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FETAL EXPERIMENTATION: LEGAL IMPLICATIONS OF AN ETHICAL CONUNDRUM

By JOHN P. WILSON*

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* Associate Dean, Boston University School of Law. The author wishes to express his sincere appreciation to David A. Roush, Candidate for Juris Doctor Degree from Boston University School of Law, for his substantial research assistance in the preparation of this paper.
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I. REGULATING FETAL RESEARCH

A. The Controversy

Research on the fetus embraces a complex mixture of ethical, legal, and medical issues. The effort to regulate it has been characterized by a struggle between doctor-researchers who support fetal experimentation to eliminate or alleviate a variety of ills which afflict mankind, and a lay population which opposes fetal experimentation as an assault on the sanctity of human life.
The controversy has been fueled by the debate on abortion. Much fetal research has taken place on fetuses scheduled for abortion; and as the number of abortions has increased, this research has become more visible and frequent. At root, both practices compel a response to a vexing question: When do the full rights of personhood attach to a developing human being?

Many in the research community assert that a fetus is not human, or at least is not protectible in a fully human sense. They laud the substantial benefits which are accruing from fetal experimentation, pointing out that the general, overwhelming purpose of such experimentation is to improve prenatal care for fetuses which are to be carried to full term. Their detractors, however, view the doctor-researchers as callous, impersonal investigators who place scientific inquiry over regard for human life. They believe a fetus is a fellow human being who should not be subjected to unwarranted scientific manipulation.

1. Types of Research

To disentangle the threads of this dispute, an understanding of the nature of fetal experimentation is necessary. Medical researchers engaged in fetal experimentation have concentrated on four areas of study: First, research concerning the growth and development of the fetus in utero; second, diagnosis and observation of fetal diseases and genetic disorders; third, improvement of fetal therapy and pharmacology; and fourth, research on the nonviable fetus ex utero. Each of these areas is discussed separately below.

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1 See N.Y. Times, Apr. 13, 1973, at 20, col. 3.
3 See generally, Martin, Ethical Standards for Fetal Experimentation, 43 FORDHAM L. REV. 547 (1975).
4 Those opposed to fetal research point to the possible “brutalizing” effect such practices can have on community ethical standards. They point to the example of research on children: In the nineteenth century, children from orphanages were used in research projects. It is generally agreed that the effort to protect the fetus is simply an extension of the humanitarian impulse to protect children which resulted in child protection statutes—a relatively recent phenomenon. For a general discussion of the legal protection of children see Paulsen, The Legal Framework for Child Protection, 66 COLUM. L. REV. 679, 680-86 (1966).
a. Growth and development

There is still a paucity of knowledge about the physiological development and the sequential changes in the biochemical growth of the fetus. The study of fetal growth and development in utero is essential, since medical practitioners must first comprehend the intricacies of fetal anatomy, physiology, organ function, sensory capacity, and metabolism in order to meaningfully diagnose and treat fetal disorders before birth.

Much experimentation in this area is conducted on dead fetuses through autopsy or on live fetal tissue or organs excised from dead fetuses. Other experiments have involved the monitoring of fetal response and behavior through ultrasound and by fetal electroencephalogram. To acquire a better understanding of fetal metabolism, researchers have examined both fluid withdrawn from the amniotic sac surrounding the fetus and samples of blood taken from the umbilical cord. Other studies have involved the injection of nonradioactive tracers (such as carbon-13) into the amniotic cavity in order to monitor the dispersal or absorption of those tracers.

b. Diagnosis

Researchers concerned with improving the diagnosis of fetal disorders have considered the problems of genetic defects, neural tube defects, Rh incompatibility, and Respiratory Distress Syndrome. This research has had a largely predictive purpose and is designed to permit physicians to assess the health and development of the fetus in utero.

The diagnostic technique used in most cases is amniocentesis, a procedure which involves withdrawing fluid from the amniotic sac surrounding the fetus for subsequent analysis. First

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7 *Id.* at 10-11, 23.

8 *Id.* at 13.

used as a clinical procedure in 1882, this technique, combined with substantial progress in tissue culture research, has greatly expanded the intrauterine diagnosis of chromosomal and metabolic disorders. However, amniocentesis is capable of detecting only the most severe disorders, and there is a slight chance that it may harm the fetus. Fetoscopy and ultrasound may prove to be superior for diagnostic purposes, but both are still in the early stages of development.

Often diagnostic research is undertaken in conjunction with the treatment of prenatal disorders. In the case of Rh incompatibility, Respiratory Distress Syndrome, and neural tube disorders—major causes of infant mortality—intrauterine therapy may be available if the condition is diagnosed. For example, in the case of Respiratory Distress Syndrome, corticosteroids can be administered to correct certain chemical deficiencies which cause lung immaturity in the infant. Diagnostic procedures may also be employed to determine whether the physician should induce premature birth to avert serious harm to the fetus and the mother which could result from certain prenatal disorders if the pregnancy were carried to full term.

Diagnostic research may reveal the presence of such grave abnormalities that abortion would be recommended. However, advances in medical knowledge through further research may actually result in saving many fetuses from abortion. For example, if both parents carry a gene for certain kinds of serious disorders, such as Tay Sachs, there is currently a one-in-four chance of their having a severely defective child. Given these odds, many parents choose to abort. As a result of research on the prenatal diagnosis of blood diseases, however, these parents can find out if their fetus is free of serious defects; and the mother may then decide to carry it to full term.
c. Fetal therapy and pharmacology

The purpose of pharmacological research is to discover which drugs and agents administered for maternal and fetal care during pregnancy are the safest and most effective. Drug transfer studies are frequently undertaken to determine whether certain drugs will cross the placental barrier and have an impact on the fetus, or will instead affect only the mother. Often drug transfer research involves only an autopsy examination of fetal tissues. Since the average woman takes six drugs or agents during or prior to discovering her pregnancy, researchers have retrospectively examined the impact of those drugs on fetuses following abortions or natural births. The effects of analgesics, hormones, birth control pills, addictive drugs, insulin, anticonvulsants, anesthetics, and drugs taken for maternal disease treatment have all been studied in this manner.

Recently there has been a movement in the research community to expand the scope of pharmacological research. Researchers have sought to concentrate exclusively on fetuses scheduled for abortion, since they are able to utilize experimental drugs without fearing the adverse consequences on research subjects who will survive. While animal experimentation must precede research on human subjects for purposes of eliminating avoidable research risks, there is no alternative to testing on human subjects at some point, because of significant physiological differences between animals and humans. The most notable example of the need for preliminary testing of drugs on human subjects occurred in the development of rubella vaccine. Researchers developed a rubella serum that did not pass through animal placentas and presumably was safe for use by pregnant women. In subsequent testing on human subjects, however, the vaccine passed through the placenta and damaged the fetus. As a result, doctors

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for examining the fetus in utero—and removal of a sample of fetal blood from the placenta revealed that their fetuses were free from defects. Id.

11 See Marx, supra note 5, at 175. See also Philipson, Sabath, & Charles, Transplacental Passage of Erythromycin and Clindamycin, 288 NEW ENG. J. OF MED. 1219 (1973).

12 Forfar & Nelson, Epidemiology of drugs taken by pregnant women: Drugs that may affect the fetus adversely, 14 CLINICAL PHARMACOLOGY AND THERAPEUTICS 632 (1973).

13 Mahoney Report, Table I at 15.

14 Id. at 36-39.
were able to caution mothers to refrain from taking rubella vaccine prior to or during pregnancy. Had there been no prior testing on fetuses to be aborted, another thalidomide-type disaster might have occurred.

d. Research on fetal tissue and nonviable fetuses ex utero

The vast majority of reported research on fetuses *ex utero* is restricted to dead fetal subjects. After the death of a fetus, many tissues can be utilized to study tissue and cell growth as well as metabolic and cellular function. Tissue cultures from human fetuses have become indispensable for the growth of certain viruses and for the development of viral vaccines to combat major illnesses.

According to one authority:

"[T]he legal prohibition of the investigative use of embryonic and fetal tissues derived from dead human embryos or fetuses . . . will gravely retard the advancement of medical knowledge in many areas. Examples of such areas are: (1) the further understanding of the causes and development of means for the prevention of fetal abnormalities; (2) the alterations in cellular mechanisms underlying transformation of normal human cells to cancer cells and the immunologic factors involved in resistance to cancer; and (3) the development of vaccines not now available against viral and other infectious micro-organisms such as varicella virus, cytomegalovirus and the agents of hepatitis and mycoplasma. Regarding the last-mentioned area of investigation, it should be realized that the development of the prophylactics now generally employed in the prevention of poliomyelitis, measles and German measles stemmed from the results of original studies with human embryonic tissues."

In addition to experimentation involving dead fetuses and fetal tissue, research has been conducted on nonviable *ex utero* fetuses which exhibit signs of life. This type of research is extremely rare: No more than 20 cases were reported out of 3,000 citations of fetal research throughout the world in the last decade. Experimentation ranges from simple observation and

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20 Mahoney Report 22.

21 Id.


23 Fetal Research Report 33,534.
monitoring of fetuses with instruments such as EEG, X-rays, and radioisotope scans,\textsuperscript{24} to more invasive procedures designed to artificially maintain fetal life functions for purposes of developing an artificial placenta which would enable doctors to increase the potential for survival of premature infants.\textsuperscript{25}

2. Abuses

Despite the minimal risk associated with much, but certainly not all, fetal research and its beneficient objectives, abuses have taken place.\textsuperscript{26} Some experiments, such as the administration of drugs of unknown danger to fetuses to be aborted, involve practices about which there might be reasonable disagreement. Similarly, research on the nonviable fetus which involves only measurement or minor invasive procedures is not likely to stir heated debate.

Other experiments on the nonviable fetus, however, raise serious ethical questions. For example, in one preliminary attempt to develop a fetal incubator, 15 fetuses (9-24 weeks' gestation) obtained from induced abortions were immersed in a salt solution containing oxygen at extremely high pressure, in an attempt to provide oxygen for the fetuses through the skin.\textsuperscript{27} As the determinants of life were a pulsating umbilical cord or visible heartbeat, the fetuses' chests were opened whenever necessary to observe their hearts. In this experiment, four fetuses were supported artificially, \textit{i.e.}, denied death, for 22 hours.\textsuperscript{28} In another example, a study to determine fetal brain metabolism of ketone bodies, the heads of eight fetuses (12-17 weeks' gestation) were severed from their bodies after heartbeat had ceased.\textsuperscript{29} While death had technically occurred, life at the cellular level continued

\textsuperscript{24} Mahoney Report 22.
\textsuperscript{25} Id. at 24-25.
\textsuperscript{28} Id.
\textsuperscript{29} Adam, Raiha, Rahiala, \textit{et al.}, \textit{Cerebral Oxidation of Glucose and D-BOH-Butyrate by the Isolated Perfused Human Fetal Head}, 7 \textit{Pediatric Research} 309 (1973).
in the brain, and thus it was possible to measure the extent to which fetal cerebral tissues could metabolize D-BOH-Butyrate as an alternative to glucose.  

