

100. *Id.* See notes 58, 59 and accompanying text *supra*.

101. *Id.* at 2298 (Marshall, J., dissenting).

102. 439 U.S. 265 (1978).

stitutional inquiry is designed for that purpose.[103] He was successful, however, in recruiting only Mr. Justice Brennan in support of the proposal.

In *Personnel Administrator of Massachusetts v. Feeney*, the Supreme Court apparently adopted the *Craig v. Boren* intermediate standard of judicial review for cases involving assertions of gender-based discrimination. All nine members of the Court appeared to accept its premise and adopt its test. On a legal basis the test promises a case-by-case factual analysis of statutes and their legislative histories, however tedious and subjective. The difficulties associated with such analysis seem to be necessary if we are to avoid the suspect classification for gender and the concomitant purge of all statutory provisions which contain even the slightest hint of gender bias. The Court clearly refused to indulge in such a total reconstruction of government employment and administration practices and procedures. They left such restructuring to the state legislatures but they left no question that they believed Massachusetts should reevaluate its preference system.

What of Feeney and others like her who may fall between the cracks of the intermediate test? There is no doubt that this decision will make it more difficult for women to base gender discrimination claims on the equal protection clause of the Fourteenth Amendment. The alternatives are few and they are not promising. First, they may bring their cases to state courts and base their claims on state constitutional grounds, grounds which may provide more protection in such matters than the federal constitution provides. Second, they can try to change the laws in the state and federal legislatures. This too is a bleak prospect since veterans possess strong political power in the legislatures.[104] Unless such changes occur, challengers must establish for the courts a clear discriminatory intent or purpose behind the statute they seek to nullify.

*Caban v. Mohammed**

In *Caban v. Mohammed*,[1] a divided United States Supreme Court struck down on equal protection grounds a New York statute which allowed an unwed mother, but not an unwed father, to block the adop-

103. *See* notes 63, 64 and accompanying text *supra*.
104. NEWSWEEK, June 18, 1979, at 52.

* Commentary by Dorothy McArthur, member, third-year class.
1. 441 U.S. 380 (1979).

tion of their illegitimate child. The five Justice majority found the statute unconstitutional on the grounds that the gender-based distinction contained in the statute was not substantially related to the achievement of important governmental objectives.

Abdiel Caban sired two children, David Andrew Caban[2] and Denise Caban,[3] during the six-year period in which he lived with Maria Mohammed in New York City. The couple held themselves out as husband and wife during this time and Caban had been denoted as the father on the birth certificates of the two children. Although the couple was never legally married,[4] both contributed to the support of the family unit.[5] In December of 1973 the couple separated. The following January, Maria, who had custody of the children, married Kazim Mohammed.[6] Caban continued to see the children on a weekly basis[7] until, at the Mohammeds' request, the children moved to Puerto Rico with Maria's mother.[8] Both parents kept in touch with the children, and in November of 1975, Caban secured their return to New York through deceptive means.[9] After unsuccessfully attempting to retrieve the children, Maria instituted custody proceedings and was awarded temporary custody.[10] Caban retained visitation rights.[11] In the interim,[12] the Mohammeds filed a petition to adopt the children under section 110 of the New York Domestic Relations Law.[13] Two months later, Caban and his new wife, Nina, cross-petitioned for adoption.

2. Born July 16, 1969.

3. Born March 12, 1971.

4. Caban was married to another woman throughout the period of cohabitation. 441 U.S. at 382.

5. *Id.*

6. *Id.*

7. Caban was able to see the children when Maria brought them to visit her mother who lived one floor above Caban. *Id.*

8. *Id.*

9. The grandmother agreed to let Caban take the children for a few days while he was visiting in Puerto Rico. Caban returned to New York with them. *Id.* at 383.

10. *Id.*

11. *Id.*

12. The custody proceeding was stayed pending determination of the adoption proceeding. *Id.*

13. *Id.* Section 110 of the New York Domestic Relations Law provides in pertinent part: "An adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an adult or minor husband or an adult or minor wife may adopt such a child of the other spouse." N.Y. DOM. REL. LAW § 110 (McKinney 1977).

The Lower Court Decisions

In granting the petition filed by the Mohammeds, the Surrogate[14] noted that Maria had exercised her rights under section 111 of the New York Domestic Relations Law[15] and had withheld her consent to the cross-petition lodged by the Cabans, thus effectively precluding Abdiel, the natural father, from ever adopting the children. Abdiel, on the other hand, had no corresponding power but was merely entitled to a voice in the adoption proceedings instituted by Maria.[16]

Caban appealed the Surrogate's decision to the Appellate Division of the New York Supreme Court[17] and to the New York Court of Appeals.[18] Both courts affirmed the Surrogate's decision on the ground that the New York Court of Appeals decision in *In re Adoption of Malpica-Orsini*[19] foreclosed the possibility of a different decision on the constitutional challenge levied by appellant.

In that case, the New York Court of Appeals had noted that it was outside the province of the judiciary to legislate[20] and that states could

14. The two petitions were heard by a law assistant to a New York Surrogate in Kings County, N.Y.

15. N.Y. DOM. REL. LAW § 111 (McKinney 1977).

16. 441 U.S. at 380-87.

17. *In re* David Andrew C., 56 A.D.2d 627, 391 N.Y.S.2d 846 (1977).

18. *In re* David A.C., 43 N.Y.2d 708, 372 N.E.2d 42, 401 N.Y.S.2d 208 (1977).

19. 36 N.Y.2d 568, 331 N.E.2d 486, 370 N.Y.S.2d 511, *appeal dismissed sub nom.* Orsini v. Blasi, 423 U.S. 1042 (1977) (lack of substantial federal question).

The facts in *In re* Adoption of Malpica-Orsini are virtually on point with the action before the Court. In that case a child was born to Hector Orsini and Corrine Caberti outside the bonds of marriage. The father readily admitted paternity and provided support for the child. Upon separation, the mother retained custody of the child, but Orsini made monthly payments and continued to visit the child. In January of 1973, the mother took steps to sever all ties with the father; the following February she married another man. The natural father did not learn of the mother's marriage until he brought an action to enforce his visitation rights. At this time the natural mother announced her marriage and instituted adoption proceedings.

Although the family court required that Orsini be notified, they held that the natural father's consent was not a prerequisite to the adoption.

Orsini appealed the court's holding directly to the New York Court of Appeals. That court, in a split decision, upheld the lower court's finding that there had been no abridgment of Orsini's rights under either an equal protection or due process challenge.

20. The court articulated several well-established principles which guided their inquiry concerning the constitutionality of the challenged statute: "that a legislative enactment carries with it an exceedingly strong presumption of constitutionality; that, while this presumption is rebuttable, unconstitutionality must be demonstrated beyond a reasonable doubt; that every intendment is in favor of the statute's validity; that the party alleging unconstitutionality has a heavy burden; and that only as a last resort will courts strike down legislative enactments on the ground of unconstitutionality. Nor may courts substitute their judgment for that of the Legislature as to the wisdom and expediency of the legislation.

"There is a further presumption that the Legislature has investigated and found facts

treat different classes of people in different ways so long as the classification was reasonable, not arbitrary and bore a fair and substantial relation to the objective sought—thus resulting in equal treatment for all persons similarly situated.[21]

Because "sensitive and fundamental personal rights" were involved, a five judge majority of the appellate court recognized the need for elevated scrutiny.[22] The court's inquiry focused on two essential questions: first, the legitimate state interest promoted by the classification, and second, the fundamental personal rights endangered by the classification.[23]

The court determined that the child's welfare was the state interest behind the enactment of section 111 of the New York Domestic Relations Law.[24] As a corollary to that state interest, the court contrasted the negative and unjust impact that the status of illegitimacy could have on a child[25] with the positive benefits afforded such a child through the adoption process. "Adoption," as the court saw it, "is a means of establishing a real home for a child."[26] A happy family life

necessary to support the legislation . . . as well as the existence of a situation showing or indicating its need or desirability . . . . Thus, if any state of facts, known or to be assumed, justify the law, the court's power of inquiry ends." 36 N.Y.2d at 570-71, 331 N.E.2d at 488, 370 N.Y.S.2d at 514.

21. *Id.* at 571, 331 N.E.2d at 488-89, 370 N.Y.S. 2d at 515.

22. "Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny." *Id.* at 574, 331 N.E.2d at 490, 370 N.Y.S.2d at 517-18 (citing Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Brown v. Board of Educ., 347 U.S. 483 (1954)).

23. 36 N.Y.2d at 574, 331 N.E.2d at 490, 370 N.Y.S.2d at 517-18.

24. *Id.* at 575, 331 N.E.2d at 491, 370 N.Y.S. 2d at 519. "The welfare of a child is a legitimate State interest and the State has a wide range of power for limiting parental freedom and authority in matters affecting the child's welfare." *Id.* (citing Prince v. Massachusetts, 321 U.S. 158, 167 (1944)).

25. 36 N.Y. 2d at 574-75, 331 N.E.2d at 491, 370 N.Y.S.2d at 518 (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175-76 (1972)). " 'The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust.' " *Id.*

26. 36 N.Y.2d at 572, 331 N.E.2d at 489, 370 N.Y.S.2d at 511. *See* SCHATKIN, DISPUTED PATERNITY PROCEEDINGS 119 (3d ed. 1944). The New York court looked to Isaac's book, *Adopting a Child Today*, for further support for its views on the preferability of adoption: "Adoption has always had the dual function of giving children homes and homes children . . . . The emphasis is now on promoting the welfare of an otherwise homeless child. . . . Illegitimacy and family breakdown have become problems on an unprecedented scale in modern industrial societies. Never before have there been so many thousands of children for whom society finds each year that it must make some provision . . . . [T]he purpose of adoption is almost uniformly seen as promoting the welfare of children." ISAAC, ADOPTING A CHILD TODAY 210-11 (1965).

secured the additional benefit of producing well-adjusted citizens. To require the illegitimate father's consent would only serve to impede the adoption process[27] which would work to the detriment of the child.[28]

The second question was concerned with the fundamental personal rights endangered by a classification of illegitimacy. The state appellate court in examing this issue utilized the equal protection mode of analysis formulated by Justice Powell in *Weber v. Aetna Casualty & Surety Co.*,[29] in weighing the rights claimed by the illegitimate father against the aforementioned interest of the state.

Although an illegitimate father may indeed have an interest in the future of his child, the difficulties posed by requiring his consent were considered too onerous to make such a prerequisite viable in the eyes of the court. In addition to the difficulty and expense involved in obtaining such consent, the appellate court looked to the burdens that would be placed upon institutions and foundling homes due to the resulting uncertainity concerning the children they placed and the possibility of extortion that could conceivably arise out of such a requirement.[30] Prospective parents, it was also feared, would be dissuaded from adopting illegitimates in light of such possible entanglements.[31]

With these considerations in mind the New York Appellate Court stated:

> The inferior classification of the father of the child born out of wedlock bears a significant relationship to the recognized purpose which section 111 of the Domestic Relations Law commendably serves. Without it, the chances that such a child will have the equal rights and benefits of a home will be immeasurably diminished and the likelihood that he or she will be a pawn for the avaricious and embittered will be greatly enhanced.[32]

27. 36 N.Y.2d at 572, 331 N.E.2d at 489, 370 N.Y.S.2d at 516.

28. *Id.* at 575-76, 331 N.E.2d at 491, 370 N.Y.S.2d at 519. Dr. Ner Littner, psychiatric consultant to adoption agencies in Chicago has stated, "We know today that keeping a baby in a boarding house can cripple him emotionally." Littner, *Fathers' Rights—Supreme Court Rulings on Adoption Complicate the Placing of Children*, Wall St. J., July 9, 1972, at 1, col. 1.

29. 406 U.S. 164 (1972). "Justice Powell's formulation of the equal protection question centers on the merits of the particular controversy at hand. It appears to allow a realistic examination of conflicting policies and interests in a challenged statute without resort to the tired formulations and stock responses which the two-tier approach automatically invokes." *In re* Adoption of Malpica-Orsini, 36 N.Y.2d 568, 575, 331 N.E.2d 486, 491, 370 N.Y.S. 2d 511, 518 (1975).

30. *Id.* at 572-73, 331 N.E.2d at 489-90, 370 N.Y.S.2d at 516-17.

31. *Id.* The court also expressed concern that marriages to illegitimate mothers having custody of their child would be similarly discouraged because the prospective spouse might never be able to adopt the child. *Id.*

32. *Id.* at 575, 331 N.E.2d at 491, 370 N.Y.S.2d at 519.

The United States Supreme Court Decision

Without reaching the due process issues raised by the appellant,[33] the majority found that the distinction between illegitimate fathers and all other parents[34] drawn by the terms of the statute regarding the necessity of consent violated the equal protection clause of the Fourteenth Amendment. Although appellees had urged that the consent requirement lacked substance and that the controlling factor was a determination of what was in the best interests of the child, the Court found that such a contention lacked support in New York case law.[35] Indeed, in looking at the case at hand, the Court found that the element of consent rather than the best interests of the children had tipped the scales of justice in favor of Maria's petition for adoption. The Court noted that because Maria had had the power to withhold her consent, adoption by Abdiel would effectively never have been possible. Abdiel had had no corresponding power and thus his only mode of blocking adoption by Maria was to prove her to be an unfit parent.[36]

In seeking to provide adequate justification for the gender-based distinction, appellees had set forth two primary arguments. First, they asserted that the "fundamental difference between maternal and paternal relations" justified the distinction.[37] The Court, however, explicitly rejected this argument, ruling that "[e]ven if unwed mothers as a class were closer than unwed fathers to their newborn infants, this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased."[38] Further, the Court found that "an unwed father may have a relationship with his children fully comparable to that of the mother."[39] The

33. Appellant contended that under the Court's decision in Quilloin v. Walcott, 434 U.S. 246 (1978), natural fathers have a due process right, unless they are adjudged unfit, to continue their parental relationship with their child. Caban v. Mohammed, 441 U.S. 380, 385 (1979). The Court declined, however, to decide "whether a state is constitutionally barred from ordering adoption in the absence of a determination that the parent whose rights are being terminated is unfit." *Id.* at 394 n.16.

34. Appellant Caban also challenged the constitutionality of the distinction made by section 111 with regard to married fathers versus unmarried fathers. The Court, however, did not reach this issue, having invalidated the statute on equal protection grounds. 441 U.S. at 394 n.16.

35. *Id.* at 387.

36. *Id.* at 387-88.

37. *Id.* at 388. " '[A] natural mother, absent special circumstances, bears a closer relationship with her child . . . than a father does.' " *Id.* (quoting Transcript of Oral Argument at 41).

38. 441 U.S. at 389. In the present action the children had lived as a family unit with both parents and were ages four and six when adoption proceedings were instituted.

39. *Id.*

Court went on to find that in the instant case, there was no reason to believe that the mother's relationship to the children differed significantly from that of the father.[40]

Appellees next contended that the challenged statute was "substantially related to the State's interest in promoting the adoption of illegitimate children,"[41] an argument to which the New York Court of Appeals decision of *In re Malpica-Orsini* lent considerable support. In examining that decision the Court acknowledged the important interest of the state in providing for the welfare of such children.[42] The Court found, however, that "neither the State nor the appellees have argued that unwed fathers are more likely to object to the adoption of their children than are unwed mothers; nor is there any self-evident reason why as a class they would be."[43] The difficulties foreseen by the New York Court of Appeals in *In re Malpica-Orsini*,[44] were dismissed by the Court as pertaining primarily to infants.[45] But where the father had acknowledged his paternity and had established substantial ties with his children, as in the instant case, the Court could see no reason for denying him a voice equal to that of the unwed mother.[46] Conversely, the Court held that "where the father has never come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child."[47]

Although the Court conceded, in a footnote, that it was not the function of a court " 'to hypothesize independently on the desirability or feasibility of any possible alternative[s]' to the statutory scheme formulated by [the State],"[48] they noted that alternatives existed other than the gender-based distinction to serve the asserted state interest.[49] The majority concluded by noting the harsh effect of the over-broad, gender-based restriction contained in the statute on unwed but loving

40. *Id.*

41. *Id.*

42. *Id.* at 390-91.

43. *Id.* at 392.

44. One difficulty foreseen by the Court was that of locating the father and establishing paternity. *Id.*

45. The Court intimated that a legislative distinction favoring unwed mothers may be justified at birth; however, because the question was not before them they did not directly express their view. *Id.* at 392 & n.11.

46. *Id.* at 393.

47. *Id.* It should also be noted that under the challenged statute, parental consent is not necessary in adoption proceedings if the parent has abandoned or relinquished his or her rights to the child. N.Y. DOM. REL. LAW § 111(2) (a) & (b) (McKinney 1977).

48. 441 U.S. at 393 n.13 (quoting Lalli v. Lalli, 439 U.S. 259, 274 (1978)).

49. *Id.*

fathers who had established ties with their children. For all of these reasons the Court reversed the New York Court of Appeals and held section 111 of the New York Domestic Relations Law to be unconstitutional.

Justices Stewart, Stevens, Rehnquist and Chief Justice Burger all took exception to the majority's holding. Justice Stewart, in an individual dissent,[50] would have upheld section 111, citing as his primary reason the strong interest of the state in promoting the welfare of children in general and of illegitimate children in particular, who were faced by reason of their birth with "formidible handicaps."[51] Justice Stewart noted that in contrast to legitimate children, "[illegitimate children] typically depend upon the care and economic support of only one parent—usually the mother."[52] Adoption provided an avenue for removing such impediments. Because the adoption process was facilitated by requiring the consent of only one parent, the mother, Justice Stewart perceived a "substantial relationship" between the maternal consent requirement and the state objective to be served by adoption.[53] Justice Stewart first addressed the equal protection and due process arguments levied by the appellant with regard to the statutory distinction between unwed fathers and all other parents.[54]

Having concurred with the majority in *Stanley v. Illinois*[55] in striking down a statutory presumption that unwed fathers were not fit parents,[56] Justice Stewart denounced appellant's reliance on that case, noting that the present situation was distinguishable from *Stanley*. First, he noted that in the present case the unwed mother was alive and indeed sought full control of the children; second, in *Stanley* the father had not even been afforded a hearing whereas *Caban* had actively participated in the adoption proceeding.[57]

Regarding the distinction between parental classes, Justice Stewart stated: "Parental rights do not spring full-blown from the biological

50. 441 U.S. at 394 (Stewart, J., dissenting).

51. *Id.* at 395.

52. *Id.*

53. *Id.*

54. *Id.* at 395-97.

55. 405 U.S. 645 (1972) (Justices White, Brennan, Stewart, Marshall and Douglas comprised the majority; Chief Justice Burger and Justice Blackmun dissented; Justices Powell and Rehnquist did not take part in the consideration or decision).

56. In *Stanley*, the state, upon death of the mother, removed the children from the custody of their father, without benefit of a hearing on his fitness as a parent. This occurred because the parents had not been married, despite the fact that they had lived as husband and wife for over 18 years. *Id.*

57. 441 U.S. at 396 (Stewart, J., dissenting).

connection between parent and child. They require relationships more enduring."[58] While commenting that the mother's parental relationship was clearer due to the physiological ties,[59] he also observed, "The Constitution does not require that an unmarried father's substantive parental rights must always be coextensive with those afforded to the fathers of legitimate children. . . . [T]he absence of a legal tie with the mother provides a constitutionally valid ground for distinction."[60] Stewart conceded, however, that in "some circumstances the actual relationship between the father and the child may suffice to create in the unwed father parental interests comparable to those of the married father."[61] Similarly, Justice Stewart pointed out that if the father had legal custody of the child, his consent would have been necessary under the statute.[62]

Appellant's equal protection challenge, predicated on alleged gender-based discrimination under the statute, was regarded by Justice Stewart as more substantial and by its very nature deserving of "careful constitutional examination."[63] Justice Stewart noted, however, that gender-based classifications were not invalid when men and women were not in fact similarly situated.[64]

Because an unwed mother, unlike the majority of unwed fathers, was an identifiable figure in the child's life, common law and statutory rules had given her the ability to confer or withhold consent in adoption proceedings.[65] Such a preference was based, according to Justice Stewart, not on gender alone, but rather on the mother's total physical and social relationship to the child.[66] Were the Court dealing with a

58. *Id.* at 397.