B. Regulating Fetal Research

The potential value of fetal research has not stilled the voices of those who view it as an unwarranted assault on the integrity of living human beings. The protest against fetal research has taken several forms, including the use of the criminal process against doctor-researchers and the promulgation of state statutes designed to limit the types of research which may be undertaken.

Two cases have commanded national attention: The Massachusetts "grave-robbing" incident and the trial of Dr. Kenneth C. Edelin. See Boston Globe, Feb. 16, 1975, at 1, col. 4. The Massachusetts "grave-robbing" cases were triggered by a journal article written by three Boston doctors. See Philipson, Sabath, & Charles, supra note 15. The article described an experiment to determine which of two drugs reaches a fetus in sufficient concentration to prevent congenital syphilis where the mothers are allergic to penicillin. All of the women who participated in the experiment had requested abortions and had provided their written consent to the research. The article came to the attention of the Boston City Council and the Suffolk County District Attorney's Office. Indictments were returned against the three doctors who wrote the article and a pathologist who assisted them in the experiment. Boston Globe, Feb. 16, 1975, at 5, col. 1. The doctors were charged with "grave-robbing" in violation of a state statute. Id. Their cases are still pending.

In the process of investigating the "grave-robbing" incident, a representative of the Suffolk County District Attorney's Office found two dead fetuses in the county mortuary. One was allegedly 24 weeks old; and a certificate listing the cause of its death could not be located. Dr. Kenneth Edelin, the doctor who performed the abortion, was indicted for the manslaughter of the aborted fetus. In his instructions to the jury, the judge stated that a fetus is not a person until birth, that birth is defined as "the process which causes the emergence of a new individual from the body of its mother," and that a person is one who is born, that is, outside the body of the mother. Despite the fact that the only eyewitness for the state testified that the fetus showed no sign of life when it was removed from the mother, the jury convicted Dr. Edelin of manslaughter. Several of the jurors said their guilty finding was based on the belief that Dr. Edelin was negligent in not attempting to save the life of a premature infant while performing an abortion. A picture of the fetus had a powerful effect in moving the jury toward conviction. Boston Globe, Feb. 16, 1975, at 4, col. 6. On appeal the Massachusetts Supreme Court ordered a directed verdict for acquittal. Commonwealth v. Edelin, 359 N.E.2d 4 (Mass. 1976).

There is a wide variation among states as to the limitations their statutes impose on fetal experimentation. Certain statutes, for example, limit experimentation on ex utero fetuses and yet fail to prohibit or regulate in utero experimentation. See, e.g., CAL. HEALTH & SAFETY CODE § 25956 (Supp. 1976); ILL. ANN. STAT. ch. 38, § 81-18 (Smith-Hurd Supp. 1976); NEB. REV. STAT. § 28-4,161 (1975). Other statutes impose a nearly universal ban on fetal experimentation, excluding only those measures designed to preserve the life or
The most pervasive regulation of fetal research, however, has been at the national level. In July 1974, in response to research on fetuses and other subjects who might lack the capacity to consent, Congress passed the National Research Act. The act applies to all federally funded fetal research and provides for the establishment of regulations governing the limits of permissible research and the procedures to be followed in undertaking such research.

As a preliminary step to the promulgation of regulations, the act provided for the establishment of a National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. The Commission was assigned the responsibility of studying the various kinds of research in progress, and reporting its conclusions and recommendations regarding appropriate research and research protocols to the Secretary of the Department of Health, Education, and Welfare. In performing its initial assignment, the Commission held hearings and solicited the oral and written views of experts from a broad range of disciplines.

Among the most comprehensive of the state statutes is that enacted by Massachusetts. It prohibits the use of live human fetuses, whether in utero or ex utero, as subjects for scientific laboratory research, or other forms of experimentation. However, procedures "incident to the study" of the fetus in utero are not prohibited if, in the physician's judgment, the study will not "substantially jeopardize" the life of the fetus, and if the fetus is not the subject of a planned abortion. Diagnostic or remedial procedures to determine or preserve the life or health of the fetus are specifically permitted.

For a more detailed analysis of several state fetal research laws, see Note, Fetal Experimentation: Moral, Legal, and Medical Implications, 26 STAN. L. REV. 1191, 1197-207 (1975).

As the federal government provides the money to support a significant percentage of research pertaining to human subjects, and, as all research on human subjects is required to conform to federal guidelines before funds are provided, the federal regulations are of vital and far reaching importance.

The members of the National Commission were selected and appointed by the Secretary of the Department of Health, Education, and Welfare. When finally constituted, the Commission consisted of three physicians with a knowledge of research, two medical ethicists, three lawyers, two psychologists, and one public representative.

See Fetal Research Report 33,530.

See Fetal Research Report 33,536-42.
The legislative history of the enabling statute, pre-existing codes, and other materials relating to research on the fetus were consulted, as were the draft rules and policy guidelines of the Department of Health, Education, and Welfare. The final recommendations of the Commission were submitted to HEW and were incorporated in large part into the regulations issued by the Department.

Following a definitional section, the Department's regulations provide for the establishment of two Ethical Advisory Boards, one advisory to the Public Health Service and the other advisory to all other agencies and components of the Department of Health, Education, and Welfare. The function of the boards

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39 Id. at 33,531. The papers and reports submitted to the Commission are compiled in The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, Research on the Fetus: Appendix (1975). The Department's draft rules and policy guidelines emphasize informed consent and prior review as the principal means for protecting human research subjects. They require an extra layering of committees to assess risk, monitor consent, and evaluate the ethical implications of particular research. 39 Fed. Reg. 30,648, 30,653-54 (1974). See notes 190-244 and accompanying text infra.

40 The regulations are found at 45 C.F.R. §§ 46.201-.301 (1976). While the regulations and recommendations are similar in many respects, they differ on the question of whether to permit research on a nonviable fetus ex utero which would alter its duration of life. The Department concluded that the continuation of research to develop an artificial placenta is in the public interest. See note 164 and accompanying text infra. In justifying its decision to permit the research, the Department stated that it was “persuaded by the weight of scientific evidence that research performed on the nonviable fetus ex utero has contributed substantially to the ability of physicians to bring to viability increasingly small fetuses.” 40 Fed. Reg. 33,528 (1975). But see note 184 infra concerning the Department’s proposed amendments to the regulations.

41 45 C.F.R. § 46.203 (1976). For the purposes of this article, the relevant definitional sections are:

(c) “Fetus” means the product of conception from the time of implantation until a determination is made, following expulsion or extraction of the fetus, that it is viable.

(d) “Viable” as it pertains to the fetus means being able, after either spontaneous or induced delivery, to survive (given the benefit of available medical therapy) to the point of independently maintaining heartbeat and respiration . . . . If a fetus is viable after delivery, it is a premature infant.

(e) “Nonviable fetus” means a fetus ex utero which, although living, is not viable.

(f) “Dead fetus” means a fetus ex utero which exhibits neither heartbeat, spontaneous respiratory activity, spontaneous movement of voluntary muscles, nor pulsation of the umbilical cord (if still attached).

Id.

42 Id. § 46.204.
is to render advice concerning the ethical issues present in those classes of proposals which each board determines must be submitted to it.\(^4\) In addition, the regulations expand the functions of Institutional Review Boards in local hospitals and similar institutions\(^4\) in connection with activities involving fetuses, pregnant women, or human \textit{in vitro} fertilization.\(^5\) No research award may be made by the Department of Health, Education, and Welfare until the appropriate reviewing bodies certify the research application.\(^6\)

General limitations are placed on all research activity.\(^7\) Prior to commencing fetal research, studies on animals and nonpregnant individuals are required. When nontherapeutic research is conducted, the risk to the fetus must be minimal; if the research is therapeutic and conducted on either the mother or the fetus, the risk to the fetus must be the least possible consistent with achieving the objectives of the research.\(^8\)

Finally, the regulations also place limits on specific areas of research. These include provisions which relate to research activities directed toward pregnant women as subjects,\(^9\) activities involving the dead fetus, fetal material, or the placenta,\(^5\) research carried out in connection with abortion,\(^5\) \textit{in utero} research,\(^5\) and experimentation on the nonviable fetus \textit{ex utero}.\(^5\)

\(^{4}\) \textit{Id.} \S 46.204(c), (d). The proposals potentially include any grant or contract sought by the applicant for "supporting research, development, and related activities involving: (1) The fetus, (2) pregnant women, and (3) human \textit{in vitro} fertilization." \textit{Id.} \S 46.201(a).

\(^{5}\) To obtain funding for research involving human subjects, an organization must establish an Institutional Review Board whose function is to review and either approve or disapprove research proposals. In addition, where the research involves risk to human subjects, the Institutional Review Board must conduct continuing review throughout the course of the project; insure that informed consent has been obtained; and determine that the risks to the subject are outweighed both by the benefits to the subject and by the knowledge to be gained through research. \textit{Id.} \S 46.102. \textit{See} text accompanying notes 232-40 \textit{infra}.

\(^{6}\) \textit{Id.} \S 46.205.

\(^{7}\) \textit{Id.} \S\S 46.204(e), 46.205(b).

\(^{8}\) \textit{Id.} \S 46.206.

\(^{9}\) \textit{Id.} \S 46.206(a)(1)-(2).

\(^{10}\) \textit{Id.} \S 46.207.

\(^{11}\) \textit{Id.} \S 46.210.

\(^{12}\) \textit{Id.} \S 46.206(a)(3)-(4).

\(^{13}\) \textit{Id.} \S 46.208.

\(^{14}\) \textit{Id.} \S 46.209.
II. LEGAL ISSUES RAISED BY THE REGULATIONS

A. Scope of Analysis

The remainder of this article will analyze the legal issues raised by sections 46.208 and 46.209 of the Department's regulations, i.e., research on the fetus in utero and on the fetus ex utero. These sections of the regulations were chosen partly for reasons of economy in an article of this length, and partly because the most baffling problems are in the areas selected.\(^5\)

Initially it may be helpful to clarify some important terms which will be used throughout the analysis. The words fetal experimentation or fetal research provide little clue to the complexity of the topic. Part of the problem is that we are considering a "being" in different environments and stages of growth, and

\(^5\) Serious questions are also posed in those areas omitted from discussion. Research on a premature infant (a fetus ex utero ascertained to be viable) is subject to the laws and regulations governing research on children in general; but that area of the law is itself unclear. The new regulation governing research on the dead fetus, fetal material, and the placenta contains vexing definitional questions. It states that such research "shall be conducted only in accordance with any applicable State or local laws regarding such activities." 45 C.F.R. § 46.210 (1976). These statutes, however, leave open perplexing questions. For example, the question of when death occurs, or perhaps, in the case of fetuses, when life occurs, must be answered.

In the case of the fetus, it is not irreversible changes which preclude a return to normal functioning that signal death, but an absence of adequate physiological development which precludes the attainment of normal functioning. Conceptually, however, it is difficult to regard the time before "life" begins as death. For a discussion of this issue and an analysis of state laws bearing on the issue of research on fetal tissue and remains, see Capron, The Law Relating to Experimentation with the Fetus, in The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, Research on the Fetus: Appendix (1975) [hereinafter cited as Capron Report].