59. *Id. See also* notes 90-94 and accompanying text *infra* for Justice Stewart's discussion concerning alleged discrimination on the basis of gender.

60. *Id.*

61. *Id.*

62. *Id.* at 395. Subsection 1(d) of section 111 of the New York Domestic Relations Law requires the consent of "any person . . . having lawful custody of the adoptive child." N.Y. DOM. REL. LAW § 111 (1)(d) (McKinney 1977).

63. 441 U.S. at 398 (Stewart, J., dissenting). Such classifications are carefully scrutinized because of their tendency to be invidious and because "they may reflect or operate to perpetuate mythical or stereotyped assumptions about the proper roles and the relative capabilities of men and women that are unrelated to any inherent differences between sexes." *Id.*

64. *Id.*

65. *Id.* at 398-99.

66. *Id.* at 399: "[C]ommon and statutory rules of law reflect the physical reality that only the mother carries and gives birth to the child, as well as the undeniable social reality that the unwed mother is always an identifiable parent and the custodian of the child . . . . An unwed father who has not come forward and who has established no relationship with the child is plainly not in a situation similar to the mother's. New York's consent distinc-

situation where the unwed father had not established a relationship with the child, the validity of the statutory distinction would have been more apparent.[67] While noting that Caban had established a paternal relationship, Justice Stewart expressed his concurrence with the arguments set forth in Justice Stevens' dissent[68] that because the statute was constitutional as per the norm, it should not be invalidated to meet such exceptional circumstances.[69] Justice Stewart went beyond this rationale, however, and inquired "whether the decision to select the unwed mother as the parent entitled to give or withhold consent and to apply that rule even when the unwed father in fact has a paternal relationship with his children constitutes invidious sex-based discrimination."[70] In answering this question in the negative, Justice Stewart considered what would best serve the interests of the child. Because Caban was given the opportunity to show that the proposed adoption by Maria and Kazim Mohammed would not be in the best interests of the children, Justice Stewart contended that the Court was bound by the implication contained in the lower court decision that adoption by the Mohammeds was in the best interests of the children.[71]

Justice Stevens authored a separate dissent and was joined by Chief Justice Burger and Justice Rehnquist.[72] Although Justice Stevens viewed appellant's primary objection to be the due process challenge, he accorded it minimal attention. Justice Stevens advocated an extention of the language found in *Stanley v. Illinois*,[73] which had indicated the Court's approval of the termination upon adoption of the parental rights of a father who had abandoned or mistreated his child, to include situations where it is determined that the best interests of the child will be served by adoption.[74] In a situation such as that presented by *Caban v. Mohammed*, where the natural family unit had been destroyed and the unwed father had not attempted previously to legitimate the children, such a termination would have been especially

tions have clearly been made on this basis, and in my view they do not violate the Equal Protection Clause of the Fourteenth Amendment." *Id.*

67. *Id.*

68. *See* notes 100-18 and accompanying text *infra*.

69. 441 U.S. at 399-400 (Stewart, J., dissenting).

70. *Id.* at 400.

71. *Id.* "Implicit in the finding made by the New York courts is the judgment that termination of his relationship with the children will in fact promote their well-being . . . ." *Id.*

72. *Id.* at 401 (Stevens, J., dissenting, joined by Chief Justice Burger and Justice Rehnquist).

73. 405 U.S. 645 (1972).

74. 441 U.S. at 414-15 (Stevens, J., dissenting).

beneficial. According to Justice Stevens, to require a showing of unfitness on the part of the father would only have dimmed the children's chances of being legitimated.[75]

In addressing the equal protection challenge, Justice Stevens noted that elevated scrutiny was essential to any analysis of the challenged statute. While not all males fell into the disadvantaged class, the statutory distinction was still predicated on gender.[76]

Beginning with the premise that "[t]he state interest in facilitating adoption in appropriate cases is strong—perhaps even 'compelling,' "[77] Justice Stevens sought to discern whether or not differences existed between the two classes which would have provided a justification for the varied treatment under the statute.[78] In line with this objective, Justice Stevens focused on the relationship of both parents to a newborn[79] and resolved that although "[b]oth parents are equally responsible for the conception," from that point on the significance of the unwed mother's role in the child's destiny far outweighed that of the unwed father.[80] In support of this contention, Justice Stewart made reference to sociological and anthropological research that indicated that both physical and psychological bonds developed between the mother and child as a result of their symbiotic relationship and close contact during pregnancy and immediately thereafter.[81] Further, he noted that the identity of the unwed father could be uncertain and should the mother have chosen not to inform him of the anticipated birth, it was conceivable that the unwed father might not be aware that he had sired a child.[82] Because of such "natural" differences, Justice Stevens drew the conclusion that

75. *Id.* at 415.

76. *Id.* at 403 n.4. The test for determining whether a distinction is gender-based is whether "but for their gender the members of the class would not be disadvantaged." *Id.*

77. *Id.* at 402 (footnote omitted). Justice Stevens pointed out that he intentionally limited the word "compelling" by the word "perhaps" to convey not that any statute which furthers the state interest is constitutional, but rather to suggest that, due to the important state interest involved, courts should be compelled to give the statute careful thought before ruling on its constitutionality. *Id.* at 402 n.3.

78. *Id.* at 403. "That determination requires more then merely recognizing that society has traditionally treated the two classes differently. But it also requires analysis that goes beyond a merely reflexive rejection of gender-based distinctions." *Id.* (footnote omitted).

79. *Id.* at 404. Justice Stevens' rationale for focusing on this early period was that "most adoptions involve newborn infants or very young children." *Id.* (footnote omitted).

80. *Id.* In particular, Justice Stevens noted that the decision of whether or not to bear the child, once conceived, rests with the mother. Planned Parenthood v. Danforth, 428 U.S. 52, 67-75 (1976).

81. *Id.* at 405 n.10. *See also* 1 & 2 J. BOWLBY, ATTACHMENT AND LOSS (1969, 1973); M. MAHLER, THE PSYCHOLOGICAL BIRTH OF THE HUMAN INFANT (1975).

82. 441 U.S. at 404-05. The difficulty of proving paternity has frequently been noted by the Court. *See, e.g.*, Parham v. Hughes, 441 U.S. 347 (1979); Lalli v. Lalli, 439 U.S. 259

it was "probable that the mother, and not the father or both parents, will have custody of the newborn infant."[83] Justice Stevens further concluded that such "differences justify a rule that gives the mother of a newborn infant the exclusive right to consent to its adoption."[84] The benefits deemed by Justice Stevens to flow from such a rule were : 1) the rule allows the mother maximum flexibility in providing for the welfare of the child; 2) it provides the unwed father with incentive to marry the mother of his child; 3) it does not adversely affect the disinterested father; and, 4) it allows the child to be assimilated into the adoptive home as quickly as is feasible.[85] To strengthen his arguments, Justice Stevens related several negative aspects of requiring the consent of both parents—a rule that he contended would "complicate and delay the adoptive process."[86] First, such a rule would remove the mother's freedom of choice without concurrently decreasing her responsibility for the child. Second, an invasion of the mother's privacy might be required in order to give the unwed father notice.[87] Finally, adoption costs—in both the monetary and emotional senses—would necessarily be increased.[88] While a state could have deemed these factors a necessary burden to be borne by the mother in order to protect the interests of an unwed father, such factors could also be viewed as providing justification for some gender-based distinctions.[89]

Justice Stevens also took issue with the majority's approach to equal protection analysis. "[T]he mere fact that the statute draws a 'gender-based distinction,' . . . should not, . . . give rise to any presumption that the impartiality principle embodied in the Equal Protection Clause has been violated."[90] Rather, Justice Stevens would require a demonstration that the unfairness had occurred in a significant number of situations before holding the statute to be in violation of the equal protection clause.[91] The dissents voiced doubt as to both

(1978); Trimble v. Gordon, 430 U.S. 762, 770-71 (1977); Gomez v. Perez, 409 U.S. 535, 538 (1973).

83. 441 U.S. at 405 (footnote omitted).

84. *Id.* at 407.

85. *Id.* at 407-08. "Put most simply, it permits the maximum participation of interested natural parents without so burdening the adoption process that its attractiveness to potential adoptive parents is destroyed." *Id.* at 408.

86. *Id.*

87. *Id.*

88. *Id.* at 408-09.

89. *Id.* at 409.

90. *Id.* at 409-10 (footnote omitted).

91. *Id.* at 411-12. "The mere fact that an otherwise valid general classification appears arbitrary in an isolated case is not a sufficient reason for invalidating the entire rule. Nor, indeed, is it a sufficient reason for concluding that the application of a valid rule in a hard

the wisdom and necessity of invalidating a rule which was pertinent in the vast majority of adoptions while at the same time devising a special rule to handle exceptional adoption circumstances, such as those presented in *Caban v. Mohammed*.

Justice Stevens contended that the Court had limited, by its wording, the application of its decision to cases similar to the present one, where paternity had been admitted and the unwed father had actively participated in the development and support of the child.[92] With this limitation in mind, Justice Stevens warned that the holding of the Court should be narrowly construed and should have no retroactive application.[93] While he viewed the Court as having crossed "a new constitutional frontier" he predicted that the decision would not affect most future adoptions.[94] He also noted that state legislatures were likely to revise their adoption statutes to comply with the Supreme Court's ruling; in the interim, however, he asserted that the existing statutes could be enforced except when situations arise such as those presented in the instant case.[95]

Analysis

The majority as well as the dissenting justices recognized the important state interest inherent in furthering the adoption process.[96] They disagreed, however, on two distinct issues: first, the propriety of a gender-based distinction which requires the consent of the mother but not of the father;[97] and second, whether a statute need provide for ex-

case constitutes a violation of equal protection principles. We cannot test the conformance of rules to the principle of equality simply by reference to exceptional cases." *Id.* (footnotes omitted).

92. *Id.* at 416.

93. *Id.* at 415-16.

94. *Id.*

95. *Id.* at 416. "In short, this is an exceptional case that should have no effect on the typical adoption proceeding. Indeed, I suspect that it will affect only a tiny fraction of the cases covered by the statutes that must now be rewritten. Accordingly, although my disagreement with the Court is as profound as that fraction is small, I am confident that the wisdom of judges will forestall any widespread harm." *Id.* at 416-17.

96. *Id.* at 391 (majority opinion); 395 & 402 (dissenting opinions). The majority stated: "The State's interest in providing for the well-being of illegitimate children is an important one." *Id.* at 391. Justice Stewart stated: "The State's interest in promoting the welfare of illegitimate children is of far greater importance than the opinion of the Court would suggest." *Id.* at 395 (Stewart, J., dissenting). Finally, Justice Stevens stated: "The state interest in facilitating adoption in appropriate cases is strong—perhaps even 'compelling.'" *Id.* at 402 (Stevens, J., dissenting)(footnote omitted).

97. *Id.* at 391 (majority opinion); 398 (dissenting opinion). The majority stated: "[T]he unquestioned right of the State to further [the well-being of illegitimate children] is not in itself sufficient to justify the gender-based distinction of § 111." *Id.* at 391. Justice Stewart,

ceptional situations such as the one presented by *Caban*, or merely be suited to the needs of more traditional adoptions.[98]

Finding no substantial relationship to link the distinction made between unwed fathers and unwed mothers with the asserted state interests, the majority struck down the challenged statute. While acknowledging that unwed mothers may have closer ties with infant children, the Court noted that "this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased."[99] The majority thus found wanting appellees' argument that the distinction was justified by the "fundamental difference between maternal and paternal relations."[100] It should be noted, however, that the Court also explicitly stated, "In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child."[101] Indeed the majority viewed the statute as already having provided for such parental abandonment.[102]

The dissenters would have upheld the statute emphasizing the weighty interest of the state[103] while at the same time asserting that the distinction, though gender-based, could be justified due to the dissimilarity of parental roles in the vast majority of adoptions.[104]

---

on the other hand, stated: "[G]ender-based classifications are not invariably invalid. When men and women are not in fact similarly situated in the area covered by the legislation in question, the Equal Protection Clause is not violated. . . . In my view, the gender-based distinction drawn by New York falls in this latter category." *Id.* at 398 (Stewart, J., dissenting). The differences in parental roles are considered by Justice Stevens to be sufficient justification for the distinctions. *Id.* at 406-07 (Stevens, J., dissenting).

98. The majority felt that "[t]he effect of New York's classification is to discriminate against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child." *Id.* at 394. The contrary reasoning of the dissenting Justices, as voiced by Justice Stevens, was that "[t]he mere fact that an otherwise valid general classification appears arbitrary in an isolated case is not a sufficient reason for invalidating the entire rule. Nor, indeed, is it a sufficient reason for concluding that the application of a valid rule in a hard case constitutes a violation of equal protection principles." *Id.* at 411-12 (Stevens, J., dissenting) (footnotes omitted).

99. *Id.* at 389.

100. *Id.* at 388.

101. *Id.* at 392.

102. *Id.* "Indeed, under the statute as it now stands the surrogate may proceed in the absence of consent when the parent whose consent otherwise would be required never has come forward or has abandoned the child." *Id. See also id.* at 392-93 n.13.

103. *Id.* at 395, 402.

104. Justice Stewart stated: "Our law has given the unwed mother the custody of her illegitimate children precisely because it is she who bears the child and because the vast majority of unwed fathers have been unknown, unavailable, or simply uninterested." *Id.* at 399 (Stewart, J., dissenting).

The Justices also disagreed as to whether such a statute necessarily should provide for *Caban*-like situations which allegedly vary from the norm. The dissenters, while recognizing the injustice of the *Caban* situation, found it to be relatively rare and thus asserted, "The mere fact that an otherwise valid general classification appears arbitrary in an isolated case is not a sufficient reason for invalidating the entire rule."[105] The majority, on the other hand, was concerned with providing additional protection for *Caban*-like situations.[106] If a father is not a recognized figure in the child's life, he is deemed to have abandoned the child and thus, by statute, his consent need not be obtained. If a father has developed ties with his child, one may infer that, in the eyes of the majority, his consent should be a prerequisite to the adoption of that child.

In view of the foregoing it appears that only minor modifications of current adoption statutes will be necessary to comply with the Supreme Court mandate in *Caban v. Mohammed*. As more couples have children outside the bonds of marriage, the value of such legislative modifications will be increasingly tested.

*Parham v. Hughes**

Parham v. Hughes[1] is one of two decisions handed down the same day involving an equal protection challenge by an unwed father.[2] The object of the challenge in *Parham* was a Georgia statute[3] which precluded the father of an illegitimate child who had not legitimated[4] the child from suing for his or her wrongful death. In a plurality opinion,

105. *Id.* at 411-12 (Stevens, J., dissenting) (footnote omitted).
106. *Id.* at 394.

* Commentary by Dale G. Feinstein, member, third-year class.

1. 441 U.S. 347 (1979).
2. The other case is Caban v. Mohammed, 441 U.S. 380 (1979).
3. GA. CODE ANN. § 105-1307 (1968). The statute provided: "A mother, or, if no mother, a father, may recover for the homicide of a child, minor or sui juris, unless said child shall leave a wife, husband or child. The mother or father shall be entitled to recover the full value of the life of such child. *In suits by the mother the illegitimacy of the child shall be no bar to a recovery.*"(emphasis added).
4. GA. CODE ANN. § 74-103 (1973). The statute provided: "A father of an illegitimate child may render the same legitimate by petitioning the superior court of the county of his residence, setting forth the name, age, and sex of such child, and also the name of the mother; and if he desires the name changed, stating the new name, and praying the legitimation of such child. Of this application the mother, if alive, shall have notice. Upon such application, presented and filed, the court may pass an order declaring said child to be legitimate, and capable of inheriting from the father in the same manner as if born in lawful wedlock, and the name by which he or she shall be known."

Justice Stewart, joined by Chief Justice Burger and Justices Rehnquist and Stevens, held that the statute did not invidiously discriminate against a class founded upon either illegitimacy or gender and that the classification was rationally related to the permissible state objective of avoiding fraudulent claims of paternity in the context of wrongful death actions. Justice Powell, although concurring in the judgment, claimed that there was a gender-based distinction. Applying the standard that the distinction must "serve important governmental objectives and must be substantially related to achievement of those objectives,"[5] he found that the statute was indeed substantially related to the state's objective of avoiding difficult problems of proof of paternity. Justices White, Brennan, Marshall and Blackmun, joining in a dissent, found that there was gender-based discrimination under the statute and that none of the interests advanced by the state warranted that discrimination.

The Lower Court Decisions

Curtis Parham was the biological father of Lemeul Parham, a minor child who, along with his mother, Cassandria Moreen, was killed in an automobile collision. Although Parham and Moreen were never married and Parham did not legitimate his son,[6] he did execute the child's birth certificate acknowledging paternity, contributed to his support[7] and visited him daily. Following the accident, Parham sued the driver of the other automobile charging that the defendant's negligence caused the child's wrongful death. A similar suit was brought by the child's maternal grandmother, acting as administratrix of his estate.[8] The defendant filed a motion for summary judgment, asserting that Parham was precluded from recovering under section 105-1307 of the Georgia Wrongful Death Act.[9] The trial court denied defendant's motion, holding that the Georgia statute violated both the due process and equal protection clauses of the Fourteenth Amendment.

On appeal, the Georgia Supreme Court reversed the trial court's

5. Craig v. Boren, 429 U.S. 190, 197 (1976).

6. *See* note 4 *supra*.

7. Section 74-202 of the Georgia Code provided that "a father is required to support an illegitimate child until the child reaches 18, marries, or becomes self-supporting, whichever occurs first." GA. CODE ANN. § 74-202 (1973).

8. Where there is no other person entitled to sue under the Georgia Wrongful Death Act, the Act provides that the executor or administrator may sue and hold the recovery for the benefit of the next of kin. GA. CODE ANN. § 105-1309 (Supp. 1979). *See* 441 U.S. at 350 n.4.

9. *See* note 3 *supra*.

ruling.[10] It assumed that the lower court had found a violation of equal protection in a classification based upon illegitimacy.[11] The high court defined the equal protection test which the lower court applied as focusing on "whether the 'ends' to be reached by the governmental classification are legitimate and whether the means employed to achieve those ends are substantially related to them . . . ."[12] The supreme court identified the means as the denial by the Georgia General Assembly of an action for wrongful death to the father of an illegitimate child. It then articulated four possible ends: 1) promoting a legitimate family unit, 2) forestalling potential problems of proof of paternity in wrongful death actions, 3) avoiding compensation for one who has suffered no real loss,[13] and 4) setting a standard of morality by refusing to allow a natural father, who has not comported with the General Assembly's idea that society needs a legitimate family unit, to sue for wrongful death benefits.[14] The court considered the proper standard of scrutiny and concluded that an ordinary level should be employed when the object of the classification is the parent of an illegitimate child rather than the child himself.[15] The court concluded that the statutory classification was not rationally related to the legitimate state interests that the legislation sought to promote and hence the statute was

10. Hughes v. Parham, 241 Ga. 198, 243 S.E.2d 867 (1978).

11. *Id.* at 199, 243 S.E.2d at 869.

12. *Id.* at 200, 243 S.E.2d at 869.

13. The Georgia General Assembly had concluded that, more often than not, the father of an illegitimate child who has elected neither to marry the mother nor to legitimate the child suffers no real loss from the mother's wrongful death.

14. *Id.*, 243 S.E.2d at 869-70. *See also* 441 U.S. at 350. Justice Stewart, in summarizing the Georgia Supreme Court opinion, claimed that the state court had found that the classification was rationally related to three state interests: 1) proof of paternity in wrongful death actions; 2) promotion of a legitimate family unit; and 3) setting a standard of morality. *Id.* The Georgia court opinion, however, stated: "All of the *four ends* proffered by this court as reasons for the legislative classification are legitimate state interests." (emphasis added) 241 Ga. at 201, 243 S.E.2d at 870. Justice White's dissent also referred to four interests. 441 U.S. at 362-68. (White, J., dissenting, joined by Brennan, Marshall, and Blackmun, JJ.).