In addition, research on the pregnant woman presents a plethora of problems, hardly solved by the new regulations. By what calculus, for example, do we measure the degree of therapeutic experimentation permissible on a mother which may cause harm to her unborn child? The regulations bar nontherapeutic research on the mother except where "the risk to the fetus is minimal." 45 C.F.R. § 46.207(a)(2) (1976). But therapeutic research on the mother may be conducted in accordance with her wishes, id. § 46.207(b)(1), with the sole limitation that the fetus be placed at risk to the minimum extent possible. Id. § 46.207(a)(1). Thus the regulations may be a poor guide to doctor-researchers in specific situations. What kind of risks are we talking about? Who measures the probability of harm and magnitude of harm which may be inflicted? If an activity will meet the health needs of the mother but will not provide significant benefit, and if the same activity involves an immeasurable risk to the fetus, are we prepared to say that the research should proceed? If doctors or hospitals refuse to proceed, are we prepared to absolve them from liability if the health needs of the mother are neglected? Is a father's consent irrelevant if he must share the burden of supporting a potentially defective offspring?
these differences may be critically important in defining whether that being has legal personhood. Thus one must distinguish carefully between fetuses in utero and ex utero and between fetuses which are previable, nonviable, or viable. A fetus in utero before the time of viability is previable, because it will in the normal course of events grow into viability; on the other hand, a fetus ex utero before the time of viability is nonviable, because, given the current state of technological development, there is no way it will attain viability. Similarly, a careful distinction must be made between therapeutic and nontherapeutic experimentation. If the objective is to benefit the subject, the experimentation is therapeutic; whereas if the main objective is to benefit others through the acquisition of new knowledge, it is nontherapeutic. Even the word experimentation should be defined. It refers to all nonstandard procedures utilized for diagnosis, therapy, or the acquisition

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5 For a definition of viability see note 41 supra. In Planned Parenthood v. Danforth, 96 S. Ct. 2831 (1976), the Supreme Court upheld the constitutionality of a Missouri statutory definition of viability as “that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems.” Id. at 2831. For a discussion of the Department’s minimum criteria for viability see note 169 infra.

6 Even the free substitution of words such as “experimentation,” “research,” “test,” and the Department’s more nebulous “activity” may be confusing. Experimentation, for example, appears to have a more invidious connotation than the word research.

The objectives of experiments on human beings cover a wide spectrum, but may be classified roughly as therapeutic or nontherapeutic. Many experiments are intended to benefit the subject (therapeutic experimentation). Frequently a doctor must treat a patient with an untried method because no “accepted” treatment exists. A doctor may also use a new method of treatment where other procedures are regarded as “standard practice,” thinking that the new method will prove more beneficial to his patient or be equally beneficial to his patient but lead to improved treatment for other sufferers of similar disorders. On the other hand, many experiments are not intended to benefit the subject (nontherapeutic experimentation), but are conducted solely in the pursuit of new knowledge. The subject might be a patient under a doctor’s care for an unrelated ailment . . . or he might be a healthy volunteer. Different standards should govern therapeutic and nontherapeutic experimentation. The therapeutic purpose itself serves to justify a doctor’s exposing a terminal leukemia patient to substantial risk in an effort to prevent or postpone imminent death, while a stronger independent justification should be required for allowing a researcher to expose a healthy volunteer to a similar risk simply to gain new knowledge.

of theretofore unknown information, and all standard procedures performed for the same reasons but not in a context where such procedures would be customary practice.58

Lastly, in considering risk, it is important to assess the probability of harm that may result from an experimental procedure. Is the likelihood one in one thousand, one in fifty, or unknown? In the use of new therapies or the pursuit of new knowledge, physicians or medical researchers may have a general notion of risk; but the very newness of their activity may make a precise calculation impossible. One should also assess the magnitude of harm which may result. For example, is damage, if it occurs, likely to be measured in terms of minor, transient injury or life-long impairment of a vital organ?59 The answer to this question may depend partly upon a consideration of the interests which are put at risk. Are we concerned with protecting “health,” i.e., the physical, mental, or emotional well-being of the research subject or other affected persons, or “human dignity”?60 The latter concept, while nebulous in content, may be our paramount concern; the concept relates not to tangible injury, but to the preservation of values associated with individual human autonomy and worth.

B. Research on the Fetus In Utero

1. Legal Status of the Fetus In Utero

The first issue raised by the Department’s regulation controlling in utero experimentation41 does not go to the regulation itself but to the rationale upon which it is based: What rights does a fetus possess which entitle it to the protection afforded by the regulations? This section will examine different areas of the law which have dealt with the fetus in utero in an attempt to determine when such a fetus acquires certain interests or “rights.”62

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58 For another definition, see Martin, supra note 3, at 549.
60 See Martin, supra note 3, at 554-56.
61 The regulation is quoted in the text accompanying note 127 infra.
62 For a more complete discussion of the rights of the fetus in utero in property, criminal, and tort law, see Louisell, Abortion, the Practice of Medicine and the Due Process of Law, 16 U.C.L.A.L. REV. 233, 236-44 (1969).
a. **Property law**

Anglo-American property law has long accorded the fetus legal recognition. In an early English case, an unborn child was held to be one of the "children living" at the time of the testator's demise.  

Three years later, another English decision rebutted the contention that a fetus is a nonentity:

Let us see, what this nonentity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian.  

American law followed the English lead. In 1834, Hall v. Hancock held that a grandchild born almost nine months after the testator's death was a beneficiary under a bequest to such grandchildren "as may be living at my death." Most states have followed this Massachusetts opinion. Cases have held that a devise of land vests in an unborn child prior to its birth, and that a child may be an income recipient under a trust before birth. The cases recognize, however, that the property rights of a child *in utero* are not perfected until and unless the child is born alive. 

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64 Deal v. Sexton, 144 N.C. 157, 56 S.E. 691 (1907).
66 G. PATON, A TEXTBOOK OF JURISPRUDENCE 396 (4th ed. 1972). See also Roe v. Wade, 410 U.S. 113, 162 (1973). Liberal construction of fetal property interests apparently stems from an attempt to carry out testator intent (the presumption being that a testator would not wish to exclude any of his issue); but such intent is viewed as applying to live-born children. This point of view is contested by Professor David Louisell, who argues that, in the process of litigation, it is natural that the cases would be decided after a child has been born, and that, under the circumstances, it is "superfluous" and "only dictum" for courts to require a "live birth" in order to establish legal rights: 

Such decisions proceed more from a pragmatic sense of fairness and realism than from a philosophic conclusion of the existence *in utero* of autonomous human life. But this is only speculation. And whatever the motivation for the decisions, they are clear-cut holdings that a child in gestation is a
b. Criminal law

Some legal scholars maintain that the common law refused to recognize feticide as homicide unless the child was fully born and then died as the result of the prenatal injuries. This is disputed by others who believe that the early common law required not birth but quickening, or animation, for a fetus to be protected by the laws against homicide. Whatever the early English law, it is generally agreed that by the mid-seventeenth century the common law had adopted the "born alive" theory.

Most American jurisdictions have followed the "born alive" theory. Some state courts, however, have held that a fetus shall

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human person, hence an autonomous legal entity capable of possessing property.


"Fully born" means that the fetus is entirely separated from its mother, with an entirely independent life, with the umbilical cord cut, and with its own breathing and heart action. Jackson v. Commonwealth, 265 Ky. 295, 96 S.W.2d 1014 (Ct. App. 1936); Morgan v. State, 148 Tenn. 417, 256 S.W. 433 (1923).

"Quickening" is the stage of development "when the motion of the fetus becomes perceptible, usually about the middle of the period of pregnancy." State v. Patterson, 105 Kan. 9, 181 P. 609, 610 (1919).

"If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dyeth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder; but if the childe be born alive and dyeth of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, in rerum natura, when it is born alive.

3 Coke, Institutes 50 (1648), as quoted by Means, supra note 71, at 420.

Singleton v. State, 33 Ala. App. 536, 35 So. 2d 375 (1948); People v. Ryan, 9 Ill. 2d
be regarded as a human being for the purpose of homicide statutes when it has reached viability. Several courts have required only a showing of "quickening" in fetal manslaughter cases. A number of others have extended the definition of "human being" for the purposes of manslaughter to include the fetus from the "moment" of conception.

c. Tort law

Early American tort law, as exemplified by the language of Justice Holmes in Dietrich v. Inhabitants of Northampton, denied recovery for fetal injury on the ground that "the unborn child was a part of the mother at the time of the injury." Until World War II, the Dietrich decision was followed universally. Courts based their opinions on Justice Holmes' erroneous knowledge of biology and on the difficult questions of causation involved in linking tortious conduct to prenatal injury.

467, 138 N.E.2d 516 (1956); People v. Hayner, 300 N.Y. 171, 90 N.E.2d 23 (1949); Harris v. State, 28 Tex. App. 308, 12 S.W. 1102 (1889); Bennett v. State, 377 P.2d 634 (Wyo. 1963). "'Person,' when referring to the victim of a homicide, means a human being who has been born and is alive." N.Y. Penal Law § 125.05(1) (McKinney 1975).


97 Evans v. People, 49 N.Y. 86 (1872); Foster v. State, 182 Wis. 298, 196 N.W. 233 (1923).


Roe v. Wade, 410 U.S. 113 (1973), will now, presumably, protect a physician from a charge of murder or manslaughter where the fetus dies in utero as a necessary result of abortion. See text accompanying notes 111-23 infra for a discussion of Roe v. Wade. The recent resolution in the case of Commonwealth v. Edelin, 359 N.E.2d 4 (Mass. 1976), reaffirms this conclusion. Freedom from a charge of homicide is more problematical in the experimentation context where a physician, not knowing the lethal effects of his experiment, injures a fetus which dies as a result. Capron Report, supra note 54, at 17.

The impact of Roe is completely unclear in more generalized situations involving homicide, as in the case of a man who fatally injures a fetus while beating a woman. Boston Globe, Oct. 3, 1975, at 16, col. 1. Depending on the wording of the applicable state statute, a charge might be brought whether the fetus dies before or after birth.

10 Id. at 17.
In 1946, in *Bonbrest v. Kotz*, a federal district court rejected the rationale and conclusion of *Dietrich* and declared that injuries to a viable unborn child were compensable in an action by the child after birth. The Minnesota Supreme Court extended this reasoning soon afterward, holding that a personal representative could maintain a wrongful death action for fetal injuries to a viable fetus. Other courts quickly followed this trend, leading to "the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts." Today, virtually every American jurisdiction permits recovery in tort for prenatal injuries. Differences still exist, however, in the requirements for actions by a surviving child and actions under wrongful death statutes; consequently, each area will be explored separately.