15. In arriving at this conclusion, the court examined United States Supreme Court cases in which a classification based upon illegitimacy had been challenged. The court found that all the cases in which a stricter level of scrutiny had been employed involved discrimination suffered by illegitimate children because of their status—something over which they had no control. The court distinguished two cases, Quilloin v. Walcott, 434 U.S. 246 (1978) and Stanley v. Illinois, 405 U.S. 645 (1972), which did involve fathers of illegitimate children who were faced with the forced loss of parental rights by state proceedings, on the basis that these cases "rested not with any traditional discrimination against fathers of illegitimate children, but rather, with the potential state infringement without proper hearing upon the fundamental right of an individual to raise a family." 241 Ga. at 201, 243 S.E.2d at 870 (1978).

unconstitutional.[16]

The United States Supreme Court Decision

Justice Stewart began his analysis by noting that state laws are generally entitled to a presumption of validity against attack under the equal protection clause. He qualified his statement by asserting that the presumption may, however, be weakened when the state has enacted legislation creating classes based upon certain immutable human attributes, among which are illegitimacy[17] and gender.[18] Thus the threshold question considered by Justice Stewart was whether the Georgia statute discriminated against a class based on either of these characteristics.

In considering state legislative classifications based upon illegitimacy, Justice Stewart explained the rationale for declaring that classifications that differentiate between legitimate and illegitimate children violate the equal protection guarantee: "it is unjust and ineffective for society to express its condemnation of procreation outside the marital relationship by punishing the illegitimate child who is in no way responsible for his situation and is unable to change it."[19] In applying that rationale to the Georgia statute, Justice Stewart found that the statute did not impose differing burdens upon legitimate and illegitimate children. Parham was responsible for conceiving the child and failing to legitimate him; hence, it was "neither illogical nor unjust for society to express its 'condemnation of irresponsible liaisons beyond the bounds of marriage' by not conferring upon a biological father the statutory right to sue for the wrongful death of his illegitimate child."[20]

16. The court asserted that if Parham's affidavit were true and he did suffer a loss, his remedy lay with the Georgia General Assembly, not the court. It suggested that the General Assembly could amend the statute to allow fathers of illegitimate children to bring wrongful death actions. *Id.* at 203, 243 S.E.2d at 871. In fact, the General Assembly went a bit further, repealing section 105-1307 effective April 4, 1979. GA. CODE ANN. § 105-1203 (Supp.1979) (repealed). The editorial note accompanying the legislation stated: "It is the intent of this Act to revise and modernize certain laws of this State which relate to intrafamilial duties, rights, and obligations, including laws relating to divorce, alimony, support of minors, husband and wife, parent and child, enforcement of support, and related matters so as to comply with those standards of equal protection under the law announced in the United States Supreme Court decision in the case of *Orr v. Orr*, decided March 5, 1979. This Act and the provisions hereof shall be liberally construed to effectuate the purposes of this Act." Editorial Note to GA. CODE ANN. § 105-1203 (Supp.1979).

17. *See, e.g.*, Gomez v. Perez, 409 U.S. 535 (1973).

18. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971).

19. 441 U.S. at 352. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

20. 441 U.S. at 353.

Having thus disposed of the illegitimacy argument, Justice Stewart considered whether the statute invidiously discriminated on the basis of gender. He began this phase of his analysis by articulating the basic principle underlying decisions in which the Court has held certain classifications based upon gender invalid under the equal protection clause:[21] "A State is not free to make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class."[22] Thus in *Reed v. Reed*,[23] the Court held that an Idaho probate code provision which gave men a mandatory preference over women in the administration of a decedent's estate violated the equal protection clause by providing dissimilar treatment for men and women who were similarly situated. Similarly, in *Frontiero v. Richardson*,[24] the Court invalidated federal armed services benefit statutes that were based upon the assumption that female spouses of servicemen were financially dependent whereas similarly situated male spouses of servicewomen were not.[25] In contrast to these cases is *Schlesinger v. Ballard*,[26] in which the Court upheld the constitutionality of a federal statute which provided that male naval officers who were not promoted within a certain time were subject to mandatory discharge whereas female naval officers not promoted within that same length of time were permitted to continue in service. The Court determined that the men and women were not similarly situated since there were restrictions on the women's seagoing service that limited their opportunities to compile records entitling them to promotion. The Court distinguished *Schlesinger* from *Reed* and *Frontiero* by claiming that while the gender-based classifications in the latter cases were based solely on administrative convenience and outworn cliches, the different treatment in *Schlesinger* reflected "not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service."[27]

With the principle reflected in these cases in mind, Justice Stewart

21. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

22. 441 U.S. at 354.

23. 404 U.S. 71 (1971).

24. 411 U.S. 677 (1973).

25. *See also* Stanton v. Stanton, 421 U.S. 7 (1975) (Utah statute providing that males had to reach a greater age than females to attain majority status held unconstitutional); Orr v. Orr, 440 U.S. 268 (1979) (Alabama statutory scheme providing that husbands but not wives may be required to pay alimony held violative of equal protection).

26. 419 U.S. 498 (1975).

27. *Id.* at 508.

determined that the Georgia statute did not invidiously discriminate against Parham because of his gender.[28] He found that under Georgia law, mothers and fathers of illegitimate children are not similarly situated as only a father can by voluntary unilateral action legitimate an illegitimate child.[29] Further, Stewart pointed out that while the identity of the mother of an illegitimate child can rarely be in doubt, the identity of the father will often be unknown.[30] Section 74-103 of the Georgia Code therefore provided a means by which a father could both establish his identity and legitimate his child.

The natural father of an illegitimate child, who has legitimated the child, can sue for wrongful death benefits in the same way as the father of a legitimate child. Accordingly, Justice Stewart found that the Georgia statute did not make an overbroad generalization about men as a class but instead distinguished between fathers who have legitimated their children and those who have not. On this basis, Justice Stewart distinguished *Glona v. American Guarantee & Liability Insurance Co.*,[31] which held that a Louisiana statute that did not allow the natural mother of an illegitimate child to sue for his or her wrongful death violated the equal protection clause. The statute struck down in *Glona* excluded every mother of an illegitimate child from suing for wrongful death whereas the Georgia statute excluded only those fathers who did not legitimate their children.[32]

28. 441 U.S. at 355.

29. GA. CODE ANN. § 74-103 (1973). *See* note 4 *supra*.

30. As authority for this assertion, Justice Stewart cited the plurality opinion in Lalli v. Lalli, 439 U.S. 259, 268-69 (1978) (Powell, J., announced the judgment of the Court, joined by Burger, C.J., and Stewart, J.): " 'That the child is the child of a particular woman is rarely difficult to prove. Proof of paternity, by contrast, frequently is difficult when the father is not part of a formal family unit. The putative father often goes his way unconscious of the birth of a child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother. Indeed the mother may not know *who* is responsible for her pregnancy.' " 441 U.S. at 355 n.7 (citations omitted).

31. 391 U.S. 73 (1968).

32. 441 U.S. at 355-56 n.7. Justice Stewart viewed the Georgia statute as adopting the "middle ground between the extremes of complete exclusion and case-by-case determination of paternity" advocated in Trimble v. Gordon, 430 U.S. 762, 771 (1977).

In *Trimble* the Court struck down section 12 of the Illinois Probate Act, which allowed illegitimate children to inherit by intestate succession only from their mothers. The Court recognized that the problems involved in proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates, but found that the Illinois statute failed to recognize that for some illegitimate children of intestate men, inheritance rights could be recognized without jeopardizing the orderly settlement of estates. The Court therefore posed a "middle ground" approach. In considering what would be sufficient proof of paternity under varied circumstances, the Court stated: "Evidence of paternity may take a variety of forms, some creating more significant problems of inaccuracy and inefficiency than others. The States, of course, are free to recognize these differences in fashion-

Similarly, Justice Stewart distinguished *Caban v. Mohammed*,[33] decided the same day as *Parham*. In *Caban*, the Court struck down a New York statute which permitted an unwed mother, but not an unwed father, to block the adoption of a child by withholding consent. The Court held the gender-based distinction created by the statute violative of equal protection. Justice Stewart pointed out that the Georgia legitimation statute enabled the father of an illegitimate child to change his status for purposes of the Georgia wrongful death statute whereas in *Caban*, the father could change neither his child's status nor his own for purposes of the New York adoption statute.[34] Justice Stewart concluded that the classification in *Parham* was unlike those condemned in *Reed* and *Frontiero*, which were premised upon overbroad generalizations and excluded *all* members of one gender even though they were similarly situated with respect to members of the opposite sex.[35]

Having determined that the Georgia statute did not invidiously discriminate against any class, Justice Stewart considered whether the statutory classification was rationally related to a permissible state objective. He concluded that it was. Justice Stewart began by noting that the Court had recognized that a state has a legitimate interest in the maintenance of an accurate system for the disposition of property at death[36] and that the existence of some mechanism for dealing with the proof of paternity of illegitimate children and the related danger of spurious claims against an estate are of particular concern to the state.[37] Justice Stewart then extrapolated this state interest in avoiding fraudulent claims of paternity from the context of property disposition upon death and applied it to actions for wrongful death.[38] He reasoned that if paternity were not established prior to the commencement of a wrongful death action, the defendant could be faced with multiple lawsuits by individuals all claiming to be the father of the decedent. Justice Stewart concluded that section 105-1307 of the Georgia Code, the means by which the Georgia legislature chose to combat the problem,

---

ing their requirements of proof. Our holding today goes only to those forms of proof which do not compromise the States' interests. This clearly would be the case, for example, where there is a prior adjudication or formal acknowledgment of paternity. *Thus, we would have a different case if the state statute were carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity.*" *Id.* at 772 n.14 (emphasis added).

33. 441 U.S. 380 (1979).

34. 441 U.S. 356 n.9.

35. *Id.* at 356-57.

36. *E.g.*, Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. 762 (1977); Labine v. Vincent, 401 U.S. 532 (1971).

37. *See* Lalli v. Lalli, 439 U.S. 259 (1978).

38. 441 U.S. at 357.

was not irrational.[39]

In response to Parham's argument that there was no question in this case that he was the father of the child, Stewart claimed that this argument misconceived the basic principle of the equal protection clause:

> The function of [the Equal Protection Clause] of the Constitution is to measure the validity of classifications created by state laws. Since we have concluded that the classification created by the Georgia statute is a rational means for dealing with the problem of proving paternity, it is constitutionally irrelevant that the appellant may be able to prove paternity in another manner.[40]

Finally, Justice Stewart disposed of Parham's argument that the Georgia statute violated the due process clause of the Fourteenth Amendment. Parham had failed to explain how due process was implicated in his claim. The only Supreme Court decision which he cited in this regard was *Stanley v. Illinois*[41] and that case was readily distinguishable. In *Stanley* the Court held that the father of illegitimate children was entitled to a hearing on his fitness as a parent before the state could take the children away from him. The *Stanley* Court weighed the interest in the integrity of the family against state interference and the freedom of a father to raise his children. By contrast, *Parham* involved only an asserted right to sue for money damages.[42]

Justice Powell concurred in the judgment of the Court but arrived at his conclusion by a somewhat different analysis. Justice Powell did not consider whether or not gender-based discrimination existed under the circumstances of the case but began by defining the standard of scrutiny: gender-based distinctions must "serve important governmental objectives and must be substantially related to achievement of those objectives" to withstand judicial scrutiny under the equal protection clause.[43] He determined that the state objective at issue was the avoidance of problems in proving paternity after the death of an illegitimate child.

Powell then considered whether the statute was substantially related to this objective. He pointed out that by following the legitima-

39. *Id.* at 357-58. Justice Stewart did not consider whether section 105-1307 was rationally related to the state's interests in promoting the traditional family unit or in setting a standard of morality. *Id.* at 358 n.11.

40. *Id.* at 358 (footnote omitted).

41. 405 U.S. 645 (1972).

42. 441 U.S. at 358-59.

43. *Id.* at 359 (Powell, J., concurring) (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).

tion procedure provided under Georgia law,[44] the father of an illegitimate child could remove himself from the disability that only he would suffer. Although the statute placed a "marginally greater burden" on the father than on the mother, this was justified by the "marked difference between proving paternity and proving maternity" that the Court had "recognized repeatedly."[45] Since the Georgia statute was unlike statutes in prior cases which provided no means for the plaintiff to remove himself from the statutory burden,[46] Justice Powell concluded that it was substantially related to the state's objective in avoiding problems in proving paternity.

The dissent, authored by Justice White, argued that the statute discriminated between unmarried mothers and unmarried fathers.[47] According to White, the appropriate standard of scrutiny, in light of this gender-based discrimination, was that the classification " 'must serve important governmental objectives and must be substantially related to achievement of those objectives.' "[48] The dissent concluded that since none of the interests urged by the state warranted the discrimination, the judgment of the Georgia Supreme Court should have been reversed.

Two of the asserted interests were the promotion of the legitimate family unit and the setting of a standard of morality. Justice White believed that the actual relationship between these interests and the classification was "far too tenuous to justify the sex discrimination involved."[49] Further, unmarried mothers and fathers who legitimate their children but remain unmarried also defy these state interests; yet each has the right to bring an action for the wrongful death of a child under the Georgia statutory scheme. Finally, in *Glona v. American*

44. GA. CODE ANN. § 74-103 (1973). *See* note 4 *supra*.

45. 441 U.S. 360. *See, e.g.* Lalli v. Lalli, 439 U.S. 259 (1978).

46. *E.g.*, Caban v. Mohammed, 441 U.S. 380 (1979); Trimble v. Gordon, 430 U.S. 762 (1977). *See* notes 32-34 and accompanying text *supra*.

47. 441 U.S. at 362 (White, J., dissenting, joined by Brennan, Marshall and Blackmun, JJ.). Justice White noted that Georgia's wrongful death scheme also discriminated between married mothers and married fathers. *Id.* He pointed out that while the plurality had emphasized that Parham never legitimated the child, it was only the death of the mother that even made legitimacy relevant. Under the Georgia Statute, in the case of the wrongful death of a legitimate child, "only the mother may sue if she is alive; the father is allowed to sue only 'if [there is] no mother.' " *Id.* n.4 (citing Ga. Code § 105-1307) (1978). *See also* note 3 *supra*.

48. 441 U.S. at 362 (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).

49. *Id.* at 363. *Cf.* Trimble v. Gordon, 430 U.S. 762, 768 (1977) (the promotion of legitimate family relationships deemed unrelated to the goal of the Illinois legislature making the intestate succession law more just to illegitimate children).

Guarantee & Liability Insurance Co.,[50] the Court found it impermissible to prevent an unmarried mother from recovering for the death of her child. Justice White asserted that what the Court held in *Glona* pertained equally to unmarried fathers.[51]

Another interest asserted by the Georgia court was the avoidance of problems in proving paternity. White concluded that whatever evidentiary problems might be involved in proof of paternity, as opposed to proof of maternity, they surely do not justify gender-based discrimination.[52] He distinguished *Lalli v. Lalli*[53] and *Trimble v. Gordon*,[54] relied on by the five Justices in the majority[55] by noting that the recognized state interest in effectuating a sound system of inheritance was far more substantial than the interest in protecting a tortfeasor from possible spurious claims.[56] The plaintiff always has the burden of proving his parenthood. The Georgia legitimation requirement was, however, an absolute prerequisite to recovery, not merely a rule of evidence; thus, the statute barred from recovery many such as Parham who were capable of proving their paternity. Justice White asserted that:

> it denigrates the judicial process, as well as the interest in foreclosing gender-based discriminations, to hold that the possibility of erroneous determinations of paternity in an unknown number of cases, likely to be few, is sufficient reason to forbid all natural, unmarried fathers who have not legitimated their children from seeking to prove their parenthood and recovering in damages for the tort that has been committed.[57]

The dissent concluded that the fourth and final interest suggested by the Georgia Supreme Court, that "more often than not the father of an illegitimate child who has elected neither to marry the mother nor to

50. 391 U.S. 73 (1968) *See* note 31 and accompanying text *supra*.

51. 441 U.S. at 363 (White, J., dissenting).

52. *Id.* at 364.

53. 439 U.S. 259 (1978). *See* note 30 *supra*.

54. 430 U.S. 762 (1977). *See* note 32 *supra*.

55. *See* 441 U.S. at 355 (plurality opinion), 359 (concurring opinion).

56. *Id.* at 364 (White, J., dissenting). In Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), the Court was faced with the question of whether illegitimate children could collect workmen's compensation benefits for a deceased parent. In determining that they could, the Court analogized the state interest in deciding who may collect workmen's compensation to the interest in deciding who may sue for wrongful death. The Court rejected the contention that the interest in the former was as substantial as that in intestacy succession: "[T]he substantial state interest in providing for 'the stability of . . . land titles and in the prompt and definitive determination of the valid ownership of property left by decedents,' is absent in the case at hand." 406 U.S. at 170 (quoting Labine v. Vincent, 229 So.2d 449, 452 (La. App. 1969)).

57. 441 U.S. at 365 (footnote omitted).

legitimate the child pursuant to proper legal proceedings suffers no real loss from the child's wrongful death,"[58] was an unacceptable basis for a blanket discrimination against all fathers of illegitimate children.[59] The Court had recognized in prior cases that some unmarried fathers maintain as close a relationship to their children as do unmarried mothers.[60] Further, despite a lack of affection, a father can still legitimate his children under the statute and thereby become eligible to recover for the wrongful death of his children. Additionally, White argued that in light of the facts in *Parham* it was unrealistic to presume that unmarried fathers who have a real interest in their children and who suffer an actual loss upon their deaths will have legitimated their children.[61] Finally, White asserted that underlying the statute was the "incredible presumption" that fathers are less deserving of recovery than mothers and that fathers of illegitimate children suffer no injury when they lose their children. He concluded by stating that if Georgia wished to base the recovery in a wrongful death action for the loss of a child on the amount of anguish and loss suffered by the parent rather than on the full value of the life of the child, it should amend its statute[62] accordingly, rather than categorically bar on the basis of sex any recovery by parents it deemed uninjured or undeserving.[63]

Analysis

The opinions in this case reveal certain basic differences in approach toward equal protection cases. The plurality found that there was no discrimination based on illegitimacy or gender but distinguished between fathers who have legitimated their children and those who have not. Hence, the plurality applied a deferential rational relation test to the legislation. In his concurrence, Justice Powell assumed that there was gender-based discrimination and therefore applied the

58. 241 Ga. at 200, 243 S.E.2d at 870.

59. 441 U.S. at 366 (White, J., dissenting).

60. *See, e.g.*, Caban v. Mohammed, 411 U.S. 380, 389 (1979).

61. 441 U.S. at 367 (White, J., dissenting). *See Quilloin v. Walcott*, 434 U.S. 246 (1978), where the Court dismissed the contention that an unmarried father had no actual interest in his son because he failed to legitimate him under the Georgia statutory scheme. *Id.* at 254. This case is discussed at length in *Constitutional Review: Supreme Court, October 1977 Term*, 6 HASTINGS CONST. L. Q. 19, 171-80 (1978).

62. The statute provided the measure of recovery in wrongful death: "The full value of life of the decedent, as shown by the evidence, is the full value of the life of the decedent without deduction for necessary or other personal expenses of the decedent had he lived." GA. CODE ANN. § 105-1308 (1968).

63. 441 U.S. at 368 (White, J., dissenting).

middle-tiered standard prescribed in *Craig v. Boren*.[64] The four dissenters expressly found gender-based discrimination implicated in the Georgia statutory scheme and applied the same standard as did Justice Powell. Thus a majority of the Court determined that the Georgia statute discriminated on the basis of gender and applied the test enunciated in *Craig v. Boren* to the statute.

Of the four possible state interests advanced by the Georgia Supreme Court, the plurality as well as Justice Powell focused upon only one, that of avoiding problems in the proof of paternity. Since the five Justices found that this interest survived judicial scrutiny—even the elevated standard applied by Justice Powell—Parham was precluded from recovery. This result was a departure from past decisions which had distinguished between the interest in protecting a tortfeasor and the interest in assuring the orderly administration of decedents' estates.[65] Only statutory schemes which protected the latter interest were upheld against claims of discrimination based upon gender or illegitimacy.[66] The Court's decision in *Parham* suggests a departure from this distinction.

Thus, the Court demonstrated opposing tendencies in deciding this case. On the one hand, a majority of the Court took a broader approach to the issue of whether a statutory scheme discriminates on the basis of gender and, upon a finding of such discrimination, applied the elevated standard of scrutiny set out in *Craig v. Boren*. On the other hand, a different majority was deferential to the state legislature's judgment to the point that it was willing to uphold a statutory burden on the basis of an asserted state interest which prior cases had held insufficient to justify discriminatory statutes. Which of these directions the Court will follow in future gender-based discrimination cases remains to be seen.

*Lalli v. Lalli**

The Supreme Court in *Lalli v. Lalli*[1] upheld against an equal pro-

64. 429 U.S. 190, 197 (1976). *See* note 43 and accompanying text *supra*.

65. *See, e.g.*, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (workmen's compensation); Glona v. American Guarantee & Liability Ins. Co., 391 U.S. 73 (1968) (wrongful death); Levy v. Louisiana, 391 U.S. 68 (1968)(wrongful death).

66. *See* note 56 *supra*.

* Commentary by Peter T. Harding, member, third-year class.

1. 439 U.S. 259 (1978).

tection challenge a New York statute[2] allowing an illegitimate child to inherit from his or her intestate father only if a court of competent jurisdiction had entered an order declaring paternity during the father's lifetime. Legitimate children are not subject to the same requirement.

Appellant Robert Lalli was the illegitimate son of Mario Lalli who died intestate in the state of New York in 1973. Appellant's mother, who had died in 1968, was never married to Mario. After Mario's widow was appointed administratrix of her husband's estate, appellant petitioned the surrogate court for a compulsory accounting, claiming that he and his sister were entitled to inherit from Mario as his children. Mario's widow opposed the petition, contending that even if appellants were Mario's children, they were not lawful distributees of the estate because they had failed to comply with section 4-1.2 of the New York Estate, Powers and Trusts Law, which provides in part:

> An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.[3]

There was no dispute as to the facts. All parties conceded that appellant, Robert Lalli, was the son of Mario Lalli. Mario Lalli had supported Robert Lalli during his youth and acknowledged him as his

2. N.Y. EST., POWERS & TRUSTS LAW (McKinney Supp. 1979) (originally enacted as 1965 N.Y. Laws, ch. 958, § 1). The statute was initially codified as section 83-a of the New York Decedent Estates Law (1965). In 1966 it was recodified without material change as section 4-1.2 of the Estates, Powers and Trusts Law. 1966 N.Y. Laws, ch. 952. Further nonsubstantive amendments were made the next year. 1967 N.Y. Laws, ch. 686, §§ 28, 29 (1967).

3. Section 4-1.2 provides in its entirety: "(a) For the purposes of this article:

"(1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.

"(2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

"(3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made as prescribed by subparagraph (2).

"(4) A motion for relief from an order of filiation may be made only by the father, and such motion must be made within one year from the entry of such order.

"(b) If an illegitimate child dies, his surviving spouse, issue, mother, maternal kindred and father inherit and are entitled to letters of administration as if the decedent were legitimate, provided that the father may inherit or obtain such letters only if an order of filiation has been made in accordance with the provisions of subparagraph (2)."

son.[4] Robert Lalli, however, had not obtained an order of filiation during his putative father's lifetime. He argued that, through the imposition of the filiation requirement, section 4-1.2 discriminated against him on the basis of his illegitimate birth in violation of the equal protection clause of the Fourteenth Amendment.

The Lower Court Decisions

The Surrogate Court noted that section 4-1.2 had previously and unsuccesfully been attacked on the same grounds,[5] and after a review of recent United States Supreme Court decisions, particularly *Labine v. Vincent*,[6] concluded that the "appellant [had been] properly excluded as a distributee and therefore lacked status to petition for a compulsory accounting."[7] On direct appeal, the New York Court of Appeals affirmed, holding that the state had met the test established in *Labine* which looks to whether "there is a rational basis for the means chosen by the Legislature for the accomplishment of a permissible State objective."[8] After discussing the problems of proof involved in establishing paternity, as opposed to maternity, the New York court concluded that it could not say that the condition precedent of requiring that the order of filiation be made during the lifetime of the father was irrational, so as to render it constitutionally infirm.

Appellant then appealed to the United States Supreme Court. While the case was pending, the Court decided *Trimble v. Gordon*,[9] and because the issues in the two cases were similar in some respects, the Court vacated and remanded to permit further consideration in light of *Trimble*.[10] On remand, the New York Court of Appeals confirmed its

4. 439 U.S. at 259-262.

5. *Id.* at 263.

6. 401 U.S. 532 (1971). In *Labine*, the Court upheld, against equal protection challenge, Louisiana's laws of intestate succession which provided that collateral relatives took the intestate father's property to the exclusion of acknowledged, but not legitimated, illegitimate children. The Court, per Justice Black, concluded that the Constitution gives the states the power to make rules to "establish, protect and strengthen family life as well as to regulate the disposition of property . . . ." *Id.* at 538. Stressing that the Louisiana scheme may not have been perfect, Justice Black nonetheless concluded that "[t]he Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules." *Id.* at 537. He stressed that the statutory scheme did not create an insurmountable barrier to illegitimate children.

7. 439 U.S. at 263.

8. *Id.* (quoting *In re* Lalli, 38 N.Y.2d 77, 81, 340 N.E.2d 721, 723, 378 N.Y.S.2d 351, 354 (1975).

9. 430 U.S. 762 (1977).

10. Lalli v. Lalli, 431 U.S. 911 (1977).

former disposition.[11] It noted that *Trimble* established that although a classification based on illegitimacy is not suspect so as to require strict scrutiny, it does require more than a "mere finding of some remote rational relationship between the statute and a legitimate State purpose."[12] The court found the statute to be significantly and determinatively different from the Illinois statute before the Court in *Trimble* and concluded that section 4-1.2 was sufficiently related to the state's interest in "the orderly settlement of estates and the dependability of titles to property passing under intestacy laws" to meet equal protection requirements.[13]

The United States Supreme Court Decision

Appellant again sought review in the Supreme Court.[14] The Court affirmed in a plurality decision.[15] Justice Powell announced the judgment of the Court and delivered an opinion in which Chief Justice Burger and Justice Stewart joined.[16]

Justice Powell began his analysis with a review of *Trimble*.[17] "At issue in that case was the constitutionality of an Illinois statute providing that a child born out of wedlock could inherit from his intestate father only if the father had 'acknowledged' the child and the child had been legitimated by the intermarrying of the parents."[18] As in the present case, the appellant in *Trimble* had been born out of wedlock, had been acknowledged by her father and her parents had not intermarried.[19] Unlike the situation in *Lalli*, however, the father had been found to be her father in a judicial decree ordering him to contribute to her support.[20] When her father died intestate, appellant was excluded as a distributee because the statutory requirements for inheritance had not been met.[21]

11. *In re* Lalli, 43 N.Y.2d 65, 371 N.E.2d 481, 400 N.Y.S.2d 761 (1977).
12. *Id.* at 67, 371 N.E.2d at 482, 400 N.Y.S.2d at 762.
13. *Id.* at 67, 69-70, 371 N.E.2d at 482-83, 400 N.Y.S.2d at 762-64 (citing Trimble v. Gordon, 430 U.S. at 771).
14. Lalli v. Lalli, 435 U.S. 921 (1978).
15. 439 U.S. at 259.
16. Justice Stewart filed a concurring opinion. Justice Rehnquist, for the reasons stated in his dissent to Trimble v. Gordon, 430 U.S. at 777, concurred. Justice Blackmun filed an opinion concurring in the judgment, disagreeing only in that he would overrule, rather than distinguish, *Trimble*. Justice Brennan filed a dissenting opinion, in which Justices White, Marshall and Stevens joined.
17. 439 U.S. at 264.
18. *Id.* at 263.
19. 430 U.S. at 763-64.
20. *Id.* at 764.
21. *Id.* at 764-65.

The *Trimble* Court affirmed the conclusion reached in *Mathews v. Lucas*[22] that although classifications based upon illegitimacy are not subject to "strict scrutiny," they are nevertheless invalid if they are not substantially related to permissible state interests.[23] Applying this standard to the Illinois statute, the *Trimble* Court found that the test had not been met.[24]

Two state interests had been asserted by the State of Illinois in *Trimble*: "the encouragement of legitimate family relationships and the maintenance of an accurate and efficient method of disposing of an intestate decedent's property."[25] While acknowledging that the state was appropriately concerned with the integrity of the family unit, the *Trimble* Court, citing *Weber v. Aetna Casualty & Surety Co.*,[26] rejected the argument that "persons will shun illicit relations because the offspring may not one day reap the benefits" that would accrue were they legitimate.[27] The statute thus bore "only the most attenuated relationship to the asserted goal" of encouraging legitimate family relationships.[28]

The *Trimble* Court found the state interest in safeguarding the orderly disposition of property at death more relevant to the statutory classification.

> The orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual States. In exercising this responsibility, a State necessarily must enact laws governing both the procedure and substance of intestate succession. Absent infringement of a constitutional right, the federal courts have no role here, and even when constitutional violations are alleged, those courts should accord substantial deference to a

22. 427 U.S. 495 (1976). *See* notes 78-86 and accompanying text *infra*.

23. 430 U.S. at 767.

24. *Id.* at 766.

25. 439 U.S. at 265 (citing Trimble v. Gordon, 430 U.S. at 766).

26. 406 U.S. 164 (1972). In *Weber*, the Court struck down Louisiana's workers' compensation laws under which unacknowledged illegitimate children were not within the class of "children," and were relegated to the lesser status of "other dependents," and thus recovered only if there were not enough surviving dependents in the preceding classes to exhaust the maximum benefits. The Court determined the validity of the state statutes under a standard requiring that, at a minimum, a statutory classification bear some rational relationship to a legitimate state purpose. It held that the inferior classification of dependent unacknowledged illegitimates bore no significant relationship "to those recognized purposes of recovery which workmen's compensation statutes commendably serve." *Id.* at 175.

27. Trimble v. Gordon, 430 U.S. at 768-69 (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. at 173), *quoted in* Lalli v. Lalli, 439 U.S. at 265.

28. Trimble v. Gordon, 430 U.S. at 768 & n.13.

State's statutory scheme of inheritance.[29]

The Court found the Illinois statute "constitutionally flawed" because by requiring not only an acknowledgment by the father but also the marriage of the parents, it excluded at least some significant categories of illegitimate children.[30] These categories consisted of children whose inheritance rights could be recognized "without jeopardizing 'the orderly settlement of estates or the dependability of titles to property passing under intestacy laws.' "[31] The Court concluded that equal protection required that a statute which placed exceptional burdens on illegitimate children in furtherance of proper state objectives be more "carefully tuned to alternative considerations"[32] than was true of the broad disqualification in the Illinois law.[33]

Having established the standard of review, Justice Powell turned to the New York statute.[34] He began by distinguishing the two statutes. The Illinois statute in *Trimble* had contained two preconditions to inheritance by illegitimate children; it required not only the father's acknowledgment of paternity but also the marriage of the parents.[35] These requirements had eliminated "the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity."[36] Under the New York statute, by contrast, the marital status of the parents was irrelevant; the single requirement at issue was an evidentiary one that the paternity of the father have been declared in a judicial proceeding sometime before his death.[37]

29. *Id.* at 771. Justice Powell noted that an important aspect to that framework is a response to the often difficult problem of proving the paternity of illegitimate children and the related danger of spurious claims against intestate estates. These difficulties "might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally." *Id.* at 770.

30. 439 U.S. at 266.

31. *Id.* (quoting Trimble v. Gordon, 430 U.S. at 771).

32. *Id.* (quoting Trimble v. Gordon, 430 U.S. at 772 (quoting Mathews v. Lucas, 427 U.S. at 513)).

33. *See* Trimble v. Gordon, 430 U.S. at 772.

34. *See* note 3 *supra.*

35. 430 U.S. at 763 & n.2.

36. *Id.* at 770-71.

37. 439 U.S. at 267. Section 4-1.2 contained an additional requirement that the judicial proceeding have been commenced "during the pregnancy of the mother or within two years from the birth of the child." "The New York Court of Appeals [had] declined to rule on the constitutionality of [this requirement] in both of its [decisions . . . because appellant concededly had never commenced a paternity proceeding . . . ." *Id.* at 267 n.5. Thus the question of the constitutionality of the two-year limitation was not before the Court; the Court sustained section 4-1.2 under the equal protection clause "only with respect to [the] requirement that a judicial order of filiation be issued during the lifetime of the father of an illegitimate child." *Id.*

Justice Powell also found differences between the state interests that the statutes purportedly furthered.[38] The Illinois law had been defended, in part, as a means of encouraging legitimate family relationships. New York did not offer such a justification, and the New York Court of Appeals had disclaimed that the purpose of the statute, "even in small part, was to discourage illegitimacy, to mold human conduct or to set societal norms."[39] Both the absence of any requirement in section 4-1.2 that the parents marry and Justice Powell's analysis of the legislative history of the statute confirmed the view that section 4-1.2 was not designed to encourage legitimate family relationships.[40]

The question, therefore, became whether the "discrete procedural demands" that section 4-1.2 placed on illegitimate children bore an "evident and substantial" relation to the particular state interest the statute was designed to serve.[41] The primary interest of section 4-1.2 was to provide for the just and orderly disposition of property at death, an interest recognized as legitimate in *Trimble*.[42] Justice Powell reviewed the reasons that had led the New York legislature to conclude it necessary to impose the strictures of section 4-1.2. These were the serious difficulties encountered in the administration of the estates of both testate and intestate decedents and the peculiar problems of proof involved in paternal inheritance by illegitimate children.[43] " 'The putative father often goes his way unconscious of the birth of a child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother. Indeed the mother may not know *who* is responsible for her pregnancy.' "[44] Additional difficulties included the administrative problem of service of process in class dispositions to "issue" of a decedent and the achievement of finality of decree in an estate.[45] The New York legislature, Justice Powell concluded, had an

38. *Id.* at 267.

39. *Id.* at 267-68 (quoting *In re* Lalli, 43 N.Y.2d at 70, 371 N.E.2d at 483, 400 N.Y.S.2d at 764).

40. 439 U.S. at 268.

41. *Id.*

42. *Id. See* Trimble v. Gordon, 430 U.S. at 771. *See also* Weber v. Aetna Cas. & Sur. Co., 406 U.S. at 170; Labine v. Vincent, 401 U.S. at 538.

43. 439 U.S. at 268-71. By contrast, Justice Powell felt that establishing maternity was seldom difficult. " '[T]he birth of the child is a recorded or registered event usually taking place in the presence of others. In most cases the child remains with the mother and for a time is necessarily reared by her.' " *Id.* at 268 (quoting *In re* Ortiz, 60 Misc. 2d 756, 761, 303 N.Y.S.2d 806, 812 (Surr. Ct. 1969)).

44. 439 U.S. at 269 (quoting *In re* Ortiz, 60 Misc. 2d at 761, 303 N.Y.S.2d at 812 (Surr. Ct. 1969)). *Accord, In re* Flemm, 85 Misc. 2d 855, 861, 381 N.Y.S.2d 573, 576-77 (Surr. Ct. 1975); *In re* Hendrix, 68 Misc. 2d at 443, 326 N.Y.S.2d at 650.

45. 439 U.S. at 269. " 'Our procedural statutes and the Due Process Clause mandate

evident and substantial interest in protecting " 'innocent adults and those rightfully interested in their estates from fraudulent claims of heirship and harassing litigation instituted by those seeking to establish themselves as illegitimate heirs.' "[46]

Finding the state's interests to be substantial, Justice Powell next considered the means adopted by New York to further these interests. The requirement of section 4-1.2 was designed to ensure the accurate resolution of claims of paternity and to minimize the potential for disruption of estate administration. By placing paternity disputes in a judicial forum during the lifetime of the father accuracy was enhanced in two respects. First, "the 'availability [of the putative father would] be a substantial factor contributing to the . . . fact-finding process.' "[47] Second, the requirement that "the order be issued during the father's lifetime permit[ted] a man to defend his reputation against 'unjust accusations in paternity [suits]' . . . ."[48] "The administration of an estate will be facilitated, and the possibility of delay and uncertainty minimized, where the entitlement of a illegitimate child to notice and participation is a matter of judicial record before the administration commences."[49]

Justice Powell rejected the contention that section 4-1.2, like the Illinois statute in *Trimble*, excluded significant categories of illegitimate children who could be allowed to inherit without jeopardizing the orderly settlement of their intestate fathers estates.[50] He did acknowledge that "there [would] be some illegitimate children who would be able to establish their relationship to their deceased fathers without serious disruption of the administration of estates and that, as applied to such individuals, section 4-1.2 [appeared] to operate unfairly."[51] The Court's inquiry under the equal protection clause, however, did "not focus on the abstract 'fairness' of a state law, but on whether the stat-

notice and opportunity to be heard to all necessary parties. Given the right to intestate succession, *all* illegitimates must be served with process. This would be no real problem with respect to those few estates where there are "known" illegitimates. But it presents an almost insuperable burden as regards "unknown" illegitimates.' " *Id.* at 270 (quoting *In re* Flemm, 85 Misc. 2d at 859, 381 N.Y.S.2d at 576).

46. 439 U.S. at 271 (quoting TEMPORARY STATE COMMISSION ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES, FOURTH REPORT, N.Y. LEGIS. DOC. No. 19 (1965) [hereinafter cited as COMMISSION REPORT]).

47. 439 U.S. at 271 (quoting *In re* Lalli, 38 N.Y.S.2d at 82, 340 N.E.2d at 724, 378 N.Y.S.2d at 355).

48. *Id.* (quoting COMMISSION REPORT, *supra* note 46, at 266).

49. 439 U.S. at 271.

50. *Id.* at 272 (quoting Trimble v. Gordon, 430 U.S. at 771). *See* notes 17-33 and accompanying text *supra*.

51. 439 U.S. at 272-73.

ute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment."[52] In this regard, the Court noted that "few statutory classifications are entirely free from the criticism that they sometimes produce inequitable results."[53]

The New York statute, unlike the statute in *Trimble*, did not effect a total statutory disinheritance of illegitimate children who were not legitimated by the subsequent marriage of the parents.[54] The scope of the Illinois statute was "far in excess of its justifiable purposes."[55] The New York statute's requirement, in contrast, did not "inevitably [disqualify] an unnecessarily large number of children born out of wedlock."[56] Justice Powell reached this conclusion through an historical review of the New York courts' application of section 4-1.2, finding that the statute had been interpreted "liberally and in such a way as to enhance its utility to both father and child without sacrificing its strength as a procedural prophylactic."[57] Justice Powell concluded that section 4-1.2 represented a carefully considered legislative judgment as how best to balance the desire "to 'grant to illegitimates . . . rights of inheritance on a par with those [of] legitimate children' " and at the same time to protect the important state interests involved.[58] "Even if . . . [section] 4-1.2 could have been written . . . more equitably, it [was] not the function of a court to 'hypothesize independently on the desirability or feasibility of any possible alternative[s]' to the formulated statutory scheme. . . ."[59] " 'These matters of practical judgment and empirical calculation are for [the State] . . . . In the end, the precise accuracy of [the State's] calculations is not a matter of specialized judicial competence; and we have no basis to question their detail beyond the evident consistency and substantiality.' "[60]

Without writing a separate opinion, Justice Rehnquist concurred

52. *Id.* at 273.

53. *Id. See* note 56 and accompanying text *infra*.

54. 439 U.S. at 273.

55. *Id.*

56. *Id.*

57. *Id.* Justice Powell noted that the father can waive his defenses in a paternity proceeding, and that the courts have excused "technical" failures by illegitimate children to comply with the statute in order to prevent unnecessary injustice. For example, a filiation order may be signed *nunc pro tunc* to relate back to the period prior to the father's death when the court's factual finding of paternity had been made or a judicial support order may be treated as "tantamount to an order of filiation," even though paternity was not specifically declared therein. *Id.* at 273-74 (citations omitted).

58. *Id.* at 274 (quoting COMMISSION REPORT, *supra* note 46, at 265.

59. 439 U.S. at 274 (quoting Mathews v. Lucas, 427 U.S. at 515).