1. Action for prenatal injuries by a surviving child

Since such a claim is brought by the child himself, it is apparent that the tortfeasor's liability is prospective, contingent on the unborn child's live birth. Thus, a child who suffers nonfatal prenatal injuries, but who dies *in utero* before birth from independent causes, cannot maintain an action for those injuries. The status of the unborn child in respect to its right of recovery is not that of a legal person capable of asserting an independent right, but that of a separate living entity having a *potentiality* of legal personhood not fully recognized until birth.

A number of courts have implied that recovery for prenatal injuries is limited to cases where the alleged injury occurred at a viable stage of gestation. The principal rationale for this requirement is the difficulty in proving that a defendant's actions were the proximate cause of the child's preivable injuries. However,

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Verkennes v. Cornies, 229 Minn. 365, 38 N.W.2d 838 (1949).
*Id.* at 337.
*Cf.* La Blue v. Specker, 358 Mich. 558, 100 N.W.2d 445 (1960) (holding that the unborn fetus is a "child" and a "person" entitled to bring an action for a parent's death prior to the child's birth).
See, e.g., the hypothetical case posed in Todd v. Sandidge Constr. Co., 341 F.2d 75, 80 n.9 (4th Cir. 1964) (Haynsworth, J., dissenting).
the viability requirement has been widely criticized as arbitrary and unsatisfactory in limiting a potential tortfeasor's duty of care. Prosser has argued that compensation for prenatal injuries should not hinge on the stage of fetal development at the time of the injury, since the child sustains the same harm after birth regardless of the time when the injury occurs. In accord with Prosser's view, the current trend has been to eliminate the viability requirement in actions for prenatal injuries. Most jurisdictions which have recently ruled on the issue allow recovery for prenatal injuries even if the injury occurs early in pregnancy, before either viability or quickening.

2. Action for wrongful death

A wrongful death action may be brought in cases where a child does not survive to assert a claim. Neither the difficulty in assessing appropriate damages nor the difficulty in proving causation has been deemed sufficient to bar the action. But while every state permits recovery for wrongful death, there is sharp disagreement with respect to whether a live birth is required in order to maintain a wrongful death action. Courts in several jurisdictions require it, maintaining that there has been no harm to a "person" until the fetus is born alive.

Arrayed against these authorities are more than a score of

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90 W. Prosser, supra note 84, at 337-38.
92 W. Prosser, supra note 84, at 337 n.31, lists seven jurisdictions (California, Georgia, Louisiana, New Hampshire, New Jersey, Pennsylvania, and Rhode Island) as having expressly discarded the viability and quickening requirements.
93 Id. at 337.
jurisdictions which permit an action for the wrongful death of a viable fetus regardless of whether it is born alive. One state, Georgia, permits such an action for children injured when not yet viable but only "quick." In order to permit recovery in these cases, courts have held that the unborn fetus is a "person" or "minor child" as a matter of statutory construction. In a recent case regarding the fetus' statutory status, Eich v. Town of Gulf Shores, the Alabama Supreme Court declared:

We recognize the cases cited by appellee construing the term "minor child" as not including a fetus, but are not persuaded that such a strict construction here would insure the necessary growth of the law in this vital area and the individual justice of the case before us. The court held that the purpose of the Alabama wrongful death statute was to preserve human life, and that therefore a live birth was not a prerequisite to liability. The court criticized the "live birth" requirement as being illogical, since under such a standard a tortfeasor's liability depends not on the seriousness of his wrongful conduct, but on whether the injured child is able to survive his injuries for at least a moment after birth. A wrongdoer is thus rewarded if his conduct kills a fetus immediately.

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87 Id. at 98, 300 So. 2d 354 (1974).
88 Id. at 96, 99, 300 So. 2d at 357.
89 Id. at 97, 99, 300 So. 2d at 355, 357. The Illinois Supreme Court was persuaded to eliminate the "live birth" standard for wrongful death actions on this same rationale. Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 304 N.E.2d 88 (1974). In denying fetal "personhood" in Roe v. Wade, Justice Blackmun attempted to reconcile his position with the fact that so many jurisdictions regarded the unborn fetus as a "person" under their
d. Welfare law

Until recently, another context in which the law appeared to be in conflict with respect to fetal status was in the definition of a "dependent child" in the Federal Aid to Families with Dependent Children (AFDC) program.\(^9\) The statutory interpretation of "dependent child"\(^1\) had caused much confusion in the courts, because nowhere in the statute was there mention of the unborn. The statute referred simply to needy children "under the age of eighteen." HEW regulations\(^4\) made matching funds available to the unborn, but the regulations were not mandatory, and the Department had approved state plans which made funds available to the unborn as well as plans which did not.\(^3\)

Four out of five federal courts of appeals which have recently considered this issue concluded that an unborn child qualified as a "dependent child" under the Social Security Act, and that a pregnant woman was, therefore, eligible to obtain AFDC benefits prior to her child's birth.\(^5\) The Fifth Circuit, for example, de-

wrongful death statutes. Permitting parents to recover in tort for the wrongful death of their fetus, he asserted, is not based on the theory that the unborn child is a person in the full sense, but rather is designed to vindicate the parents' interest in the potentiality of human life. 410 U.S. at 162. Blackmun's view is difficult to reconcile with the fact that the wrongful death statutes are not framed in terms of "potential children." In construing the statutes, the courts have struggled to determine whether legislatures intended to include the fetus in the class of "persons" covered by the statutes. Moreover, it does not disprove legal personhood to say that a wrongful death suit for an unborn fetus is designed only to vindicate parental interests, since a wrongful death action always vindicates the interests of the family of the deceased. The fact that parents may recover in tort for the wrongful death of their child in no way diminishes the legal personhood of children.

In Great Britain the recent Law Commission Report on Injuries to Unborn Children considered the question of when parents may bring an action "for loss of their unborn child." The Commission recommended that such an action should be barred unless the fetus survives for at least 48 hours after delivery. Even before presentation of the Report to Parliament the 48-hour requirement was criticized as being illogical, partly on the ground that it might encourage doctors to take extraordinary measures to keep a fetus alive merely to satisfy a technical requirement. The Times (London), Sept. 12, 1975, at 14, col. 1. All attempts at line drawing ignore the fact that biological development lies on a continuum.

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\(^1\) 42 U.S.C. § 606(a) (1970) (a statutory definition of "dependent child" for the purposes of the Social Security Act).


\(^6\) The First, Fourth, Fifth, and Seventh Circuits had upheld fetal eligibility prior to
clared that ‘[a]n unborn child’s lack of status as a ‘person’ for Fourteenth Amendment purposes does not affect the status of an unborn child as a ‘child’ within the language of the Act . . . ’.106 The Seventh Circuit based its finding of eligibility on the administrative practices of the Department of Health, Education, and Welfare and its predecessors, which had permitted prenatal benefit payments since 1941.107

The Supreme Court held, however, that it was not mandatory for states receiving federal assistance under AFDC to provide benefits to pregnant women, since the unborn child did not qualify as a “dependent child” as defined by the Social Security Act.108 Because the Court based its holding on statutory construction, it expressly reserved the question of whether HEW has the statutory authority to approve federal participation in state programs which elect to continue payments for unborn children.109 Had the Court concluded that the unborn were indeed dependent children, it would have faced a serious equal protection issue in those states which excluded the unborn from coverage.110

e. Roe v. Wade

Although the trend prior to 1973 appeared to be in the direction of expanding legal recognition of fetal interests, in that year the Supreme Court decided Roe v. Wade,111 the landmark decision in the area of abortion. The Court held that a woman’s right

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Wisdom v. Norton, 507 F.2d 750 (2d Cir. 1974). In Burns v. Alcala, however, the Supreme Court refrained from determining whether HEW exceeded its statutory authority. 420 U.S. at 586.

In Wisdom v. Norton, the Second Circuit Court of Appeals declared that the Department of Health, Education, and Welfare exceeded its statutory authority in permitting states to confer AFDC benefits upon the unborn child. 507 F.2d 750, 755 (2d Cir. 1974). In Burns v. Alcala, however, the Supreme Court refrained from determining whether HEW exceeded its statutory authority. 420 U.S. at 586.


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Such a holding would have enunciated a view of fetal personhood inconsistent with its holding in Roe v. Wade, 410 U.S. 113 (1973).

Id. The Court further explicated its position on a woman’s constitutional rights to abortion in Planned Parenthood v. Danforth, 96 S. Ct. 2831 (1976) and Bellotti v. Baird, 96 S. Ct. 2857 (1976).
of privacy is protected by the fourteenth amendment," that the
decision to have an abortion falls within this right," and that the
right to an abortion is fundamental and can only be subject to
regulation when there is a compelling state interest. The state
has two legitimate interests: maternal health and the protection
of the potentiality of human life. Each interest acquires increas-
ingly greater significance as the fetus develops during pregnancy.
This maturing of significance permits limited state regulation to
foster maternal health during the second trimester and provides
the state with a compelling interest in proscribing abortion in
order to protect the potentiality of human life during the third
trimester or after viability, except where an abortion is necessary
to protect the health of the mother.

With respect to fetal rights, what did Roe decide? The Court
held that "the word 'person,' as used in the Fourteenth Amend-
ment, does not include the unborn." A fetus in utero therefore
enjoys no fourteenth amendment rights and, in all probability, no
other constitutional rights until after birth, since the Court's con-
stitutional analysis was not limited to the fourteenth amend-
ment. A state may choose not to restrict abortions even after
viability; and a fetus has no constitutional right to object, despite
the harm that might occur.

Although Roe may appear to some to be the logical and ultimate extension of the
Court's concern for privacy in matters of sexual conduct enunciated in Griswold v. Con-
necticut, 381 U.S. 479 (1965) and Eisenstadt v. Baird, 405 U.S. 438 (1972), it has not gone
without detractors. Professor John Ely, criticizing the decision as an unjustifiable exten-
sion of the constitutionally protected right to privacy and as court-made legislation, said:

What is frightening about Roe is that this super-protected right [a woman's
freedom to choose an abortion] is not inferable from the language of the
Constitution, the framers' thinking respecting the specific problem in issue,
any general rules derivable from the provisions they included, or the nation's
governmental structure.

(1973).

Certainly the Court in Roe has substantially expanded the notion of privacy. It is one
thing to protect the privacy of the home and of those intimate sexual activities between
Although Roe held that the fetus is not a person in the fourteenth amendment sense, this decision does not necessarily mean that the fetus is not entitled to protection. As Roe acknowledged, the state has an “important and legitimate interest in protecting the potentiality of human life.” Whether a previable or viable fetus, as a potential human life, should be accorded protection should depend on a balancing of the interests asserted in a particular context, and those interests may differ in situations other than abortion.

When the mother's fundamental right to privacy is involved, the state may regulate only when its interest is compelling. Roe held that the state's interest in protecting the potentiality of human life becomes compelling when the fetus reaches viability (during the third trimester of gestation); thereafter, the mother's fundamental privacy right to abortion can be subordinated to the state's interest in protecting the viable fetus, except where the mother's life or health is endangered.

However, Roe leaves unanswered the question of the scope of the mother's fundamental privacy right. The decision might be

husband and wife which take place within the home. It is another thing, however, to expand the concept of privacy in its sexual sense to abortion—to confer a privacy right in the reproductive sphere after conception, within the first trimester of pregnancy and essentially within the second as well.

The result in Roe v. Wade, but not its legal reasoning, has been defended. Tribe, The Supreme Court 1972 Term, Forward: Toward a Model of Roles in the Due Process of Life and Law, 87 Harv. L. Rev. 1, 15-32 (1973). Professor Tribe argues that the question of "when life begins" has become an essentially religious issue, not resolvable by resort to the slippery slope of biological development, and that if governmental decisions are based on the pervasive interference of religious groups in legislative considerations, the establishment clause must be invoked unless there are compelling, wholly secular reasons for the legislation. As in Roe v. Wade, Tribe asserts that the government may intervene only after viability, because only at that point in time is the fetus in the same status as an infant for the secular purpose of protecting it from infanticide.

128 410 U.S. at 162. See note 114 and accompanying text supra. The potentiality concept is inapposite, however, to protection of the nonviable fetus which, by definition, is physiologically incapable of attaining viability. See notes 141-42 infra. Nevertheless, the nonviable fetus may be entitled to protection based on a fundamental "dignity" concept: The fetus, simply because it is a member of the human family, must be accorded certain considerations. See note 135 infra. See also note 100 supra.

111 410 U.S. at 163. The Court defined "viability" as that point of development at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." Id. at 160. The Court added: "Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." Id.

122 See note 116 supra.
interpreted to confer on the mother an unfettered right to do what
she pleases with her fetus until the third trimester, but it can also
be narrowly construed as a determination of the respective rights
of mother and fetus only in the context of abortion. While *Roe*
acknowledges a mother’s fundamental right to terminate her
pregnancy, it does not expressly grant a right to manipulate
fetal existence in any other context; nor does it expressly grant
the mother a right to consent to *in utero* experimentation.

If the mother’s privacy right in *Roe* is broadly construed to
encompass absolute control over the fetus in the first two trimesters,
the state might nevertheless assert a compelling interest in
protecting the potentiality of life at a point earlier than viability
when a procedure such as nontherapeutic experimentation,
rather than abortion, is planned. And if *Roe* is strictly construed
to apply only to abortion, then there is no precedent to assume
the mother’s fundamental privacy right includes fetal experimenta-
tion, and state regulation to protect the fetus’ potentiality for
a full life need not be justified by a compelling interest. The state
would merely have to demonstrate a rational basis for the asser-
tion of its interest. Thus, even though *Roe* deems the fetus a
nonperson for constitutional purposes, it may nevertheless be en-
titled to protection where the state demonstrates a compelling
interest in the potentiality of life in the nonabortion context, or
where the fundamental rights of the mother are not at issue.

A somewhat analogous situation arises in cases involving the
state’s power to restrict experimentation on animals. Animals,
like the fetus, enjoy no constitutional rights. Yet a rational
basis for the statutes banning cruelty to animals in most, if not
all, states can be found in the dehumanizing and brutalizing
effect on society of needless cruelty inflicted on helpless crea-
tures. These statutes, attacked as unconstitutional takings of

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122 That the constitutional right of privacy encompasses a woman’s right to obtain an
abortion is difficult to square with cases holding that a person has no absolute right to
for criminal evidence); Buck v. Bell, 274 U.S. 200 (1927) (involuntary sterilization); Jacob-
son v. Massachusetts, 197 U.S. 11 (1905) (compulsory vaccination). *See also* note 128
infra.


125 *See, e.g.*, ILL. ANNOT. STAT. ch. 8, § 704 (1975); IOWA CODE ANN. § 717.3 (1946);
MASS. GEN. LAWS ANN. ch. 272, § 77 (Supp. 1976).
property without due process of law, have been upheld as a legitimate exercise of the police power to protect public morality. If a state or the federal government may regulate animal research, it surely may regulate fetal research to protect the potentiality of human life; and it is inconceivable that the protection accorded to the fetus, even when balanced against the interests of society in the results of fetal experimentation, would not be greater than those accorded to animal research subjects.

2. Regulation of Research on the Fetus In Utero

Section 46.208 of the Department’s regulations addresses activities directed toward fetuses in utero as subjects.

(a) No fetus in utero may be involved as a subject in any activity covered by this subpart unless: (1) The purpose of the activity is to meet the health needs of the particular fetus and the fetus will be placed at risk only to the minimum extent necessary to meet such needs, or (2) the risk to the fetus imposed by the research is minimal and the purpose of the activity is the development of important biomedical knowledge which cannot be obtained by other means.

One example of research addressed by this section of the regulations is the development of a perfected fetoscope for the diagnosis and amelioration of fetal diseases and defects. Other examples include detection of fetal breathing through ultrasound, fetal heartbeat through electrocardiogram, and fetal vision through light shined transabdominally. The administration of certain drugs to the mother in an effort to determine whether they will cross the placenta and provide therapy to the fetus before birth would also be covered by this section. Some of these procedures involve only minimal violation of bodily integrity and appear to pose little risk. With other procedures, however, the hazards of research are incalculable; and the decision to use the

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126 Burr, Toward Legal Rights for Animals, 4 ENV. AFF. 205, 207 (1975). Of course, as might be expected, in a genuine collision of animal and human interests, the interests of animals have been forced to give way. The Animal Welfare Act, 7 U.S.C. §§ 2131-55 (1970), provides protection for most warm-blooded animals in terms of requirements such as adequate housing, ample food and water, and decent sanitation. But the act in no way authorizes “disruption or interference with scientific research or experimentation.” Similarly, states assign animals quite limited rights in the area of research, barring only “unnecessary” infliction of pain, but permitting the use of animals for “the testing of drugs or medicines.” See, e.g., MASS. GEN. LAWS ANN. ch. 49A, § 2 (1968).

research technique may depend on the anticipated benefit to the fetus.

Despite its sound legal foundation, the regulation raises serious questions because of its (perhaps deliberate) imprecision of language. This imprecision may lead to two situations where possibly unintended results could occur. One situation involves the requirement of consent by both parents before physicians may render even a life-saving, therapeutic, but experimental treatment to their unborn fetus. Apparently therapeutic care may be withheld if either parent objects. Were this situation to arise with respect to a child, however, it is entirely possible that upon petition a court would intervene, declare the child neglected, and order the treatment under its parens patriae power. It is not clear, however, that a court would, or could, intervene if it finds the fetus is not a human person equivalent to a child. The regulation could have been drafted to provide an exception to parental consent in cases of serious, possibly life-threatening illness or injury, although the draftsmen may have believed that a judicially applied common law or statutory remedy would still be available.

There is also reason for concern, in the case of nontherapeutic research, with the requirement that the risk be “minimal.” If a procedure is truly experimental, the degree of risk is definitionally unascertainable. Moreover, the word “minimal” disguises the measurement to be used; does it refer to the likelihood of injury, the magnitude of injury, or both? Many would regard even the possibility of minor injury as unacceptable and unnecessary.

128 In a case decided before Roe v. Wade, the New Jersey Supreme Court required that a pregnant woman obtain blood transfusions necessary to save the life of her unborn fetus. The woman had refused the transfusions on religious grounds. (She was a Jehovah’s Witness.) The court stated:
We are satisfied that the unborn child is entitled to the law’s protection and that an appropriate order should be made to ensure blood transfusions to the mother in the event that they are necessary in the opinion of the physicians in charge at the time.
Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson, 42 N.J. 421, 422, 201 A.2d 537, 538, cert. denied, 377 U.S. 985 (1964). This holding is not necessarily foreclosed by Roe v. Wade, since it involved compulsory prenatal medical care for a “viable” fetus. Since the state may assert a “compelling interest” in the potential life of the fetus during the third trimester of pregnancy, it may arguably require a pregnant woman to obtain certain types of therapeutic care, despite the fact that this requirement might impinge on “fundamental” privacy and religious rights.
when the fetus will receive no benefit, even though others might characterize the risk in such a case as minimal.

More importantly, particularly from a substantive point of view, the notion of what constitutes minimal risk may vary depending on whether or not a fetus will be aborted. Because the regulations are not clear on this point, the contention may be raised that a previable fetus is incapable of being subject to risk, because it will necessarily die following abortion. In addition, if it is scheduled to die by techniques which will mutilate it in any event, why be squeamish about conducting research which may result in lesser degrees of harm?

There are several responses to this assertion. For example, it may be argued that the decision to abort involves the taking of a life. Even if, as a pragmatic matter, that taking is permissible under the law, our instincts should be to preserve and protect life whenever possible. Therefore, no undue influence should be imposed upon a woman to abort. Experimentation, if it involves

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129 There are very valid reasons for conducting fetal research, and it makes good research sense to use a fetus scheduled for abortion in a potentially hazardous but valuable experiment, e.g., in studies concerning drug transfer across the placenta. See note 19 and accompanying text supra.


131 During the first 12 weeks, or first trimester, of pregnancy, both dilation and curettage ("D and C") and vacuum curettage procedures are employed for abortion. The former involves widening the mouth of the cervix and scraping and emptying the uterus manually. The latter involves the use of a vacuum-powered device to scrape the fetus, placenta, and amniotic sac from the uterine wall, homogenize them, and suck them out of the uterus. Interview with James H. Staton, Executive Director of the Boston Hospital for Women, in Boston, Feb. 19, 1975.

Abortions are generally not performed from the twelfth through the sixteenth week of pregnancy, but between sixteen and twenty weeks, two methods are used: Injection of saline solution into the uterus, or intravenous injection of the drug prostaglandin. In almost all cases, a saline abortion kills the fetus, often deforming it hideously. Interview with Dr. David Nathan, Professor of Pediatrics, Harvard Medical School, Children's Hospital Medical Center, Boston, Mass., in Boston, Feb. 13, 1975. Prostaglandin may not kill the fetus, but at least 90% of the fetuses aborted by this method are born dead. If a fetus shows some signs of life—a determination made by the delivering physician—it generally dies within minutes, or at most a few hours. Boston Globe, Feb. 13, 1975, at 3, col. 1.

If these methods do not induce an abortion of the fetus, a hysterotomy, or little Caesarian, is performed. This is a surgical procedure in which the fetus is removed intact from the uterus, and it may be the procedure of choice for pregnancies between 20 and 24 weeks. This method poses the smallest health risk to the fetus and the greatest risk to the pregnant woman. Id.

132 Fetal Research Report, supra note 19, at 33,539.

133 Statement by R. Wasserstrom, id. at 33,540.
a potential hazard of deforming the fetus, will compromise the mother's choice of whether to carry it to full term, since once the decision has been made to have an abortion, subsequent experimentation may preclude the mother from reconsidering that decision.\textsuperscript{134}

More important than the rather utilitarian argument on withdrawal of consent is the contention that nontherapeutic experimentation on a fetus \textit{in utero} involves an assault on the dignity of a potential human being.\textsuperscript{135} Until abortion actually occurs, the fetus scheduled for abortion should be treated no differently than the fetus carried to full term.\textsuperscript{136} Professor Louisell, in his dissent to the Commission's recommendations, states: "The argument that the fetus-to-be-aborted 'will die anyway' proves too much. All of us 'will die anyway.'"\textsuperscript{137} We should not subject a terminally ill cancer patient to potentially harmful nontherapeutic experimentation simply because the person lacks what most of the rest of us have—an unascertainably long and full future life. Arguably, we should do the same for a fetus, whether or not it has full status as a person.