60. 439 U.S. at 274 (quoting Mathews v. Lucas, 427 U.S. at 515-16).

in the judgment for the reasons stated in his dissent in *Trimble*. In that dissent, he had criticized the nature of the Court's inquiry on two grounds. First, the majority opinion, in its analysis of the Illinois legislature's purpose, had expanded the normal meaning of the word "purpose" into something more like motive.[61] Accordingly, litigants wishing to invalidate a law under the equal protection clause were faced with a difficult task. "They must first convince this Court that the legislature had a particular purpose in mind in enacting the law, and then convince it that the law was not at all suited to the accomplishment of that purpose."[62]

Justice Rehnquist found another and more grave defect in that the holding in *Trimble* required the Court to second guess legislative judgment in an area where the Court had no expertise whatever.[63] "In making this judgment it must throw into the judicial hopper the whole range of factors which were first thrown into the legislative hopper."[64] Justice Rehnquist concluded, in words apposite to *Lalli*:

> The fact that the Act in question does not alleviate all of the difficulties, or that it might have gone further than it did, is to me wholly irrelevant under the Equal Protection Clause. The circumstances which justify the distinction between illegitimates and legitimates contained in § 12 are apparent with no great exercise of imagination; they are stated in the opinion of the Court, though they are there rejected as constitutionally insufficient. Since Illinois' distinction is not mindless and patently irrational, I would affirm the judgment of the Supreme Court of Illinois.[65]

Justice Blackmun concurred in the *Lalli* judgment, departing from the plurality opinion only in that he would overrule, rather than distinguish, *Trimble*.[66] He had joined the dissent in *Trimble*,[67] which, in a short statement, had found the situation in *Trimble* constitutionally indistinguishable from *Labine v. Vincent* and thus concluded that the state statute should have been upheld against constitutional attack.[68]

Justice Brennan, joined by Justices White, Marshall and Stevens, dissented in *Lalli*, declaring that "the state interest in the accurate and efficient determination of paternity [could have been] adequately

61. 430 U.S. at 782.
62. *Id.* at 783.
63. *Id.*
64. *Id.* at 784.
65. *Id.* at 786.
66. 439 U.S. at 276-77.
67. 430 U.S. at 776 (Burger, C.J., and Stewart, Blackmun and Rehnquist, JJ., dissenting).
68. 430 U.S. at 777.

served by requiring the illegitimate child to offer into evidence a 'formal acknowledgment of paternity.' "[69] The dissenters found the New York scheme inconsistent with this standard because an illegitimate child could inherit "only if there had been a judicial finding of paternity during the lifetime of the father."[70] Justice Brennan found no reason to suppose that the injustice of the present case, where all interested parties conceded that Robert was the son of Mario Lalli, was aberrant.

> First, [illegitimate children acknowledged and supported by their fathers] are unlikely to see the need for . . . adversary proceedings. Second, even if aware of the rule requiring judicial filiation orders, they are likely to fear provoking disharmony by suing their fathers. For the same reasons, mothers of such illegitimates are unlikely to bring proceedings against the fathers. Finally, fathers who do not even bother to make out wills (and thus die intestate) are unlikely to take the time to bring formal filiation proceedings.[71]

Justice Brennan concluded that, as a practical matter, section 4-1.2 made it "virtually impossible for the acknowledged and freely supported illegitimate children to inherit intestate."[72]

The dissent rejected the argument that reliance upon mere formal public acknowledgment of paternity would open the door to fraudulent claims of paternity.[73] Justice Brennan asserted that "even if . . . confidence in the accuracy of formal public acknowledgments [is] unfounded, New York [had] available less drastic means of screening out fraudulent claims. . . ."[74] It could have required, for example, an elevated standard of proof, by clear and convincing evidence or even beyond a reasonable doubt, in addition to requiring formal acknowledgment.[75]

The dissent also rejected the argument that section 4-1.2 protected estates from belated claims by unknown illegitimates. Publication notice and a short limitations period in which claims against the estate could be filed would have served the state interest. The dissent concluded that no reason had been advanced to retreat from the decision in *Trimble*, as the New York statute, like the Illinois statute in *Trimble*, excluded " 'forms of proof which do not compromise the State['s] inter-

69. 439 U.S. at 277 (quoting Trimble v. Gordon, 430 U.S. at 772 n.14).
70. 439 U.S. at 277.
71. *Id.* at 278.
72. *Id.*
73. *Id.*
74. *Id.* at 278-79.
75. *Id.* at 279.

ests,' "[76] and thus discriminated "against illegitimates through means not substantially related to the legitimate interests that the statute purported to promote."[77]

Analysis

The Supreme Court in *Lalli* was not concerned with reconsidering the middle-tier standard of review. Justice Powell cited as controlling the decision in *Mathews v. Lucas*, which had been reaffirmed in *Trimble*, that classifications based on illegitimacy are not subject to strict scrutiny.[78] The appropriate standard of review is whether such classifications are substantially related to permissible state interests.[79]

In *Mathews*, a case involving an equal protection challenge to certain statutory presumptive classifications in the Social Security Act regarding illegitimate children's entitlement to survivor's benefits, the Court, per Justice Blackmun, acknowledged that "the legal status illegitimacy, however defined, is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society."[80] The *Mathews* Court thus recognized that

> visiting condemnation upon the child in order to express society's disapproval of the parents' liaisons 'is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent.'[81]

The Court, however, had "no difficulty in finding the discrimination impermissible on less demanding standards than [strict scrutiny]."[82] Further, it had found that the discrimination against illegitimates had never approached the severity or pervasiveness of the historic legal and political discrimination against women and

76. *Id.* (quoting Trimble v. Gordon, 430 U.S. at 772 n.14).

77. 439 U.S. at 279.

78. *Id.* at 265.

79. *Id.*

80. 427 U.S. at 505. Justice Blackmun was joined by Chief Justice Burger and Justices Stewart, White, Powell and Rehnquist.

81. *Id.* (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. at 175 (1972)).

82. 427 U.S. at 505 (citing New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973); Richardson v. Davis, 409 U.S. 1069 (1972); Richardson v. Griffin, 409 U.S. 1069 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968)).

blacks.[83] Accordingly, "such irrationality in some classifications does not in itself demonstrate that other, possibly rational, distinctions made in part on the basis of legitimacy are inherently untenable."[84] The *Mathews* Court thus concluded that classifications based on illegitimacy do not " 'command extraordinary protection from the majoritorian political process'. . . which [the] most exacting scrutiny would entail."[85]

In *Lalli*, therefore, the Court was concerned with the application of an established standard rather than determining the standard itself. The *Lalli* situation was before the Court as a result of the Court's decision in *Trimble*. The Court had articulated the applicable level of judicial scrutiny in *Mathews* but its application of this standard in *Trimble* was somewhat confusing.

The Court had previously recognized that the encouragement of legitimate family relationships was a permissible state interest.[86] In *Trimble*, however, the Court, per Justice Powell,[87] declaimed that "[i]n subsequent decisions, we have expressly considered and rejected the

83. 427 U.S. at 506. *See* Frontiero v. Richardson, 411 U.S. 677, 684-86 (1973) (plurality opinion). The Court sidestepped justifying its conclusion. It only hypothesized that this less than pervasive and severe discrimination in the historic placement of the illegitimate child in an inferior position in certain circumstances, identified as the area of family law, was "perhaps in part because the roots of the discrimination rest in the conduct of the parents rather than the child, and perhaps in part because illegitimacy does not carry an obvious badge, as race or sex do . . . ." 427 U.S. at 506 (footnote omitted).

84. 427 U.S. at 505.

85. *Id.* at 506 (footnote omitted) (quoting San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)). *See* Jimenez v. Weinberger, 417 U.S. 628, 631-34, 636 (1974); Weber v. Aetna Cas. & Sur. Co., 406 U.S. at 173, 175-76.

86. Labine v. Vincent, 401 U.S. at 538-39. *Labine* involved an equal protection challenge to Louisiana's laws of intestate succession which provided that collateral relations took a deceased intestate father's property to the exclusion of acknowleged, but not legitimated, illegitimate children. *Id.* at 533-35. The Court, per Justice Black, recognized two permissible state interests: "[T]he power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State. Absent a specific constitutional guarantee, it is for that legislature, not the life-tenured judges of this Court, to select from among possible laws." *Id.* at 538-39 (footnote omitted). Permissible state interests were not at issue in *Mathews*, as it involved the Social Security Act. In *Mathews*, the Court found Congress' purpose in adopting the statutory presumptions to be administrative convenience. 427 U.S. at 509. Without discussion, the Court assumed this to be a permissible interest and held that the standard of review, although "not a toothless one," required the challengers of the statutory scheme to demonstrate the insubstantiality of the relation between the statutory classifications and the likelihood of dependency. The Court found that this burden was not met and that the statutory classifications did not exceed the bounds of substantiality tolerated by the applicable level of scrutiny because they were "justified as reasonable empirical judgments that are consistent with a [legitimate] design to qualify entitlement to [survivor] benefits upon a child's dependency at the time of the parent's death." *Id.* at 509-10.

87. Justice Powell was joined by Justices Brennan, White, Marshall and Stevens.

argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships."[88] The Court did indicate that the "more serious problems of proving paternity" might justify a more demanding standard for illegitimates claiming under their fathers' estates than that required for children claiming under either their mothers' estates or for legitimate children generally.[89] The Court went on to find, however, that the relation between the Illinois statute and the state's proper objective of assuring accuracy and efficiency in the disposition of property at death was not sufficient to sustain judicial scrutiny.[90] The determining factor, according to the majority, was the failure of the statute to be "carefully tuned to alternative considerations"[91] "between the extremes of complete exclusion and case-by-case determination of paternity."[92]

In *Lalli*, Justice Powell distinguished *Trimble* and characterized the failure of the Illinois statute in that case to have been the requirement that the legitimation of the child occur through the intermarriage of the parents "as an absolute precondition to inheritance."[93]

Although the New York statute also contained the absolute precondition that the paternity of the father be declared in a judicial proceeding sometime before his death, Justice Powell found it distinguishable from the Illinois statute in two respects. First, Justice Powell found that the precondition of section 4-1.2 clearly illustrated the New York legislature's desire "to 'grant to illegitimates in so far as practicable rights of inheritance on a par with those enjoyed by legitimate children,' "[94] while still protecting the important state interests involved.[95] Section 4-1.2 "represent[ed] a carefully considered legislative judgment as to how this balance best could be achieved,"[96] thus satisfying the Court's inquiry as to whether the statute's relation to the state interests it was intended to promote was so tenuous that it lacked the "rationality contemplated by the Fourteenth Amendment."[97]

The second, and subsidiary, ground upon which Justice Powell

88. 430 U.S. at 769. Justice Powell did not cite the subsequent decisions. He used the rationale utilized in *Weber* to distinguish *Labine* on other grounds as support for this statement. *Id.* at 769-70.

89. *Id.* at 770.

90. *Id.* at 770-76. *See* notes 29-33 and accompanying text *supra*.

91. *Id.* at 772 (quoting Mathews v. Lucas, 427 U.S. at 513).

92. *Id.* at 771.

93. 439 U.S. at 266.

94. *Id.* at 274 (emphasis deleted) (quoting COMMISSION REPORT, *supra* note 46, at 265).

95. 439 U.S. at 274. *See* notes 47-60 and accompanying text *supra*.

96. 439 U.S. at 274.

97. *Id.* at 273. As Justice Blackmun stated in his concurring opinion, his "point of

distinguished *Trimble* was that the New York courts had given section 4-1.2 a liberal interpretation, even excusing "technical" failures to comply with the statute.[98] The statute's precondition, therefore, did not in practice create "significant categories of illegitimate children" who could have been allowed to inherit "without jeopardizing the orderly settlement" of their intestate fathers' estates.[99]

The Court in *Lalli* appears to be turning away from the more activist position taken in *Trimble*. Although again affirming the applicability of the middle-tier standard of review, the future judicial interpretation of this standard remains uncertain. By distinguishing rather than overruling *Trimble*, "the corresponding statutes of other States will be of questionable validity until [the] Court passes on them, one by one, as being on the *Trimble* side of the line, or the *Labine-Lalli* side."[100]

*Ambach v. Norwick**

In *Ambach v. Norwick*,[1] the Court considered whether a state may refuse to employ as elementary and secondary school teachers aliens who are eligible for United States citizenship but who refuse to seek naturalization. Since 1886, the Court has been confronted with a number of statutes which allegedly discriminate against aliens in violation of the equal protection clause of the Fourteenth Amendment.[2] Al-

departure . . . is at the plurality's valiant struggle to distinguish, rather than overrule, Trimble v. Gordon . . . ." *Id.* at 276.

98. *See* note 57 and accompanying text *supra*.

99. Trimble v. Gordon, 430 U.S. at 771.

As Justice Powell acknowleged, there will be some illegitimate children who will be able to prove "their relationship to their deceased fathers without serious disruption of the administration of estates. . . ." 439 U.S. at 272-73. He noted in this regard that "few statutory classifications are entirely free from the criticism that they sometimes produce inequitable results. Our inquiry under the Equal Protection Clause does not focus on the abstract 'fairness' of a state law, but on whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment." *Id.* at 273.

100. 439 U.S. at 277 (Blackmun, J., concurring). This is made evident in a footnote to the plurality opinion, where Justice Powell states: "In affirming the judgment below, we do not, of course, restrict a State's freedom to require proof of paternity by means other than a judicial decree. Thus, a State may prescribe any *formal* method of proof, whether it be similar to that provided by § 4-1.2 or some other regularized procedure that would assume the authenticity of the acknowledgment. As we noted in *Trimble*, 430 U.S. at 772 n.14, such a procedure would be sufficient to satisfy the State's interest." *Id.* at 272 n.8.

* Commentary by Stephen Traverse, member, third-year class.

1. 441 U.S. 68 (1979).

2. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886), where the Court invalidated a city

though the seminal cases in this area protected an alien's "right to work,"[3] a distinction was early drawn between "the common occupations of the community" and activities affected with a "special public interest."[4] During and immediately following World War I, the Court relied on this distinction in upholding state statutory prohibitions against an alien's working on public construction projects,[5] owning land for farming purposes[6] and operating pool and billiard rooms.[7]

Perhaps in response to an evolution of social attitudes generally,[8] as well as to a desire, expressed by Congress, to comfortably and expeditiously assimilate aliens and other minorities into American society on the whole,[9] later decisions greatly reduced the scope of the "special public interest" doctrine.[10] This trend culminated in *Graham v. Richardson*,[11] where the Court declared state statutory classifications based on alienage to be "inherently suspect and subject to close judicial scrutiny."[12] Since *Graham*, the Court has invalidated statutes which prevented aliens from entering a state's competitive civil service,[13] working as engineers,[14] receiving state financial aid for higher education[15] and practicing law.[16] More recently, however, in *Foley v. Connelie*,[17] a

ordinance which was discriminatorily enforced against aliens in order to prevent Chinese subjects from operating laundries within the city. These early cases are, in many instances, also relevant to classifications based on race. *See, e.g., id.*; United States v. Wong Kim Ark, 169 U.S. 649 (1898); Wong Wing v. United States, 163 U.S. 228 (1896).

3. *See, e.g.*, Truax v. Raich, 239 U.S. 33, 41 (1915).

4. *Compare* Truax v. Raich, 239 U.S. 33, 41 (1915) (invalidating an Arizona statute which prohibited employers of more than five persons from hiring any more than 20% aliens) *with* People v. Crane, 214 N.Y. 154, 161, 108 N.E. 427, 429 (opinion by Cardozo, J.), *aff'd sub nom.* Crane v. New York, 239 U.S. 195 (1915) (upholding a New York statute which prohibited employment of aliens on public construction projects).

5. Heim v. McCall, 239 U.S. 175 (1915); Crane v. New York, 239 U.S. 195 (1915).

6. Terrace v. Thompson, 263 U.S. 197 (1923).

7. Ohio *ex rel.* Clarke v. Deckebach, 274 U.S. 392 (1927). *See also* the lower court cases collected in Note, *Constitutionality of Restrictions on Aliens' Right to Work*, 57 COLUM. L. REV. 1012, 1021-23 (1957).

8. *Cf.* Fujii v. California, 38 Cal. 2d 718, 242 P.2d 617 (1952) (United Nation Charter's guarantee of human rights and freedoms invoked to invalidate a California statute restricting land ownership by aliens).

9. *See* 42 U.S.C. § 1981 (1976) (formerly 8 U.S.C. § 41), *cited in* Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 419 (1948).

10. *See, e.g.*, Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948); Oyama v. California, 332 U.S. 633 (1948).

11. 403 U.S. 365 (1971).

12. *Id.* at 372.

13. Sugarman v. Dougall, 413 U.S. 634 (1973).

14. Examining Board of Engineers v. Flores de Otero, 426 U.S. 572 (1976).

15. Nyquist v. Mauclet, 432 U.S. 1 (1977).

16. *In re* Griffiths, 413 U.S. 717 (1973).

17. 435 U.S. 291 (1978). This case is discussed at length in Greenberg, Scholz, Hiaring

state's legitimate interest in excluding aliens from its "democratic political institutions"[18] was held to justify the requirement that a state's police officers be United States citizens.[19] Thus, where the state's goal was to "preserve the basic conception of a political community,"[20] the Court would require only a rational relationship between the state's interest and the statute's limiting classification.[21] The Court relied primarily on *Foley* to uphold, in a five to four decision, a state statute prohibiting the employment of aliens as teachers in the state's elementary and secondary schools.[22]

A New York statute forbidding permanent certification as a public school teacher of any person not a United States citizen, unless that person has manifested an intention to apply for citizenship,[23] was held in *Ambach* not to violate the equal protection clause of the Fourteenth Amendment.[24] The appellees, one British and the other Finnish, had resided in the United States since 1965 and 1966 respectively and met the educational requirements set by New York for certification as a public school teacher.[25] Both had consistently refused to seek citizenship, however, despite their eligibility to do so, and their applications for teaching certificates covering nursery school and the elementary grades were accordingly denied.[26]

& Hart, *Constitutional Review: Supreme Court, October 1977 Term*, 6 HASTINGS CONST. L.Q. 19, 180-89 (1978).

18. 435 U.S. at 295 (quoting Sugarman v. Dougall, 413 U.S. 634, 648 (1973)).

19. 435 U.S. at 300.

20. *Id.* at 296 (quoting Sugarman v. Dougall, 413 U.S. at 647).

21. *Id.* at 296.

22. 441 U.S. at 69-70.

23. *See* N.Y. EDUC. LAW § 3001 (McKinney 1970), which provides: "No person shall be employed or authorized to teach in the public schools of this state who is . . . [n]ot a citizen. The provisions of this subdivision shall not apply, however, to an alien teacher now or hereafter employed, provided such teacher shall make due application to become a citizen and thereafter within the time prescribed by law shall become a citizen. . . ." The statute further excepts persons who are ineligible for United States citizenship solely because of an oversubscribed quota. *Id.* § 3001-a. The Commissioner of Education has authority to create further exemptions from the prohibition. Pursuant to that authority, a regulation has been promulgated providing for the issuance of a provisional certificate to alien teachers, even where such teachers have not declared their intention of becoming citizens, if "such teacher has the appropriate educational qualifications as defined in the regulations and (1) possesses skills or competencies not readily available among teachers holding citizenship, or (2) is unable to declare intention of becoming a citizen for valid statutory reasons." 8 N.Y. CODE OF RULES AND REGULATIONS § 80.2 (i) (1978).

24. 441 U.S. at 71-72.

25. *Id.* at 71.

26. *Id.*

The Lower Court Decision

One appellee, Norwick, sought to enjoin enforcement of the statute, and the other, Dachinger, obtained leave to intervene as a plaintiff. A three-judge district court was convened pursuant to title 28, section 2281, of the United States code[27] and, applying the *Graham* "close judicial scrutiny" standard, held the statute discriminatory against aliens in violation of the equal protection clause.[28] The court declared the statute overbroad as excluding all resident aliens from all teaching jobs and as disregarding the subjects sought to be taught, the alien's nationality, the nature of the alien's relationship to the United States and his willingness to substitute other representations of loyalty to American political values.[29] The Commissioner of the New York State Department of Education appealed the district court's judgment to the United States Supreme Court.