C. \textit{Research on the Nonviable Fetus Ex Utero}

The regulation governing research on fetuses \textit{ex utero}, including nonviable fetuses, provides that:

\textsuperscript{134} A similar withdrawal of consent problem exists in adoptions of newborn children. Frequently a mother, who before giving birth has consented to surrender her child for adoption, wishes to withdraw that consent upon or shortly after birth. To cope with this problem,

\textbullet\ number of states have statutes which declare invalid any consent executed by a mother before the birth of the child. . . . (The British Adoption Act of 1958 . . . absolutely voids any consent unless the infant is at least six weeks old on the date of the execution of the document.


\textsuperscript{135} Prior to the abortion of the fetus, its protection may be justified on two grounds: First, its potentiality for human existence; and, second, because it should be afforded a measure of human dignity. The term "dignity," as used here, encapsulates those pragmatic, theological, and metaphysical considerations which give worth and value to human existence; it relates to the notion that the fetus is entitled to respect simply because it is a member of the human family.

\textsuperscript{136} Once abortion occurs, however, the potentiality of continued existence is terminated and can no longer serve as the basis for protection of fetal rights. The fetus should then be treated, with respect to experimentation, like other nonviable fetuses and accorded a measure of dignity, and, hence, protection. See notes 138-84 and accompanying text infra.

\textsuperscript{137} \textit{Fetal Research Report}, \textit{supra} note 19, at 33,549 (dissent by D. Louisell).
(a) No fetus _ex utero_ may be involved as a subject in an activity covered by this subpart until it has been ascertained whether the particular fetus is viable, unless: (1) There will be no added risk to the fetus resulting from the activity, and (2) the purpose of the activity is the development of important biomedical knowledge which cannot be obtained by other means.

(b) No nonviable fetus may be involved as a subject in an activity covered by this subpart unless: (1) Vital functions of the fetus will not be artificially maintained except where the purpose of the activity is to develop new methods for enabling fetuses to survive to the point of viability, (2) experimental activities which of themselves would terminate the heartbeat or respiration of the fetus will not be employed, and (3) the purpose of the activity is the development of important biomedical knowledge which cannot be obtained by other means.\(^3\)

The regulation prohibits any research which may subject a fetus _ex utero_ to additional risks until it has been ascertained whether that fetus is viable. If a fetus is found to be viable, it must be treated as a premature infant.\(^1\) If, however, the fetus _ex utero_ is found to be nonviable, it may be the subject of research to further the development of important biomedical knowledge which cannot be obtained by other means.\(^1\)

\(^1\) 45 C.F.R. § 46.209 (1976). HEW has received criticism of the concept of viability as it applies to the fetus _ex utero_. The Department noted, in response, that both it and the Commission were aware of the medical uncertainty inherent in the term "viability" and that, therefore, the regulations defining a viable fetus used very conservative criteria to insure against medical error in determining viability. Consequently, HEW proposed no changes in the use of the terms "viability" or "fetus _ex utero_." 42 Fed. Reg. 2792 (1977).

\(^3\) 45 C.F.R. § 46.203(d) (1976). The regulation specifies that "[i]f a fetus is viable after delivery, it is a premature infant." Once a fetus attains the status of a premature infant, a legal duty of care arises for both the attending physician and the parents. Generally this duty requires that life-saving therapeutic assistance be rendered so that the premature infant will have the opportunity to survive. For a discussion of this legal duty of care in related areas see Robertson, note 186 infra; Paulsen, supra note 4.

The permissible risk associated with such research is not clear. The regulations contain a general provision requiring minimal risk in activities unrelated to fetal health needs. 45 C.F.R. § 46.206(2) (1976). This standard is imprecise and difficult to apply even to fetal experimentation generally. See text accompanying notes 59-60 supra. In the unique situation of the nonviable fetus which cannot be "harmed for life," however, minimal risk may be a meaningless proposition. See text accompanying note 159 infra. Perhaps for this reason, the regulations pertaining to the nonviable fetus omit any reference to risk, 45 C.F.R. § 46.209, in contrast to the provisions regulating research on the fetus _in utero_ where the concept of minimal risk is expressly included, id. § 46.208(a).

The difficulty of defining permissible risk for the fetus _ex utero_ raises a potential problem in the application of the Department's waiver provisions. The regulations provide that the Secretary may modify or waive specific limitations on fetal research after considering:
1. Rights of the Nonviable Fetus

Obviously, the critical distinction in the regulations is between those *ex utero* fetuses which are viable and those which are not. The regulations define viability as "being able, after either spontaneous or induced delivery, to survive (given the benefit of available medical therapy) to the point of independently maintaining heartbeat and respiration." A lack of viability does not, however, mean that the fetus is already dead. The nonviable fetus *ex utero* is similar to any other being which, having lost a vital function, must necessarily die. But, while a nonviable fetus is *a fortiori* dying and has no potentiality for continued life, it may be regarded as a living person for the duration of its short existence. Is there, then, any scientific or moral justification for conferring fewer of the rights of humanity on the nonviable fetus than are required for the viable fetus? Is the distinction made in the regulations a tenable one?

a. **Legal precedent**

Legal source materials are of little help in answering this question. While many courts and commentators have struggled to define the status of the fetus *in utero*, there is a curious void in considering the status of beings born prior to the stage of viability. In tort and homicide cases, for example, most courts will confer human status on an infant who is born alive, without apparent regard to whether the infant is viable or nonviable. The risks to the subject are so outweighed by the sum of the benefit to the subject and the importance of the knowledge to be gained as to warrant such modification or waiver and that such benefits cannot be gained except through a modification or waiver.

Id. § 46.211. Approval by both an Institutional Review Board and an Ethical Advisory Board is required. Despite this significant safeguard, if risk is, in fact, seen as a meaningless concept in the context of research on the fetus *ex utero*, the waiver provisions might give rise to potentially degrading forms of research on such fetuses, a result which the promulgation of the regulations was originally intended to prevent.

141 45 C.F.R. § 46.203(d) (1976).

142 The regulations define a dead fetus as one "which exhibits neither heartbeat, spontaneous respiratory activity, spontaneous movement of voluntary muscles, nor pulsation of the umbilical cord (if still attached)." Id. § 46.203(f). A nonviable fetus may possess one or more of these attributes; but absent appropriate weight and age, these attributes are not themselves sufficient to indicate viability. FETAL RESEARCH REPORT, supra note 19, at 33,543.

143 See, e.g., People v. Chavez, 77 Cal. App. 2d 621, 176 P.2d 92 (1947); People v. Ryan, 9 Ill. 2d 467, 138 N.E.2d 516 (1956); Jackson v. Commonwealth, 265 Ky. 295, 96
courts will usually confer blanket human status in homicide cases as long as the child has been completely expelled from the mother's body and has a separate and independent existence. Proof of independent existence frequently depends on a showing of "independent circulation and/or respiration"; but a fetus may be patently nonviable and still be capable of having "independent circulation and/or respiration." Presumably, the nonviable fetus has a "separate and independent existence" for the duration of its life and, therefore, qualifies as a human person under the homicide statutes.

The point is not clear, however, because case law usually deals with the murder of babies at full term. In People v. Chavez, for example, it was held that a viable child, in the process of being born, may be considered a live "human being" within the meaning of the homicide statute. Likewise, in Singleton v. State, the court, citing People v. Chavez with approval, stated that a baby should be regarded as a human being if it is viable and, after separation from the mother, capable of life if given normal and reasonable care. Neither court expressly decided, however, whether a nonviable, live-born fetus would similarly be regarded as a human being.

Like the judiciary, state legislatures have not addressed the issue directly. Most fetal experimentation statutes prohibit research on live fetuses; and "life" is variously defined. Their
language is neither consistent nor sophisticated. One is left with the impression that most legislatures proceeded on the unarticulated premise that personhood begins at conception. Blocked from conferring this status on the fetus in utero by Roe v. Wade, they seized upon any reasonable sign of life as sufficient to confer personhood once birth or abortion has occurred.

What of Roe v. Wade? Unhappily, those who might have anticipated some illumination by the Supreme Court will be disappointed. At one point the majority opinion remarks that “the law has been reluctant to endorse any theory that life . . . begins before live birth.” “Live birth” is not explained, however; and in a subsequent opinion, Planned Parenthood v. Danforth, the Court does little to clarify the issue. The majority opinion in Danforth appears to equate personhood with live birth and viability; but while both the majority and Justice White employ words such as “live-born infant” and “live babies” when discussing fetuses ex utero, no distinction is made between viable and nonviable fetuses and no definition is offered.

b. Scientific justification

In view of the ambiguity in judicial opinions, it is not surprising that when we turn from law to science, to hoped-for certainty in the growing body of knowledge concerning fetal growth and development, we obtain little in the way of clarification. Instead of firm demarcation lines, we find a continuum, a process in which there is an uneven maturation of human characteristics. There is no point of discontinuity, no point at which we can confidently say in biological terms that this fetus is a person and that one is not.

The advance of embryology and medicine over the past century and a half rendered untenable any notion that the fetus suddenly

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1152 Id. at 161.
1153 96 S. Ct. 2831 (1976).
1154 Id. at 2848.
1155 Id. at 2855 (White, J., concurring in part and dissenting in part).

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“came to life” in a physiological sense at a definable point during pregnancy. Once the embryo’s growth had been traced in a continuous line from a single unfertilized ovum through the unbroken processes of fertilization, cell division, segmentation (in the case of identical twins), implantation of the blastocyst in the uterine wall, and a gradual fetal development to the point of birth, those who believed in the sanctity of the fetus from the “moment” of quickening, or from some other “moment”, were deprived of the ability to link their belief to any distinct physical or biological event other than perhaps “conception”, which was itself later revealed as a complex and continuous process.\(^{197}\)

c. An ethical view

Clearly, both scientific technology and legal precedent are of little assistance in ascertaining whether the distinction between viable and nonviable fetuses is an appropriate one for determining the existence of human rights. In fact, the sole justification for this distinction may lie in a discussion of the ethical issues involved in research on the fetus ex utero.

In its report to HEW, the National Commission began its analysis with the view that the nonviable fetus “must be considered a dying subject.”\(^{158}\) The Commission then stated that this status alters the situation of the fetus in two ways. “First, the question of risk becomes less relevant, since the dying fetus cannot be ‘harmed’ in the sense of ‘injured for life.’”\(^{159}\) Unlike the previable fetus in utero, its potential for continued existence is gone.