The United States Supreme Court Decision

Writing for the majority,[30] Justice Powell observed that the Supreme Court's decisions regarding the permissibility of statutory classifications based on alienage had not formed "an unwavering line" over the years.[31] Adverting to the "special public interest" cases, Justice Powell noted that the Court's more recent decisions had not entirely abandoned the "general principle that some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government."[32] He asserted that the exceptional rule for "governmental functions" rests on the distinction between citizens and aliens, which is "fundamental to the definition and government of a State,"[33] and that "because of [the] special significance of citizenship . . . governmental entities, when exercising the functions of government, have wider latitude in limiting the participa-

27. This section provided that an interlocutory or permanent injunction restraining the enforcement, operation or execution of a state statute on grounds of unconstitutionality could not be granted unless the application was heard by a three-judge district court. The section was repealed in 1976. Pub. L. 94-381 §§ 1, 2, 90 Stat. 1119.

28. *See* Norwick v. Nyquist, 417 F. Supp. 913, 917 (S.D.N.Y. 1976).

29. *Id.* at 920-21.

30. Justice Powell was joined by Chief Justice Burger and Justices Stewart, White and Rehnquist; a dissenting opinion was filed by Justice Blackmun with whom Justices Brennan, Marshall and Stevens joined.

31. 441 U.S. at 72.

32. *Id.* at 73-74.

33. *Id.* at 75.

tion of noncitizens."[34]

In applying *Foley* to the case, Justice Powell stated that a determination, for equal protection purposes, of whether teaching in public schools constitutes a "governmental function" requires consideration of "the role of public education and . . . the degree of responsibility and discretion teachers possess in fulfilling that role."[35] He noted that a teacher enjoys close personal contact with students, influencing student perceptions and values by acting as a "role model."[36] Justice Powell further observed that since public education "fulfills a most fundamental obligation of government to its constituency"[37] and since the public schools play an important part both in preparing individuals "for participation as citizens"[38] and in the preservation of the "values on which our society rests,"[39] public school teachers may properly be regarded as performing a function which, under *Sugarman v. Dougall*,[40] "go[es] to the heart of representative government."[41] Since all public school teachers "should help fulfill the broader function of the public school system,"[42] such teachers were considered "well within the 'governmental function' principle recognized in *Sugarman* and *Foley*."[43] On these grounds, the Court held that a citizenship requirement for teaching in state public schools need bear only a rational relationship to a legitimate state interest.[44] Determining that the New York statute met this rational relationship standard,[45] the Court upheld the law.

Four justices dissented from the Court's holding. Writing for them, Justice Blackmun questioned the applicability of *Foley* and of the majority's "governmental function" standard to the challenged statute.[46] He distinguished *Foley* both by its facts and under the rule in *Sugarman* as relevant only to " 'important nonelective executive, legislative, and judicial positions' held by 'officers who participate directly

34. *Id.*
35. *Id.*
36. *Id.* at 78.
37. *Id.* at 76 (quoting Foley v. Connelie, 435 U.S. at 297 (1978)).
38. 441 U.S. at 76.
39. *Id.*
40. 413 U.S. 634 (1973) (invalidating state statute which prevented aliens from entering state's competitive civil service).
41. 441 U.S. at 74 (quoting Sugarman v. Dougall, 413 U.S. at 647).
42. 441 U.S. at 79-80.
43. *Id.* at 80.
44. *Id.*
45. *Id.* at 81-82.
46. *Id.* at 83-84 (Blackmun, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.).

in the formulation, execution, or review of broad public policy.' "[47] Justice Blackmun argued that the "public responsibility" of police protection could constitutionally be confined to citizens of the United States only because police are authorized to exercise "an almost infinite variety of discretionary powers that could seriously affect members of the public," and because of the "special demands of police positions."[48] However, Blackmun, therefore, viewed *Foley* as "narrowly isolated"[49] and inapposite to the facts in *Ambach*. Especially relevant to the latter connection, argued Blackmun, were the appellees' roots in this country and their exceptional educational qualifications.[50]

Deeming *Foley* inapplicable to the present case, Justice Blackmun advanced four reasons for affirming the lower court's invalidation of the New York statute. First, the law itself refutes the argument that New York attaches much importance to the issue of alienage within its general educational scheme: the education of students who attend private schools or who are taught in public schools by alien teachers employable under any of the statute's many exceptions[51] "seems not to be inculcated with something less than what is desirable for citizenship and what the Court calls an influence 'crucial to the continued good health of a democracy.' "[52] Second, the statute is all-inclusive in its disqualifying provisions, being " 'neither narrowly confined nor precise in its application,' nor limited to the accomplishment of substantial state interests."[53] Third, the statutory classification is irrational in its attempt to bring " 'diverse and conflicting elements' " together " 'on a broad but common ground,' . . . by disregarding some of the diverse elements that are available, competent, and contributory to the richness

47. *Id.* at 83 (quoting Foley v. Connelie, 435 U.S. at 296 (1978) and Sugarman v. Dougall, 413 U.S. at 647 (1973)).

48. 441 U.S. at 83 (Blackmun, J., dissenting, joined by Brennan, Marshall and Stevens, JJ.). Note that Justice Blackmun has avoided the majority's term "governmental function" in favor of "public responsibility."

49. *Id.* at 84.

50. *Id.* at 84-85. Justice Blackmun noted, in particular, that "[b]oth appellee Norwick and appellee Dachinger have been in this country for over 12 years. Each is married to a United States citizen. Each currently meets all the requirements, other than citizenship, that New York has specified for certification as a public school teacher. . . . Each is willing, if required, to subscribe to an oath to support the Constitutions of the United States and of New York. Each lives in an American community, must obey its laws, and must pay all of the taxes citizens are obligated to pay." *Id.* (footnotes and citation omitted).

51. *See* note 23 *supra*.

52. 441 U.S. at 86 (Blackmun, J., joined by Brennan, Marshall and Stevens, JJ., dissenting) (quoting *id.* at 79).

53. *Id.* at 87 (quoting Sugarman v. Dougall, 413 U.S. at 643).

of our society and of the education it could provide."[54] Finally, Justice Blackmun could perceive no analytical distinction between this case and *In re Griffiths*,[55] where the Court held that a state could not bar an alien from qualifying to practice law:

> If an attorney has a constitutional right to take a bar examination and practice law, despite his being a resident alien, it is impossible for me to see why a resident alien, otherwise completely competent and qualified, as these appellees concededly are, is constitutionally disqualified from teaching in the public schools of the great State of New York.[56]

Analysis

It seems clear that in extending the concept of "governmental function" well beyond limits of *Foley* and in adopting a more general standard, based on language in *Sugarman*, of functions that "go to the heart of representative government," the Court has substantially modified its position vis-à-vis the constitutional validity of statutory classifications based on alienage. *Foley*, following *Sugarman*, recognized that a state may constitutionally require that "important nonelective executive, legislative, and judicial positions" be held only by citizens, where such positions involve direct participation in the "formulation, execution, or review of broad public policy."[57] But the Court made no attempt in *Ambach* to bring public school teachers within the primary specifications of the *Foley-Sugarman* standard. Rather, it chose to disregard that standard and looked instead to *Foley*'s secondary considerations of role, responsibility and discretion in reinterpreting *Sugarman*.

The Court's almost total reliance on *Foley* made its task easier. Just as government satisfies, according to *Foley*, a "most fundamental obligation"[58] in exercising the police power, so also is public education a governmental obligation, at least insofar as it prepares individuals "for participation as citizens" and contributes to "the preservation of the values on which our society rests."[59] But this analysis, however convenient, begs several key questions. The exercise of a general police power is reserved by state governments to themselves.[60] Education, on

54. 441 U.S. at 88 (quoting *id.* at 77).
55. 413 U.S. 717 (1973).
56. 441 U.S. at 89.
57. Foley v. Connelie, 435 U.S. at 296; Sugarman v. Dougall, 413 U.S. at 647.
58. 441 U.S. at 76 (quoting Foley v. Connelie, 435 U.S. at 297).
59. 441 U.S. at 76.
60. *Cf.* N.Y. CRIM. PRO. LAW § 140.30 (McKinney Supp. 1971) (restricting lawful arrests by persons other than peace officers to situations where a felony has in fact been committed, or where any other offense has been committed in the presence of the arresting

the other hand, lies within the legal competence of both governmental and nongovernmental entities.[61] Does this not render education a less fundamental *governmental* obligation than the exercise of the police power?[62] Does not New York's singular requirement for *private* school teachers, that they be "competent," [63] suggest that a state's obligation to educate its citizens is limited? Can the principal purpose of education really be to prepare persons for "participation as citizens," or even to preserve the "values on which our society rests," if aliens and citizens may be educated alike in public schools, and if those schools purport to bring together "diverse and conflicting elements . . . on a broad but common ground"?[64]

In noting the "critical part" a teacher plays in developing a student's "attitude toward government and understanding of the role of citizens in our society,"[65] the Court assumed that teachers, like the state troopers in *Foley*, act principally to benefit government. Further, the Court drew no distinction between a teacher's role in influencing "atti-

person). Arrests for misdemeanors may be made under such circumstances only in the county where the offense was committed. *Id.* Special laws relating to post-arrest procedure under such circumstances are codified in *id.* at § 140.40 (McKinney Supp. 1979). *Cf. also* Note, *The Law of Citizen's Arrest*, 65 COLUM. L. REV. 502 (1965) (criticizing the usual imposition of absolute liability for citizen's arrests made in error).

61. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925). Note that the New York statute does not apply to teachers in private schools. *See* 441 U.S. at 70, n.1.

In support of its conclusion that education constitutes a "governmental function" under *Sugarman v. Dougall*, the Court quoted a passage from Brown v. Board of Education, 347 U.S. 483, 493 (1954): "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." 441 U.S. at 76-77. The text in *Brown* continues, however: "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, *where the state has undertaken to provide it*, is a right which must be made available to all on equal terms." 347 U.S. at 493 (emphasis added).

Therefore, despite the explicit reference in *Brown* to education as an "important function of state and local governments," that function cannot be considered as comparable to the function of the constabulary, unless it be also admitted that a state is free not to exercise the police function, or that nongovernmental entities may exercise that function in a state's stead if they do so competently.

62. *Cf.* San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 35 (1973) (holding that education is not a fundamental right explicitly or implicitly protected by the Constitution).

63. N.Y. EDUC. LAW § 3204 (2) (McKinney Supp. 1979).

64. 441 U.S. at 76-77.

65. *Id.* at 78.

tude toward government" and a policeman's role in assuring compliance with the codified criminal law of a particular state. While focusing, therefore, on the wide discretionary powers that teachers enjoy in communicating course material to students, the Court seems to bring ordinary classroom lessons within the purview of a state's governmental policy, thus ignoring the palpable differences between a teacher's discretionary powers and those of a policeman. This omission is particularly vexing in view of *Foley*'s principal reliance on the "almost infinite variety of discretionary powers"[66] exercised by policemen in the performance of their official duties.

The Court's analogy between the respective discretionary powers of teachers and policemen, drawn in order to justify its reliance on *Foley*, would seem ill-served by the observation that teachers enjoy close personal contact with students, for whom they serve as role models and over whose "perceptions and values" they exert "a subtle but important influence."[67] Clearly, the Court was concerned with the state's responsibility—and manifest power—to protect its young; however, the Court made no attempt to specify the evils which the New York statute purports to protect the state's young from. The Court noted the opportunity a teacher has "to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities."[68] But to the extent a teacher is constitutionally able to exercise such influence, others are in a similar position, irrespective of their status as teachers or even as citizens. The First Amendment arguably protects citizens and resident aliens alike, without regard to profession or occupation.[69] In this connection it is difficult to accept the Court's assertion that recognition of First Amendment principles in the present context "would bar any effort by the State to promote particular values and attitudes toward government."[70] As Justice Blackmun observed in his dissent, "[t]he State will know how to select its teachers responsibly, wholly apart from citizenship, and can do so selectively and intelligently."[71]

66. Foley v. Connelie, 435 U.S. at 297.

67. 441 U.S. at 78-79.

68. *Id.* at 79.

69. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech. . . ." Since the amendment's language does not restrict the right of free speech to citizens, it would appear that the right is enjoyed by citizens and aliens alike. *See* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 233-34 (1954).

70. 441 U.S. at 79 n.10.

71. *Id.* at 87 (Blackmun, J., dissenting, joined by Brennan, Marshall and Stevens, JJ.) (footnote omitted).

The Court's focus on the state's responsibilities to its young derived from its own view of public education as fulfilling, under *Foley*, "a most fundamental obligation of government *to its constituency*."[72] The Court seemed to consider the governmental function of apprehending criminals through the state police force as correlative with the governmental function of educating the young through the state's public school teachers, in that both functions seek to protect society at large. In this manner, the Court used *Foley*'s secondary criteria of role, responsibility and discretion to justify the application of a primary criterion entirely different from that recognized in *Foley*.[73] In holding that a state may constitutionally exclude aliens from its police force,[74] the Court relied primarily on a finding, under *Sugarman v. Dougall*,[75] that "[p]olice officers very clearly fall within the category of 'important nonelective . . . officers who participate directly in the . . . execution . . . of broad public policy.' "[76] In *Ambach*, however, the Court viewed *Sugarman* more narrowly, regarding the factors considered in *Foley* as merely derivative of the primary consideration of whether public school teachers, like policemen, perform "task[s] 'that [go] to the heart of representative government.' "[77]

Thus, while the Court in *Ambach* purported to follow *Sugarman*, it in fact created a much more general test, under which state statutes excluding aliens from certain public employment will be upheld where the employment requires performance of functions that go to the heart of representative government. Ignoring the primary standards in *Foley* and judging public school teachers according to the secondary criteria of role, responsibility and discretion, the Court found education to constitute one such governmental function. This result is manifestly incompatible with that reached in *Sugarman*, or indeed in any case following *Sugarman*. Baldly declaring education to be a governmental function going "to the heart of representative government,"[78] the Court

72. *Id.* at 74 (quoting Foley v. Connelie, 435 U.S. at 297) (emphasis added).

73. *See* note 57 and accompanying text *supra*.

74. 435 U.S. at 300.

75. 413 U.S. 634 (1973).

76. 435 U.S. at 300 (emphasis omitted) (quoting Sugarman v. Dougall, 413 U.S. at 647).

77. 441 U.S. at 75-76 (quoting Sugarman v. Dougall, 413 U.S. at 647). The complete sentence in *Sugarman* reads: "[a]nd this power and responsibility of the State [to exclude aliens from certain areas of employment] applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." *Id.*

78. *Id.* at 75-76.

made no attempt to justify its conclusion vis-à-vis its implication in *Sugarman* that members of a state's competitive civil service do *not* perform such functions.[79] Since the Court's holdings in *Sugarman* and *Foley* explicitly condition the constitutionality of similarly discriminatory statutes upon a public employee's *direct participation* "in the formulation, execution, or review of broad public policy,"[80] it is clear that the Court in *Ambach* has asserted a new test. In failing to define the specifications of this new test, however, the Court has left the continued vitality of alienage as a suspect classification, at least in public employment contexts, open to serious doubts.

*Holt Civic Club v. City of Tuscaloosa**

In the area of equal protection of the fundamental right to vote, the Court in *Holt Civic Club v. City of Tuscaloosa*[1] upheld Alabama statutes which permitted the extension of limited governmental powers beyond the electoral constituency of a municipal government. The challenged statutes created a three-mile extension of conventional police powers beyond the strict geographical borders of a municipality of 6,000 or more inhabitants and a one-and-one-half-mile jurisdiction beyond the corporate limits of cities having less than 6,000 inhabitants.[2] Persons residing within these limits were subject to the municipality's police and safety regulations,[3] its business, trade and profession licensing requirements[4] and, to some extent, its planning authority.[5] Despite this augmented authority, residents of the adjoining territory subject to

79. *See* 413 U.S. at 646-47.

80. Foley v. Connelie, 435 U.S. at 296; 413 U.S. at 647.

* Commentary by John Heisse, member third year class.

1. 439 U.S. 60 (1978).

2. The challenged statutes were ALA. CODE tit. 11, 11-40-10 (1975); ALA. CODE tit. 11, 11-51-91 (1975); ALA. CODE tit. 12, 12-14-1 (1975). Title 11, section 11-40-10 of the Alabama Code (1975) provides: "The police jurisdiction in cities having 6,000 or more inhabitants shall cover all adjoining territory within three miles of the corporate limits, and cities having less than 6,000 inhabitants and in towns, such police jurisdiction shall extend also to the adjoining territory within a mile and a half of the corporate limits of such city or town.

"Ordinances of a city or town enforcing police or sanitary regulations and prescribing fines and penalties for violations thereof shall have force and effect in the limits of the city or town and in the police jurisdiction thereof and on any property or rights-of-way belonging to the city or town."

3. *Id.*

4. Title 11, section 11-51-91 of the Alabama Code (1975) provides in pertinent part: "Any city or town within the state of Alabama may fix and collect licenses for any business, trade or profession done within the police jurisdiction of such city or town but outside the corporate limits thereof; provided, that the amount of such licenses shall not be more than

these powers were not entitled to vote in municipal elections or to initiate or participate in municipal referenda or recall elections. It was to correct this disparity that the action was brought.

The Lower Court Decisions

The plaintiffs in *Holt* were a civic organization and seven residents of Holt, Alabama, an unincorporated community located within the police jurisdiction of Tuscaloosa.[6] In 1973 these plaintiffs brought a statewide class action in the United States District Court for the Northern District of Alabama challenging the constitutionality of the aforementioned Alabama statutes. They based their attack on the Fourteenth Amendment, claiming that Tuscaloosa's extraterritorial exercise of its police powers, absent a concomitant extension of the voting franchise to police jurisdiction residents, violated their equal protection and due process rights.[7]

Upon denial of plaintiffs' request to convene a three-judge court pursuant to 28 U.S.C. section 2281[8] and dismissal of the complaint, plaintiffs appealed to the Court of Appeals for the Fifth Circuit. The Fifth Circuit found that the challenged statutes had the statewide applicability required by section 2281 and remanded the case to the district court for the convening of a three-judge court.[9] On remand the plaintiffs' claim fared no better. The district court dismissed the equal protection argument, refusing to hold that extraterritorial regulation was unconstitutional per se. The plaintiffs' due process claim was rejected

one half the amount charged and collected as a license for like business, trade or profession done within the corporate limits of such city or town. . . ."

5. Although title 11, section 11-52-30 of the Alabama Code (1975) extended the territorial jurisdiction of municipal planning commissions to include the police jurisdiction area, the Alabama Supreme Court distinguished planning from zoning and held that municipal planning commissions cannot zone extraterritorially. Roberson v. City of Montgomery, 285 Ala. 421, 425, 233 So. 2d 69, 72 (1970). The *Roberson* court defined planning as relating to the systematic development of a community, while zoning was limited to use regulation of specific parcels or districts. *Id.* at 425, 233 So. 2d at 72.

6. Tuscaloosa has a population of 65,700; its surrounding police jurisdiction contains between 16,000 and 17,000 residents.

7. 439 U.S. at 62-63.

8. 28 U.S.C. § 2281 (repealed by Pub. L. No. 94-381, § 1, 90 Stat. 1119 (1976)) required the empanelling of a three-judge district court to rule on injunctions sought to restrain "the enforcement, operation or execution of a State statute by restraining the action of any officer of such State in the enforcement or execution of such statute." In order for section 2281 to be employed, the challenged statute must have had statewide application or have effectuated a statewide policy. Board of Regents of the Univ. of Texas Sys. v. New Left Educ. Project, 404 U.S. 541, 543 (1972).

9. Holt Civic Club v. City of Tuscaloosa, 525 F.2d 653, 656 (5th Cir. 1975).

without comment.[10]

The United States Supreme Court Decision

On direct appeal the United States Supreme Court affirmed the judgment of the district court. The majority opinion in the six to three decision was written by Justice Rehnquist.[11] Appellants argued that because the challenged statutes created a classification which infringed upon their right to participate in municipal elections, the laws could be sustained only if they were supported by a compelling state interest which justified Alabama's assertion of state regulatory power without granting the right to alter such regulations.[12] In support of this contention, appellants relied on several voting rights cases holding that denial of the franchise would be sustained only if justified by compelling state interests.[13] On the basis of this argument, appellants sought one of two remedies: that the city's extraterritorial power be nullified by invalidating the authorizing statutes or that the right to vote in municipal elections be extended to residents within the jurisdiction of the regulations.

Prior to ruling on the substantive aspects of appellants' claim, Justice Rehnquist addressed the applicability of section 2281 and the sufficiency of the complaint. With respect to the applicability of section 2281, the court concluded the statutes had the requisite statewide application because they spoke in mandatory terms.[14] Accordingly, convening the three-judge district court was proper.[15] In response to the appellants' argument that the district court had dismissed their complaint merely because they had failed to seek the proper remedy, the Court agreed that this would have been an improper reason for dismissal. Nevertheless, the majority felt that regardless of the remedy sought, the appellants' claim was not cognizable under the United

10. The district court did, however, grant leave to plaintiffs to amend their complaint "to specify particular ordinances of the City of Tuscaloosa which are claimed to deprive plaintiffs of liberty or property." Holt Civic Club v. City of Tuscaloosa, No. 73-736-W (N.D. Ala., filed June 7, 1977).

11. Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978). Justice Rehnquist was joined by Burger, C.J., and Stewart, Blackmun, Powell, and Stevens, JJ., with Stevens, J. filing a concurrence. Brennan, J., dissented, joined by White and Marshall, JJ.

12. 439 U.S. at 66.

13. *See, e.g.*, Evans v. Cornman, 398 U.S. 419 (1970); Kramer v. Union Free School Dist. No. 15, 359 U.S. 621 (1969).

14. Both the language of title 11, section 11-40-10 of the Alabama Code (1975) and decisions of the Alabama Supreme Court require city ordinances to have force and effect in the police jurisdictions of all municipalities of the requisite size. *See* City of Leeds v. Town of Moody, 294 Ala. 496, 319 So. 2d 242 (1975).

15. 439 U.S. at 65.

States Constitution.[16]

Moving to the merits, Justice Rehnquist rejected appellants' contention that the Alabama laws must be subjected to strict scrutiny. Appellants relied on *Kramer v. Union Free School District No. 15*,[17] *Cipriano v. City of Houma*[18] and *Evans v. Cornman*[19] to support their contention that the constitutionality of the denial of the franchise to residents within the jurisdiction of police power regulations hinges on satisfaction of the strict scrutiny test. The Court distinguished these cases, finding that the element common to each of them—the fact that the unfranchised party resided within the geographic boundary of the governmental entity concerned—was absent in *Holt*.[20] The Court therefore declined to extend the principle of "one man, one vote" beyond the geographic confines of the governmental unit.

Citing *Dunn v. Blumstein*,[21] *Kramer* and *Cornman*, Justice Rehnquist summarized: "our cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders."[22] Even bona fide residence does not alone activate the principle of "one man, one

16. *Id.* at 65-66.

17. 395 U.S. 621 (1969). *Kramer* involved a New York franchise qualification statute that imposed requirements on voters in school district elections in addition to traditional age and citizenship qualifications. Specifically, the statute limited eligible voters to district residents who (1) owned or leased taxable real property located within the district, or (2) were married to a person owning or leasing such property, or (3) were parents or guardians of children enrolled in a local district school for a specified time during the preceeding year. *Kramer* never addressed the validity of a residency requirement because the Court found the statute insufficiently tailored to meet the "exacting standard of precision . . . [required] of statutes which selectively distribute the franchise" since it excluded many bona fide residents who had distinct and direct interests in school board decisions while including many less interested residents. *Id.* at 632.

18. 395 U.S. 701 (1969). Decided the same day as *Kramer*, *Cipriano* involved a Louisiana law which provided that only "property taxpayers" could vote in elections called to approve the issuance of revenue bonds by a municipal utility system. Since property owners and non-property owners alike were substantially affected by such a bond issue, the restriction of the franchise was held impermissible. *Id.* at 705-06. *See also* City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970).

19. 398 U.S. 419 (1970). *Cornman* dealt not with a statute but with a ruling by a state administrative agency that denied the franchise to residents of a federal enclave located within the geographical boundaries of the state of Maryland. The agency ruled that the federal employees were not residents within the meaning of the state constitution. The Court rejected the contention that Maryland could deny the enclave residents the right to vote in state elections and found the plaintiffs to be both bona fide residents and sufficiently interested in the electoral process that they could not be denied equal voting rights. *Id.* at 422, 424.

20. 439 U.S. at 68.

21. 405 U.S. 330 (1972).

22. 439 U.S. at 68-69.

vote." Suffrage has traditionally been denied minors, aliens and convicts. More particularly, "in the context of special interest elections the State may constitutionally disfranchise residents who lack the required special interest in the subject matter of the election."[23]

In *Dunn* the Court had established that "[a]n appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community and therefore could withstand close constitutional scrutiny."[24] Thus, by relying on a literal interpretation of previous holdings, Justice Rehnquist obviated the need to apply a strict scrutiny standard in determining the constitutionality of the challenged statutes.

Justice Rehnquist conceded the "logical appeal" of the plaintiffs' position. Nevertheless, he noted that the realities of public administration dictate that the "imaginary line defining a city's corporate limits cannot corral the influence of municipal actions."[25] Justice Rehnquist reasoned that although purely internal municipal actions often have indirect extraterritorial effects, these indirect consequences could not form the basis for a constitutional right to participate in the municipality's political process.[26] The majority refused to distinguish "the direct effects of limited municipal powers over police jurisdiction residents from the indirect . . . extraterritorial effects of purely internal municipal actions[:] it makes little sense to say that one requires the extension of the franchise while the other does not."[27]

Having established that Alabama's statutory scheme need not pass the strict scrutiny test, the majority then addressed itself to whether the statutes bore a rational relationship to some legitimate state interest. Although the Fourteenth Amendment does not prohibit a law " 'merely because it is special, or limited in its application to a particular geographical or political subdivision of the state,' "[28] it will condemn legislation which " 'rests on grounds wholly irrelevant to the achievement of the State's objective.' "[29] The Court commenced its analysis of Alabama's interest with a discussion of the broad discretion afforded the states in the area of the allocation of state legislative power. The Court noted that thirty-five states authorize their municipalities to exercise

23. *Id.* at 69.
24. 405 U.S. at 343-44 (footnote omitted).
25. 439 U.S. at 69.
26. *Id.*
27. *Id.* at 70.
28. *Id.* at 70-71 (quoting Fort Smith Light and Traction Co. v. Board of Impvmt., 274 U.S. 389, 391 (1927)).
29. *Id.* at 71 (quoting McGowan v. Maryland, 366 U.S. 420, 425 (1961)).

governmental powers beyond their corporate limits and that several of these provisions for extraterritorial regulation are more extensive and intrusive than the Alabama scheme.[30] Although the constitutionality of these other plans was specifically left open, the Court implied that some more extensive schemes of extraterritorial regulation would fail to pass constitutional muster.[31]

In response to the appellants' argument that it would be both constitutionally preferable and more practical to place management of the police jurisdiction in the hands of county authorities, the Court explained that it was beyond its purview to decide "whether Alabama has chosen the soundest or most practical form of internal government possible."[32] Once the state legislature has chosen a scheme, the Court's inquiry "is limited to the question whether 'any state of facts reasonably may be conceived to justify' Alabama's system of police jurisdictions."[33] The Court had no problem answering this inquiry affirmatively.

The Court found that reasonableness of providing some municipal control over the police jurisdiction lies in the state legislature's "legitimate interest in seeing that this substantial segment of the population does not go without basic municipal services such as police, fire, and health protection."[34] It was also reasonable to require residents of the police jurisdiction to contribute through license fees to defray the expense of services provided them by the city.[35] Thus, once the Court applied the "rational relationship" test, it took little more to find that the Alabama statutes were reasonably justified by valid state objectives.

30. 439 U.S. at 72. *See generally* R. MADDOX, EXTRATERRITORIAL POWERS OF MUNICIPALITIES IN THE UNITED STATES (1955); Comment, *The Constitutionality of the Exercise of Extraterritorial Powers by Municipalities*, 45 U. CHI. L. REV. 151 (1977).

31. 439 U.S. at 73 n.8. It should be noted that the Court specifically mentioned legislative powers not included in the Alabama scheme: "While the burden was on appellants to establish a difference in treatment violative of the Equal Protection Clause, we are bound to observe that among the powers *not* included . . . are the vital and traditional authorities of cities and towns to levy ad valorem taxes, invoke the power of eminent domain, and zone property for various types of uses." *Id.* (emphasis in original). Two of these powers have been specifically precluded by Alabama Supreme Court decisions. *See* Roberson v. City of Montgomery, 285 Ala. 421, 423, 223 So. 2d 69, 70 (1970) (cities may not zone extraterritorially absent specific legislative authority); City of Prichard v. Richardson, 245 Ala. 365, 370, 17 So. 2d 451, 455 (1944) (extraterritorial taxation for revenue is unconstitutional). *See also* note 5 *supra*.

32. 439 U.S. at 73-74.

33. *Id.* at 74 (quoting Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 732 (1973)).

34. 439 U.S. at 74.

35. *Id.*

Appellants, citing *United States v. Texas*,[36] argued that the imposition of government authority absent a concomitant right to vote was a fundamental violation of the due process clause.[37] *United States v. Texas* prohibited the conditioning of the franchise of otherwise qualified votes upon payment of a poll tax, since such a scheme denied due process to many Texas voters. The Court in *Holt* dismissed plaintiffs' due process attack by reiterating that the right to vote may be conditioned upon actual residence within the geographic boundaries of the governmental unit concerned.[38] Since the plaintiffs did not reside within the corporate limits of Tuscaloosa, they were not "qualified voters" within the meaning of *United States v. Texas*, and thus were not entitled to vote in Tuscaloosa's municipal elections. Absent a right to vote, there could be no violation of the due process clause.[39]

Although he joined the majority opinion, Justice Stevens wrote separately to stress the limited scope of the Court's holding.[40] According to Justice Stevens, the Court had merely found the Alabama scheme not to be unconstitutional per se and left open the question of whether the scheme, or one similar to it, might unconstitutionally deny the voting franchise to individuals who share the interests of their voting neighbors.[41] Justice Stevens likened the Alabama scheme to a situation where a suburban community contracts with a nearby city to provide municipal services for its residents.[42] Although he noted the difference between a suburb's decision to contract with a nearby city and a decision by the state legislature requiring the suburb to do so,[43] Justice Stevens recognized that even the contracting suburb could not consent to a waiver of its residents' constitutional voting rights. If the residents are qualified voters, the state must ensure them an "equally effective voice in the election process."[44]

Justice Stevens then distinguished the plaintiffs' situation from that of the federal enclave residents in *Evans v. Cornman*;[45] appellants were not without a voice in the election of their governing officials since they directly elected state and county officials, through whom "they

36. 252 F. Supp. 235 (W.D. Tex. 1966) (three-judge district court), *aff'd*, 384 U.S. 155 (1966).
37. 439 U.S. at 75.
38. *Id.*
39. *Id.*
40. *Id.* at 75 (Stevens, J., concurring).
41. *Id.* at 78.
42. *Id.* at 76.
43. *Id.* at 76 n.1.
44. *Id.* at 76 (quoting Avery v. Midland County, 390 U.S. 474, 480 (1968)).
45. 398 U.S. 419 (1970).

participate directly in the process which has created their governmental relationship with the city."[46] The issue then became, according to Justice Stevens, "whether by virtue of that relationship created by state law, the residents of Holt and all other police jurisdictions in the State are entitled to a voice 'equally effective' with the residents of the municipalities themselves in the election of the officials responsible for governing the municipalities."[47] Justice Stevens concluded that they were not.[48]

This conclusion was grounded on two factors. First, Justice Stevens echoed the majority's view that a state or city is "free under the Constitution to require that 'all applicants for the vote actually fulfill the requirements of bona fide residence.' "[49] Second, the challenged statutes extend to the cities only limited extraterritorial powers, leaving many traditional municipal powers entrusted to the county government, which is fully representative of, and responsible to, the residents of Holt.[50] Stevens concluded that, absent a showing of unreasonableness either in the drawing of the residency lines or in the cost to the police jurisdiction for the services provided, the Alabama statutes could not be found to be unconstitutional on their face.[51]

The majority was met by a sharply critical dissent authored by Justice Brennan and joined by Justices White and Marshall.[52] The dissent stressed that legislation such as the contested Alabama statutes had traditionally been subjected to exacting judicial scrutiny, since " 'statutes distributing the franchise constitute the foundation of our representative society.' "[53] The dissenters noted that when statutes grant the franchise to some citizens and deny it to others, " 'the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest.' "[54] Although they recognized that past cases have upheld bona fide residency requirements as valid voter qualifications,[55]

46. 439 U.S. at 77 (Stevens, J., concurring).
47. *Id.*
48. *Id.*
49. *Id.* (quoting Carrington v. Rash, 380 U.S. 89, 96 (1965)).
50. 439 U.S. at 77.
51. *Id.* at 78.
52. *Id.* at 79.
53. *Id.* at 80-81 (quoting Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 626 (1969)).
54. *Id.* at 81 (emphasis in original) (Brennan, J., dissenting) (quoting Kramer v. Union Free School Dist. No. 15, 395 U.S. at 627 and Dunn v. Blumstein, 405 U.S. at 337).
55. 439 U.S. at 81. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 343-44 (1972); Evans v. Cornman, 398 U.S. 419, 422 (1970); Carrington v. Rash, 380 U.S. 89, 91, 96 (1965); Pope v. Williams, 193 U.S. 621 (1904).

the dissenters refused to insulate the Alabama statutes from strict judicial scrutiny. To do so "cedes to geography a talismanic significance contrary to the theory and meaning of . . . past voting-rights cases."[56]

The dissent argued that the Court had previously exempted from strict scrutiny only "bona fide residency requirements that were 'appropriately defined and uniformly applied.' "[57] The touchstone for determining the validity of such requirements had been whether they were aimed at preserving the political community.[58] However, argued the dissent, such a political community is based on the notion of a reciprocal relationship between government and its electorate. By mandating extraterritorial regulation, the challenged statutes "fracture this relationship by severing the connection between the process of government and those who are governed."[59] This undermines the very purpose sought to be furthered by traditional residency requirements.[60]

In reponse to the majority's implication that the police jurisdiction was not "governed enough" to be included within the political community of Tuscaloosa, the dissent contrasted the case at hand with *Kramer* and *Cipriano*.[61] In neither case, reasoned the dissent, were the unfranchised parties affected by the decisions of the governmental body in question to the same degree as the residents of Tuscaloosa's police jurisdictions. Indeed, an Alabama municipality may use its police power over its police jurisdiction to restrict, or even ban, the practice of businesses or professions it finds " 'hurtful to public morals, public safety, productive of disorder or injurious to public good.' "[62] The dissent also criticized the majority for failing to establish standards for determining when those subject to extraterritorial regulation will have been "governed enough" to trigger the more stringent protections of the equal protection clause.[63]

Further, the dissenters characterized Alabama's residency criterion as "entirely arbitrary."[64] It should have been immaterial that the appellants resided outside of the physical boundaries of Tuscaloosa, as long as they "live[d] within the perimeters of the city's 'legislative pow-

56. 439 U.S. at 81 (Brennan, J., dissenting).
57. *Id.* at 82 (quoting Dunn v. Blumstein, 405 U.S. at 343).
58. 439 U.S. at 82.
59. *Id.*
60. *Id.*
61. *Id.* at 85.
62. *Id.* at 85-86 (quoting Chappell v. Birmingham, 236 Ala. 363, 365 (1938)).
63. 439 U.S. at 86.
64. *Id.* at 87.

ers.' "[65] Since appellants, like the citizens of Tuscaloosa, were governed by the laws of Tuscaloosa, the dissenters argued that they should have been entitled to a concomitant extension of the voting franchise.[66]

The dissenters dismissed the majority's argument equating appellants with those indirectly affected by municipal actions as a "simple non sequitur."[67] Such a distinction, argued the dissent, had been recognized by Alabama law[68] and was consistent with the political community concept which underlies bona fide residency requirements. Lastly, the dissent proposed that since no compelling state interest had been articulated and since Alabama's interest in providing police jurisdiction residents with municipal services was in no way inconsistent with an extension of voting rights to such residents, the Alabama statutes could not stand in the face of the equal protection clause. Therefore, the dissenters would have reversed the judgment of the district court and held the challenged statutes to be in violation of the equal protection clause of the Fourteenth Amendment.[69]

Analysis[70]

The primary distinction between the approach taken by the majority and that taken by the dissent was the test each employed to determine the constitutionality of the contested statutes. The majority cited *Dunn* as authority for the proposition that "a government unit may legitimately restrict the right to participate in its politicial processes to those who reside within its borders."[71] The dissent on the other hand, arguing that the Alabama restrictions "undermine the very purposes which have led this Court in the past to approve the application of bona fide residency requirements,"[72] insisted that the contested statutes be subjected to " 'exacting judicial scrutiny.' "[73]

The reason for this divergence in approaches stems from each group's interpretation of *Dunn*. The majority apparently read *Dunn* as holding that requirements of residency within the geographic boundaries of the governmental entity are constitutional per se.[74] The dissent

65. *Id.*
66. *Id.*
67. *Id.*
68. *See* Roberson v. Montgomery, 285 Ala. 421, 233 So. 2d 69 (1970).
69. 439 U.S. at 88 (Brennan, J., dissenting).
70. For a more detailed discussion of this area, see Comment, *The Constitutionality of the Exercise of Extraterritorial Powers by Municipalities*, 45 U. CHI. L. REV. 151 (1977).
71. 439 U.S. at 68-69.
72. *Id.* at 82 (Brennan, J., dissenting).
73. *Id.* (quoting Kramer v. Union School Dist. No. 15, 395 U.S. at 628).
74. 439 U.S. at 68-69.

construed *Dunn* as upholding such residential restrictions only when the purpose of the restriction was "to preserve the basic conception of a political community."[75] Since a political community is based on the notion of a reciprocal relationship between government and its electorate, the dissent would have upheld a residency requirement only if it encompassed all those within the perimeters of the governmental unit's legislative powers.

At issue in *Dunn* was a Tennessee statute imposing a requirement of one year state residency prior to voting in any elections. In that case, the Court found the durational requirement to be unconstitutional,[76] but felt that a bonafide residency requirement may be the only adequate means of protecting a state's legitimate interest in preserving a "political community."[77] The political community involved in *Dunn* was the state of Tennessee. The reasonableness of a bona fide residency requirement therein emanated from the coincidence of the state's geographic boundaries with the limits of its legislative powers. It was reasonable to preclude residents of neighboring states from voting in Tennessee elections, since they were in no way governed directly by the Tennessee legislature. This logic, however, should not be extended to the situation presented by *Holt* where the extraterritorials involved were subject to the legislative powers of the municipal government. Once the boundaries of legislative power exceed the geographic limits of a governmental entity, the "talismanic significance"[78] of residency within those geographic limits loses force.

It cannot be denied that the three major voting rights cases distinguished by the majority—*Kramer*, *Cipriano* and *Evans*—each involved the denial of the franchise to persons residing within the geographic limits of the governmental entity concerned. The importance of this distinction, however, must be tempered by the concept of the "political community" discussed above. Indeed, a major emphasis of each case was the concern of the Court that voter qualifications not be drawn so as to exclude anyone who is not "substantially less interested or affected than those the statute includes."[79] The plaintiffs in *Holt* should be considered members of Tuscaloosa's "political community," and thus the extension of the franchise to them would be consistent with *Kramer*, *Cipriano* and *Evans*.

75. *Id.* at 82 (Brennan, J., dissenting) (quoting Dunn v. Blumstein, 405 U.S. at 344).
76. Dunn v. Blumstein, 405 U.S. at 360.
77. *Id.* at 343-44.
78. Holt Civic Club v. City of Tuscaloosa, 439 U.S. at 81 (Brennan, J., dissenting).
79. Kramer v. Union Free School Dist. No. 15, 395 U.S. at 632.