Second, however, while questions of risk become less relevant, considerations of respect for the dignity of the fetus continue to be of paramount importance, and require that the fetus be treated with the respect due to dying subjects. While dying subjects may not be “harmed” in the sense of “injured for life,” issues of violation of integrity are nonetheless central.\(^{160}\)

The Department echoes this sentiment, stating that for fetuses ex utero “no procedures will be undertaken which fail to treat the fetus with due care and dignity, or which affront community sensibilities.”\(^{161}\)

\(^{197}\) Tribe, supra note 119, at 19-20 (footnotes omitted).
\(^{158}\) Fetal Research Report, supra note 19, at 33,546.
\(^{159}\) Id.
\(^{160}\) Id.
\(^{161}\) Id. at 33,528.
After uttering these protestations, however, both bodies apparently conclude that the nonviable fetus' "dignity" does not preclude all nontherapeutic research, but only such research which alters the duration of fetal life. Thus, where important biomedical knowledge may be gained, the Commission, and the Department by implication, apparently embrace the rationale that they expressly reject: Nontherapeutic research on the nonviable fetus is permissible because the fetus cannot be "harmed" or "injured" for life. In addition, the regulations provide that researchers may artificially sustain the life signs of a nonviable fetus—admittedly an alteration of the duration of life, but arguably therapeutic—if the purpose of the research is the development of artificial life support systems.

In arriving at what seems to be a clear compromise between principle and practice, both organizations may have concluded that there is no completely satisfactory way to balance the demands of medical research against the rights of a being whose status as a legal "person" has not been definitely ascertained. On the basis of biological facts, a categorical assertion that the nonviable fetus either is or is not a "person" entitled to certain rights is unwarranted. Given this uncertainty, however, caution alone suggests that doubts should have been resolved in favor of personhood and that the nonviable fetus should be regarded as a full human being in the research context.

In advocating the permissibility of research on the nonviable fetus, however, both the Commission and the Department may have been influenced by the ethical approach advocated by Dr. Sissela Bok. In reference to the problem of abortion, Dr. Bok has suggested that "[w]e must abandon . . . a definition of humanity capable of showing us who has a right to live," and examine, instead, the reasons for protecting life. In a paper submitted to the National Commission, Dr. Bok advanced a similar thesis with respect to fetal experimentation. She proposed four reasons for protecting humans from harm: "(1) [T]he victim's anguish, suf-

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162 See 45 C.F.R. § 46.209 (1976); Fetal Research Report, supra note 19, at 33,546.
163 See text accompanying notes 178-83 infra.
164 The issue of artificially sustaining the life signs of a nonviable fetus for the purpose of developing an artificial placenta is a major area of conflict between the Commission and the Department. See note 40 supra.
165 Bok, Ethical Problems of Abortion, 2 Hastings Center Studies 33, 41 (1974).
ferring and deprivation of continued experience of life; (2) the brutalization of the agent; (3) the grief of those who care about the victim; and (4) the establishment of a pattern that ultimately will harm all of society.”

Dr. Bok concluded that none of these reasons was applicable to a fetus in the early stages of gestational life. But this approach poses a new dilemma. Instead of a biological continuum, we are confronted by a continuum of reasons for protecting a fetus ex utero the further along it is in the process of development. Here it may be equally difficult to draw a line. However, in terms of Dr. Bok’s ethical analysis, the Department’s 20-week minimum age criterion for viability is reasonable, albeit arbitrary. Undeniably, a 19-week-old, nonviable fetus looks human; but according to most medical experts, it cannot feel pain or experience emotional anguish, and certainly cannot apprehend its circumstances. These facts, if known, could avoid possible grief to the parents resulting from experimentation; and the parental consent requirement can effectively prevent research which would offend the feelings of the mother and father. Nor would research on the

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166 Fetal Research Report, supra note 19, at 33,538.

167 Id.

168 This difficulty may ultimately require that all “human” dying subjects be protected, regardless of age, expectation of life, or circumstance. P. Ramsey, The Ethics of Fetal Research 33-35 (1975).

169 As minimal criteria to identify viability, the Department requires “an estimated gestational age of 20 weeks or more and a body weight of 500 grams or more.” Fetal Research Report, supra note 19, at 33,552. See also notes 41 and 55 supra. These requirements are conservative. The National Commission, on the basis of a study conducted by Dr. Richard Behrman of Columbia University, concluded that a fetus must weigh 601 grams or more and have a gestational age over 24 weeks to sustain independent growth and development. Id. at 33,542-44. The Commission could find no unambiguous documentation that a fetus with weight and age below these limits had ever survived; and the chances of survival of an infant weighing less than 750 grams are extremely small. Id. at 33,543.

170 Note the reaction of the jury in the Edelin trial to pictures of a fetus only slightly older. Boston Globe, Feb. 16, 1975, at 2, col. 1. See note 31 supra.

171 It is highly unlikely that the fetus has the capacity to experience pain prior to 28 weeks. See Scarf, supra note 2, at 93-94. No one actually knows, however, whether this assertion is true. Interview with Dr. David Nathan, Professor of Pediatrics, Harvard Medical School, Children’s Hospital Medical Center, Boston, Mass., in Boston, Feb. 13, 1975.


173 The regulations specify that research may be conducted “only if the mother and father are legally competent and have given their informed consent.” 45 C.F.R. § 46.209(d)
nonviable fetus be brutalizing for the researcher.

Moreover, it seems highly unlikely that nontherapeutic research on the nonviable fetus will open the door to similar research on persons distinguished by race, religion, or status who have been subjected involuntarily to research in the past. Because there is almost no likelihood that it experiences pain or discomfort, due to its undeveloped nervous system, the nonviable fetus differs substantially from a more mature subject, even one who is unconscious and dying. Given these distinctions, it seems unlikely that values we cherish in this society—respect for the dignity and integrity of others—will be affronted by this type of research. Subjecting the nonviable fetus to nontherapeutic experimentation will not cause us to fear, as it might with research on retarded or incarcerated subjects, that such experimentation could be extended without logical break to all others.

To argue that nontherapeutic research is permissible, however, is not to argue that it should proceed without regulation. Although the nonviable fetus occupies a unique status, as a person it is entitled to substantial protection. Even if its personhood is denied, the dignity it is accorded, while not sufficient by itself to countermand the needs of medical research, should be sufficient to compel elaborate safeguards and to eliminate offensive and degrading forms of research. A number of safeguards are discussed in section III of this paper.

2. Research Which Artificially Sustains the Life of a Nonviable Fetus

One particular form of experimentation on the nonviable fetus deserves special scrutiny: Research which artificially maintains vital functions in order "to develop new methods for enabling fetuses to survive to the point of viability." A desire to

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174 The "opening wedge" argument is usually employed by those who object to the wedge, but cannot muster sufficient arguments against it; instead, they point to all the dire possibilities that may result from the extension of a principle. The law is replete with line drawing; and there are often dire possibilities on either side of the line.


176 See Martin, supra note 3, at 565.

177 See notes 190-268 and accompanying text infra.

178 45 C.F.R. § 46.209(b)(1) (1976). See text accompanying note 244 infra for standards which should govern this type of research.
eliminate offensive and degrading forms of research seems inconsistent with this type of experimental activity. Past research projects, such as the one in which fetuses were submerged in hyper-oxygenated saline solution because their lungs were insufficiently developed to permit them to breathe,\textsuperscript{177} involve methods which offend and shock a significant segment of society. In view of this reaction, persuasive justification should be required for activities which so substantially assault notions of “human” dignity and bodily integrity.

One such justification might be the argument that research using the nonviable fetus to develop an artificial placenta meets fetal health needs. As a general limitation on fetal experimentation, the Department’s regulations require that the risk\textsuperscript{180} to the fetus should be minimal and the least possible for achieving the objectives of the activity, “except where the purpose of the activity is to meet the health needs of . . . the particular fetus.”\textsuperscript{181} It would seem to follow from the regulation that any risk, pain, indignity, or discomfort to a fetus is acceptable, if its health or life even possibly hangs in the balance. The law appears to support this societal objective.\textsuperscript{182}

No one would deny, however, that for most fetuses involved in this type of research death is inevitable. Researchers will be able to devise sophisticated techniques which will allow them to sustain a fetus’ life signs long after it would die naturally if left undisturbed. There is no chance that the nonviable fetus will benefit in any way as a result of these herculean efforts, other than having its life prolonged. As the research techniques are perfected and the technology comes closer to achieving its objective, the struggle for life may be sustained over a substantial period of time. Can one reasonably analogize these projects to

\textsuperscript{177} See note 27 supra.

\textsuperscript{180} See note 142 and text accompanying notes 59-60 supra for a discussion of the difficulty involved in defining risk.

\textsuperscript{181} 45 C.F.R. § 46.206(2) (1976) (emphasis added).

\textsuperscript{182} In a recent case, a Maine court declared that a mother and father had “neglected” their defective newborn infant by refusing to obtain “ordinary” medical care. A guardian was appointed for the child and surgery was performed. When the child subsequently died, the parents expressed great anguish at having been brought into court and having the decision to seek surgery taken out of their hands. Maine Medical Center v. Houle, Civil No. 74-145 (Supreme Court of Cumberland County, Feb. 14, 1974), reported in Washington Post, Feb. 25, 1974, at 1, col. 1.
therapeutic attempts to keep a patient alive through extraordinary means, when there is almost no chance for fetal survival, and the primary purpose of the procedures is to accumulate scientific data?

These conflicting considerations make a judgment about the therapeutic or nontherapeutic character of the research extremely difficult. If the possibility of life is the goal, and if any given fetus may achieve this objective for even a limited period of time, then the research may be characterized as therapeutic. On the other hand, if the practical implications of the research are borne in mind, it seems clear that most fetuses used in these experiments will be research subjects with no hope of obtaining a real benefit. By this characterization, clearly the research is nontherapeutic.

It may be argued, however, that this research is therapeutic for the particular fetuses involved. Our values adjure us to preserve life regardless of its quality; and distinctions are not drawn as to whether we should implement this value only if the preservation is for longer than an hour, a day, a week, or some other period of time. Preserving life in all its contexts furthers an important societal objective. It is difficult to argue, moreover, that research designed to preserve life has an intrinsically brutalizing effect or that it opens the door to experimental atrocities on other classes of defenseless subjects. Nevertheless, because of the nature of this research, substantial prior animal testing should be required in the development of an artificial placenta before using human fetal subjects; and the participation of human fetuses should be limited to situations where there is some, even if remote, chance of ultimate survival. These limita-

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183 Because we should generally strive to preserve life, it does not follow that we should be compelled to do so in all circumstances, e.g., “[when] the degree of bodily invasion increases and the prognosis dims.” In re Quinlan, 355 A.2d 647, 664 (N.J. 1976). Neither should we be forbidden to do so. Parents of a nonviable fetus should be free to consent or withhold consent to its participation in this form of experimentation.