On a practical level, however, some degree of extraterritorial regulation is often desirable. Through extraterritorial regulation, the city can influence the development, health and safety of the area immediately outside its borders. Additionally, extraterritorial government can provide these outlying areas with essential municipal services such as police and fire protection. By refusing to require an extension of the voting franchise beyond the geographic boundaries of the city, the Court avoided the strict scrutiny test and thus ensured that such desirable extraterritorial regulation will continue so long as it bears "some rational relationship to a legitimate state purpose"[80] and is not overly oppressive.[81]

*Columbus Board of Education v. Penick, Dayton Board of Education v. Brinkman**

The Supreme Court handed down two decisions in its 1978 Term dealing with the power of federal courts to desegregate public school systems. Both *Columbus Board of Education v. Penick*[1] and *Dayton Board of Education v. Brinkman*[2] were class action suits initiated by the parents of students attending school systems allegedly operated on a racially discriminatory basis in violation of the equal protection clause of the Fourteenth Amendment. The two decisions considered the factual circumstances which would establish the existence of an intentionally maintained dual system of public education based on race and which would in turn warrant the imposition of system-wide remedial measures—including court-ordered busing—to correct segregation sanctioned by the state.

The United States Supreme Court Decisions

A. Columbus Board of Education v. Penick

The District Court for the Southern District of Ohio found that in 1976, the year it completed trial, half of the 172 schools in the Columbus school system had student bodies that were either ninety percent black or ninety percent white. Approximately seventy percent of the system's 96,000 students attended schools that were at least eighty per-

80. 439 U.S. at 70.
81. *Id.* at 72-73 n.8.

* Commentary by Morgan D.S. Prickett, member third-year class.
1. 99 S. Ct. 2941 (1979).
2. *Id.* at 2971.

cent black or eighty percent white, yet only thirty-two percent of the students enrolled in the district as a whole were black.[3] In March of 1977, the district court filed an opinion setting forth findings of fact and conclusions of law. It found, *inter alia*: (1) that the Columbus school system was intentionally segregated by race in 1954, the year *Brown v. Board of Education* (I)[4] was decided; (2) that at no time thereafter did the Board set out to disestablish this dual system; (3) that the Board had adopted a variety of practices and policies which had maintained and enhanced this system; and (4) that the Board had rejected suggestions proffered by interested parties to dismantle the dual system.[5]

The district court inferred that these actions were motivated by an intent to perpetuate segregation throughout the system, and further found that this animus violated the equal protection clause of the Fourteenth Amendment. Because this course of official conduct had affected the entire system, the district court held that any remedial plan looking to eradicate this dual system would have to be system-wide in scope. Such a plan was submitted by the Board and accepted by both the district court and the Court of Appeals for the Sixth Circuit.[6] As a result, thirty-three schools were closed, the structure of grade levels was reorganized, faculty and staff were reassigned along with 42,000 of the system's students, and 37,000 students were ordered bused to new schools to achieve racial balance.[7]

The Supreme Court affirmed the district court's ruling, stating that "the Board's conduct at the time of trial and before . . . was animated by an unconstitutional segregative purpose . . . [which] had current, segregative impact that was sufficiently system-wide to warrant the remedy ordered. . . ."[8] The opinion of the Court was delivered by Mr. Justice White, writing for himself and four other Justices.[9]

The Board contended at the outset that the district court could not properly find that a dual system existed in 1954 because segregated

3. *Id.* at 2943.

4. 347 U.S. 483 (1954).

5. 99 S. Ct. at 2944 (summarizing conclusions from Penick v. Columbus Bd. of Educ., 429 F. Supp. 229, 260-61 (S.D. Ohio 1977)).

6. *Id.* at 2944-45. See Columbus Bd. of Educ. v. Penick, 583 F.2d 787 (6th Cir. 1978).

7. 99 S. Ct. at 2952-53 (Rehnquist, J., dissenting, joined by Powell, J.).

8. *Id.* at 2945.

9. Justices Brennan, Marshall, Blackmun and Stevens concurred in Justice White's opinion. Chief Justice Burger and Justice Stewart concurred only in the result. *Id.* at 2952 (Burger, C.J., concurring in the judgment), 2983-88 (Stewart, J., concurring in the judgment, joined by Burger, C.J.). Justice Powell dissented in a separate opinion, *id.* at 2988-93 (Powell, J., dissenting), and joined Justice Rehnquist's dissenting opinion. *Id.* at 2952-71 (Rehnquist, J., dissenting, joined by Powell, J.).

schooling was not required by state law. Justice White summarily rejected this position. While such a legislative commandment would ease the plaintiff's burden of proving a constitutional violation, the majority held that under *Keyes v. School District No. 1*,[10] proof of state-imposed segregation, in whatever form, if it resulted in separate black or white schools, was prima facie evidence of a dual system and would suffice to support a finding to that effect.[11]

Justice White then approved the lower courts' finding that since the second *Brown* decision in 1955,[12] the Columbus School Board had been under a duty to " 'effectuate a transition to a racially non-discriminatory school system.' "[13] Every instance of the Board's refusal or failure to discharge this affirmative duty would constitute an independent violation compounding the original breach.[14] The district court had reviewed the Board's action since *Brown* II and had found faculty assignments made on the basis of race, boundary lines gerrymandered in a manner not explainable except with reference to race, construction programs undertaken, sites for new facilities selected and optional attendance zones instituted with knowledge that all these acts would have a segregative effect. Confronted with such evidence, the Supreme Court held that the district court was warranted in concluding that the Board had failed to discharge its affirmative duty to disestablish the dual system.

Justice White noted that the equal protection clause would support plaintiffs' claims only upon a finding of intentional discrimination and that proof of discriminatory impact alone was not sufficient to merit the

10. 413 U.S. 189 (1973).

11. 99 S. Ct. at 2947. *Accord*, Keyes v. School Dist. No. 1, 413 U.S. 189, 203 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971).

The Court in *Columbus* rejected the contention that Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977), had cast doubt on the continued validity of parts of the *Keyes* and *Swann* opinions which had approved the drawing of inferences of system-wide, purposeful discrimination which resulted in dual systems. 99 S. Ct. at 2947 n.7. The holding of that *Dayton* case concerned the scope of remedies, not the propriety of inferences going to create the factual predicate for liability. On the same day *Columbus* was decided, the Court approved use of this inference within the context of the *Dayton* litigation. *See* Dayton Bd. of Educ. v. Brinkman, 99 S. Ct. at 2978.

12. 349 U.S. 294 (1955).

13. 99 S. Ct. at 2947 (quoting Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955)). *Accord*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 12-14 (1971); McDaniel v. Barresi, 402 U.S. 39, 41 (1971); Green v. County School Bd., 391 U.S. 430, 437-38 (1968).

14. 99 S. Ct. at 2947. *See also* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 413-14 (1977); Wright v. Council of City of Emporia, 407 U.S. 451, 460 (1972); United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972).

invocation of judicial authority.[15] Since the lower courts had taken account of this and applied the correct legal standard, their decisions properly reflected the general rule that "actions having forseeable and anticipated disparate impact are relevant evidence . . . 'as one of the several kinds of proof from which an inference of segregative intent may be properly drawn.' "[16]

Justice White noted that the case presented a situation where: (1) the Board had a duty to dissolve its segregated system; (2) this duty, having existed for twenty years, had repeatedly and ineffectually been brought to the Board's attention;[17] (3) the Board had pursued a course of conduct with knowledge that its actions would forseeably result in perpetuating racial imbalance in the public schools; and (4) the Board had purposefully maintained segregation in a substantial part of the system, thus furnishing a sufficient basis for a rebuttable presumption of system-wide discriminatory intent.[18] Accordingly, the district court was entitled to treat the conjunctive effect of all these factors as prima facie proof of a system-wide discriminatory intent. Particular mention was made of the Board's opportunity to rebut this evidence of segregative purpose and current system-wide impact. It had not done so to the satisfaction of either the district court or the court of appeals, and the Supreme Court found "no apparent reason to disturb the factual findings and conclusions" made by tribunals closer to the evidence.[19]

Justice White noted that because the segregative impact affected the entire district, the trial court's order imposing a system-wide remedy was not improper. The majority did not believe the district court had seized upon isolated instances of unusual discriminatory impact; rather it had moved to correct a twenty-year history of incrementally segregative decisions whose cumulative discriminatory impact had, at the time of judgment, infected the warp and woof of education throughout the entire system. Finding no prejudicial erros of fact or law, the Supreme Court was not persuaded to upset the district court's decision.[20]

15. 99 S. Ct. at 2950. *See generally* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

16. 99 S. Ct. at 2950 (quoting Penick v. Columbus Bd. of Educ., 429 F. Supp. 229, 255 (S.D. Ohio 1977)).

17. *Id.* at 2949 n.11.

18. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973).

19. 99 S. Ct. at 2950.

20. *Id.* at 2952.

B. Dayton Board of Education v. Brinkman

In *Dayton*, the district court had originally found a violation of the equal protection clause,[21] but after protracted litigation[22] eventually dismissed the complaint for plaintiff's failure to show that existing patterns of segregation had been caused by the Board's purposefully discriminatory conduct.[23] The district court had found that in 1972, when the original complaint was filed, fifty-one of the system's sixty-nine schools were virtually all white or all black. Forty-three percent of the students were black, but seventy-six percent of them had been assigned to the twenty-one predominantly black schools. This pattern had continued for at least twenty years.[24] The district court had also found that the Board operated a district-wide black high school with a black principal and an all-black faculty, and that several elementary schools were created and maintained on a similar basis.[25] The district court had further found that in 1950 the faculties of various schools were completely segregated to reflect the predominant racial composition of student enrollments: one hundred percent black schools had totally black faculties, while the faculties of other schools were one hundred percent white.[26]

21. This violation was composed of three elements: (1) the pronounced racial segregation patterns which existed in the district and which the Board had made no attempt to alter; (2) the Board's adoption of optional attendance zones which had a racial motivation and a significant effect in certain school areas; and (3) the Board's repeal of resolutions by which an earlier Board recognized its responsibility for the existing pattern of racial segregation and its duty to alleviate the condition. Dayton Bd. of Educ. v. Brinkman, 99 S. Ct. at 2975 n.3.

22. The suit was filed in April, 1972. The district court ordered the school board to formulate a desegregation plan in February, 1973, and approved a plan submitted by the Board in July, 1973. On appeal, the Court of Appeals for the Sixth Circuit affirmed the district court's findings of fact, but reversed and remanded as to the remedial plan. Brinkman v. Gilligan, 503 F.2d 684 (6th Cir. 1974). On remand, the district court accepted a modified plan submitted by the Board in March, 1975. The court of appeals again reversed as to the remedy proposed and directed the district court to adopt a system-wide plan for the 1976-1977 school year that would approximate the system-wide ratio of black and white students. 518 F.2d 853 (6th Cir. 1975). The district court then adopted a plan which employed a variety of desgregation techniques, including student exchange programs between "paired" schools and a redistricting of attendance zones. This plan was approved by the court of appeals. 539 F.2d 1084 (6th Cir. 1976), but was disapproved by the Supreme Court because the system-wide remedy was not based on a finding that the segregation patterns resulted from intentional action by the Board. Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977).

23. Brinkman v. Gilligan, 446 F. Supp. 1232 (S.D. Ohio 1977).

24. 99 S. Ct. at 2975 n.1. The figures are from Brinkman v. Gilligan, 503 F.2d at 694-95.

25. Brinkman v. Gilligan, 446 F. Supp. 1232, 1246 (S.D. Ohio 1977).

26. Brinkman v. Gilligan, 583 F.2d at 248-49.

Nevertheless, the district court held that the plaintiff had failed to establish the Board's intent to operate a dual system. This conclusion was overturned by the court of appeals as clearly erroneous. The court of appeals, reviewing the evidence, found that the district court had misapplied controlling principles of law insofar as it had ignored (1) the "purposeful segregation in faculty assignments . . . [which was] 'inextricably tied to racially motivated student assignment practices,' "[27] and (2) the "intentional maintenance of a substantial number of black schools in the system at the time of *Brown* I."[28] The legal import of these and other factors, the court of appeals held, made it clear that the Board was operating a dual system which had existed at the time of *Brown I*, that it had failed to disestablish that system, that the "Board's 'intentional segregation practices [could not] be confined in one distinct area,' " that this had warranted an inference of purposeful segregation in other parts of the system, and that the Board had not produced evidence sufficient to rebut the inference that the Board's actions since *Brown I* had been taken to create or perpetuate segregation. The court of appeals concluded that since the inferences of segregative intent and system-wide impact had gone unchallenged, the district court would have been justified in imposing a system-wide remedy.[29]

The Supreme Court, again per Justice White, noted that the factual predicate for finding a dual system in *Dayton* was similar to that established in *Columbus*. As in *Columbus*, Justice White was disinclined to overturn the factual findings of the lower courts. Accordingly, he found "no reason . . . to upset the judgment of the Court of Appeals."[30]

Following the analytical sequence used in *Columbus*, Justice White held that once it was established that the Dayton Board had operated an intentionally segregated dual system in 1954, the Board would be judged in light of its affirmative duty "to eradicate the effects of that system," a part of this duty being "the obligation not to take any action that would impede the process of disestablishing the dual system

27. 99 S. Ct. 2978-79 (quoting Brinkman v. Gilligan, 583 F.2d at 248). Speaking of the importance of racially motivated assignment of teachers, the Court in Swann v. Charlotte-Mecklenburg Board of Education had said: "Independent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff . . . a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." 402 U.S. 1, 18 (1971).

28. 99 S. Ct. at 2978.

29. Brinkman v. Gilligan, 583 F.2d at 247, 253.

30. 99 S. Ct. at 2977-78 n.8.

and its effects."[31] This duty required the Board to do more than simply abandon prior discriminatory practices,[32] or to adopt plans for desegregation which on their face were racially neutral.[33] The duty "to eradicate the effects of [a dual] system" obliges the Board to formulate and implement positive techniques to dismantle the segregated system. Courts will review these actions, not for their ostensible purpose, but for their "effectiveness . . . in decreasing or increasing the segregation caused by the dual system."[34]

The Supreme Court affirmed the holdings of the court of appeals not only that the Board had failed to adopt measures to extirpate the dual system, but that it had also taken numerous actions since 1954 which had exacerbated the original constitutional violation. Among these incidents of aggravation were the continued assignment of students and faculty by race, the operation of segregated schools, the adoption of racially discriminatory optional attendance zones, and a pattern of school construction and site selection which perpetuated racial segregation throughout the system.[35] The court of appeals found that these actions showed that the Board had failed to discharge its affirmative duty. As in *Columbus*, the majority in *Dayton* affirmed, after finding that the lower court had committed "no prejudicial errors of fact or law."[36]

C. Separate Opinions

Justice White's opinions in *Columbus* and *Dayton* spoke for a bare majority of the Court. Four Justices wrote separate opinions, each varying in length and focus. Chief Justice Burger and Justice Stewart concurred in *Columbus* but dissented in *Dayton*. Justices Powell and Rehnquist dissented in both cases.

Chief Justice Burger wrote a short opinion expressing his agreement with various points developed by other Justices. The Chief Justice agreed with Justice Stewart that the complex nature of desgregation suits placed a premium on appellate court deference to

31. *Id.* at 2979. *Accord*, Wright v. Council of City of Emporia, 407 U.S. 451 (1972); United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972). *See generally* Green v. County School Bd., 391 U.S. 430, 437-38 (1968).

32. 99 S. Ct. at 2979. The Court at this point referred to Keyes v. School Dist. No. 1, 413 U.S. 189, 200-01 n.11 (1973), which in turn cites Green v. County School Bd., 391 U.S. 430, 437-38 (1968).

33. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971).

34. 99 S. Ct. at 2979. *Accord*, Wright v. Council of City of Emporia, 407 U.S. 451, 460, 462 (1972); Davis v. Comm'rs of Mobile County, 402 U.S. 33, 37 (1971).

35. Brinkman v. Gilligan, 583 F.2d at 258.

36. 99 S. Ct. at 2981.

the findings and conclusions of lower courts unless clearly erroneous. Thus he, like Justice Stewart, voted to affirm in *Columbus* and reverse in *Dayton*.[37] The Chief Justice joined Justice Rehnquist's detailed criticisms of the Court's "novel legal standard" regarding the affirmative duty of school boards to desegregate their systems upon a judicial finding that a dual system existed at the time of *Brown* I.[38] Chief Justice Burger shared Justice Powell's concern that federal court supervision of local desegregation efforts would have undesirable implications for local government. The Chief Justice thought it "increasingly doubtful" that busing would promote racial harmony, but he made no move to reopen the issue.[39] Apparently, he was of the opinion that development of this point would only add further uncertainty to the already confused body of desegration decisions.

Justice Stewart, joined by the Chief Justice, concurred specially in *Columbus* and dissented in *Dayton*.[40] This seeming contradiction was explainable in terms of the deference Justice Stewart believed appellate courts should extend to the findings and conclusions of the district courts. Those lower tribunals, Justice Stewart felt, were "uniquely situated . . . to appraise the societal forces at work in the communities where they sit" and to evaluate the subtle and intricate factors that could substantiate a finding of intentional segregation.[41] Justice Stewart therefore accepted the district court's finding of intentional segregation in *Columbus*, while voting to preserve the original decision in *Dayton*.

Justice Stewart was disturbed that the majority would shift to a school board the burden of rebutting a presumption of current, authorized segregation upon a showing that a dual system existed in 1954. He felt that the likelihood that an invidious intent to discriminate might be presumed to exist twenty years later, or that the effects of such a violation would have major effects on a current system, was too tenuous to justify creation of such a presumption. Even if this presumption is rebuttable, he argued, it fails to take sufficient account of the pervasive and dynamic changes wrought in racial relationships over the twenty-five years since *Brown* I was decided.[42]

These considerations persuaded Justice Stewart that the district

37. *Id.* at 2952 (Burger, C.J., concurring).
38. *See* notes 89-91 and accompanying text *supra*.
39. 99 S. Ct. at 2952 (Burger, C.J., concurring).
40. *Id.* at 2983-88 (Stewart, J., and Burger, C.J., concurring and dissenting).
41. *Id.* at 2983.
42. *Id.*

court in *Dayton* had reached the currect result.[43] Convinced that the court of appeals had been "wholly unjustified" in shifting the burden of proof approved by the majority and that such action might decisively affect litigation involving such elusive issues as the collective intent attributable to decision-making bodies of earlier years, Justice Stewart deemed it "a serious mistake to upset the District Court's findings."[44]

Within the context of *Columbus*, Justice Stewart believed the district court had discovered "relatively strong"[45] evidence of recent discriminatory intent.[46] The lower court's finding that a substantial part of the Columbus system was operated on a segregated basis justified the district court in activating a presumption shifting to the school authorities the burden of disproving the inference that the entire system was maintained on an unconstitutional design to discriminate.[47] The Columbus Board did not rebut this presumption, a fact which, in Justice Stewart's opinion, supported the finding that the system was operated on a segregated basis, as well as the District Court's imposition of a system-wide remedy to rectify this state of affairs.

Justice Powell dissented in both *Columbus* and *Dayton*.[48] The thrust of his opinion was that the Supreme Court should reexamine and reevaluate the calculus of judicial efforts to desegregate the nation's public schools.[49] Justice Powell agreed that integration was the basic goal and that the judiciary should participate in the realization of that goal: "Proved discrimination by state or local authorities should never be tolerated."[50] "Courts," he felt, "should confront discrimination whereever it is found to exist."[51] Justice Powell, however, did doubt whether the courts' "single-minded pursuit of racial balance" best served this goal when mathematical ratios are exalted to the exclusion of equally important but more ephemeral values.[52] According to Justice Powell, the judicial supervision of educational systems implicates both institutional and philosophical values. Speaking to the former, Justice Powell believed courts were the "least competent" branch

43. *Id.*
44. *Id.* at 2985.
45. *Id.* at 2986.
46. *Id.*
47. *Id.* Justice Stewart cited Keyes v. School District No. 1, 413 U.S. 189, 208 (1973), to support this proposition.
48. *Id.* at 2988-93 (Powell, J., dissenting).
49. *Id.* at 2992.
50. *Id.*
51. *Id.* at 2993.
52. *Id.* at 2990-91.