184 Currently, the regulations provide that “vital functions of the fetus will not be artificially maintained except where the purpose of the activity is to develop new methods for enabling fetuses to survive to the point of viability.” 45 C.F.R. § 46.209(b)(1) (1976). See note 138 and accompanying text supra. In response to criticism of this provision by the National Commission, see 42 Fed. Reg. 2792 (1977), HEW has proposed an amendment to “reflect the Department’s actual intent . . . to permit artificial maintenance of vital functions only to enable the particular fetus ‘to survive to the point of viability.’” Id. The proposed regulation provides that, with respect to an ex utero fetus whose viability has not been ascertained, the purpose of the research must be “to enhance the possibility
ctions would insure that nontherapeutic elements, such as the opening of fetal chest walls to observe heartbeat, do not predomi-
nate in the research design.

3. A Duty to Experiment?

One final issue is raised by the regulations permitting re-
search which artificially sustains life. If this type of research is
characterized as therapeutic, may desperate parents, following
premature, spontaneous delivery of a nonviable or possibly viable
fetus, resort to legal action to compel experimentation in the hope
of obtaining a viable offspring? The answer to this question is
probably in the negative, since it is unclear on what theory par-
ets could force physicians to reverse a decision not to experi-
ment. A malpractice action would occur subsequent to the event
and would be inapposite because of the customary practice rule.

Specific performance based on a theory of contract between par-
ents and doctor would probably be no more successful; at best, a
doctor contracts to render reasonable, ordinary care. When a pro-
cEDURE has no realistic prospect of success, is extraordinary in
nature, and requires a willing application of skill in its perform-
ance, it is highly unlikely that it could or should be compelled.

In addition, it is unclear whether an obstetrician attending
a mother at an abortion prior to the third trimester must assume
the fetus is a patient once "birth" occurs and, in keeping with
good medical practice, act to preserve its life and health. The
Supreme Court, in Planned Parenthood v. Danforth, assumed
that criminal statutes would operate to compel treatment for
"live-born infants." The Court struck down, however, a statute

of survival of the particular fetus to the point of viability." Id. at 2793 (Proposed 45 C.F.R.
§ 46.209(a)(2)). Once the ex utero fetus is ascertained to be nonviable, however, "vital
functions of the fetus will not be artificially maintained." Id. (Proposed 45 C.F.R. §
46.209(b)(1)).

Note that the proposed amendment does not prohibit highly invasive research proce-
dures; moreover, it prescribes neither the magnitude of "the possibility of survival of the
particular fetus" nor the anticipated duration of survival. These issues are critical in
determining whether to characterize the research as therapeutic or nontherapeutic.

183 See text accompanying notes 255-56 infra.
184 Robertson, Involuntary Euthanasia of Defective Newborns: A Legal Analysis, 27
185 96 S. Ct. 2831 (1976).
186 Id. at 2848. Paradoxically, the Court refused to sever the provisions of the Missouri
statute before it for consideration, and thereby struck down as unconstitutional a require-
ment that physicians act to preserve the life of an aborted "child."
which imposed criminal liability for failure "to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which . . . would be required . . . to preserve the life and health of any fetus intended to be born and not aborted."\(^{186}\) The Court's finding of unconstitutionality appears to have been based on a reading of the statute as applying to all fetuses, even those before the stage of viability, whether in utero or ex utero. Presumably, then, a physician may not be liable for failure to undertake "therapeutic" measures for a nonviable fetus ex utero.

### III. PROTECTIVE MECHANISMS

The Department's regulations, in addition to establishing guidelines for experimentation, set forth two principal protective devices for safeguarding fetal rights. One device is a requirement that consent of the parents of the fetus be obtained before research can be conducted. The other device involves review and monitoring by Ethical Advisory Boards at the national level and by Institutional Review Boards at each research institution. This section will examine the legal efficacy of these protective mechanisms and the extent to which they are adequate safeguards. Additional protective mechanisms will then be discussed briefly in conclusion.

#### A. Controls Established by Federal Regulations


   The sections of the regulations relating to experimentation with fetuses in utero\(^{189}\) and nonviable fetuses ex utero\(^{191}\) contain nearly identical provisions on consent: The regulation pertaining to ex utero fetuses provides that research

   may be conducted only if the mother and father are legally competent and have given their informed consent, except that the father's informed consent need not be secured if: (1) his identity or whereabouts cannot reasonably be ascertained, (2) he is not reasonably available, or (3) the pregnancy resulted from rape.\(^{192}\)

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\(^{186}\) *Id.* at 2847.

\(^{189}\) 45 C.F.R. § 46.208 (1976).

\(^{191}\) *Id.* § 46.209.

\(^{192}\) *Id.* § 46.209(d). The consent regulation pertaining to in utero fetuses fails to track precisely the quoted language; the word "informed" is omitted from the phrase "father's informed consent." *Id.* § 46.208(b).
a. Source

This requirement of parental consent for fetal experimentation appears to have been extrapolated from the requirement that parental consent be obtained prior to utilization of either established or innovative medical procedures on children. Two principles govern this exercise of parental authority. First, as a general proposition, parents in this culture have traditionally possessed substantial independent control over their children. Second, parents in all jurisdictions have an affirmative obligation to provide necessary medical care for their children; and their failure to do so may result in prosecution and the forfeiture of their rights of parenthood. Thus, in a blend of these two principles, parents are given wide latitude in the choice of medical treatment for a child; but they must exercise their power to grant or withhold consent on the basis of the child's best interest. When a child's condition is serious, as when death is imminent, parents may consent to drastic therapeutic measures. Parents do not, however, possess authority to consent to nontherapeutic medical procedures; and, a fortiori, they may not consent to nontherapeutic

The Department's regulations require both mother and father to be legally competent. Since males and females in their early teens are capable of conceiving children, this competence limitation may preclude obtaining their consent to fetal research, even in situations where the research is therapeutic. A preferable solution would be to permit therapeutic research after consent has been obtained from other parties, such as the incompetent parents' legal guardians, as well as from the parents themselves.


See note 186 supra.

Cf. Prince v. Massachusetts, 321 U.S. 158 (1944). In Prince, the Supreme Court refused to invalidate a state statute barring minors from selling newspapers and other merchandise. The statute was applied to prohibit a child from selling religious literature. The Court recognized that zealous attempts to distribute propaganda of any type might create an emotional situation harmful to the child. The Court then observed:

Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.

Id. at 170.
experimentation," since the risks engendered by research are more difficult to assess than those associated with accepted medical procedures.

Nevertheless, courts have permitted nontherapeutic procedures on children, even procedures presenting a substantial hazard, in certain limited situations. The leading case on the subject, *Bonner v. Moran*, involved a 15-year-old boy who consented to be the donor in a skin transplantation procedure that was necessary to save the life of his cousin. The court held that the consent of the minor alone was not sufficient to compel judgment for the defendant doctor in an action for assault and battery. Inerentially, the case may be read to stand for the proposition that parental consent would have been sufficient to enable the physician to perform the procedure, even though the procedure entailed a substantial risk of injury.

In the late 1950’s, the issue of parental consent for a nontherapeutic procedure performed on a minor was placed directly in focus by three Massachusetts cases involving kidney transplantation. In all three cases, the kidney of a healthy child was to be transplanted to his ill sibling; both the minors and their parents had consented. In each of these cases the Massachusetts Supreme Judicial Court decided that, since the donor child would receive a psychological benefit, the parents could consent to the operations. In a similar case, the Court of Appeals of Kentucky permitted the transplantation of a kidney from a mentally retarded 27-year-old man to his dying brother. The court based its opinion on two conclusions: The incompetent would suffer

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197 However, one commentator has suggested that, because of the drastic impediment to medical research on childhood diseases which would occur if experimentation were curtailed, children should be permitted to be subjects of such research “where they are peculiarly suitable and there is no discernible hazard to them.” Freund, *Introduction to Experimentation with Human Subjects* at xvi (P. Freund ed. 1970).


psychological damage from the loss of his brother; and the risk to the incompetent donor was minimal.\textsuperscript{202}

Other courts have rejected the psychological benefit theory, but have permitted nontherapeutic procedures on other grounds. For example, in a 1972 Connecticut case\textsuperscript{203} involving a kidney transplant, the court discounted testimony relating to psychological benefit to the donor. Nevertheless, it permitted the operation to proceed, holding that parents of identical twins could consent to a transplant from one twin to the other when the operation is necessary for the continued life of the donee, the risk is negligible, and the parents' motives and reasoning have been reviewed by a guardian ad litem, clergyman, and the court.\textsuperscript{204} Another court similarly rejected the concept of psychological benefit in the context of bone marrow transplantation.\textsuperscript{205} The court found that, although "the evidence does not permit a finding that the procedure will be of any benefit"\textsuperscript{206} to the donor, it did "not believe that a finding of benefit to the donor is essential . . . ."\textsuperscript{207} The opinion clearly stated that "parents have the right and responsibility to make these decisions"\textsuperscript{208} subject to judicial review to guard against a conflict arising from their responsibility to care for both children. The court must merely decide if the parents' decision to allow their child to be a donor is "fair and reasonable."\textsuperscript{209}

Several propositions can be drawn from the transplant cases. First, a striking aspect of these decisions is the fact that the courts never questioned the parents' right to consent to an experimental (but therapeutic) procedure on behalf of the donee-child. Thus, parents may consent to placing their child at serious risk if exigent circumstances justify drastic therapeutic measures and the child might derive a benefit from them.\textsuperscript{210} Second, parents may consent to a nontherapeutic procedure in which the child
will be a donor if the risks to the donor are outweighed by the
benefits to the donee.\textsuperscript{211} Third, there appears to be some move-
ment away from rationalizing such parental consent to a nonther-
apeutic procedure on the basis of the contrived notion that the
incompetent donor receives a benefit. Finally, courts are deferen-
tial to parental authority and appear very reluctant to second-
guess parents after they have made a decision concerning their
child, even though the parents have a serious conflict of interest
when both the donor and the donee children are their own.

In the context of therapeutic research on a fetus \textit{in utero}, the
federal regulations embody the first proposition: As in the case
of a minor child, the parents of a fetus have broad discretion when
they act to further its health needs. In the context of nonthera-
peutic research on both \textit{in utero} and nonviable \textit{ex utero} fetuses,
however, the regulations grant authority to parents significantly
beyond that inhering in the other three propositions derived from
the transplant cases: Parents may consent to experimentation on
the fetus even though it will not provide a life-saving benefit to a
sibling.\textsuperscript{212} No benefit, psychological or otherwise, need accrue to
the fetus. Moreover, courts do not even have the opportunity to
review the parental decision since no judicial approval is neces-
sary under the regulations.

The latitude given to parental authority might be under-
standable were we to conclude that parents are as protective to-
ward their fetuses as they are toward their minor children. But
common sense suggests that this assumption is not warranted;
and the number of abortions makes the point doubly clear. The
alternative conclusion is that fetuses are not as deserving of pro-

\textsuperscript{211} In the bone marrow and kidney transplant cases, notes 199-209 supra, the benefit
(the possibility of saving the donee's life) outweighed the risk of harm to the donor. Only
once was parental consent overridden, \textit{In re} Richardson, 284 So. 2d 185 (La. App.), \textit{cert.}
denied, 284 So. 2d 338 (La. 1973), in a situation where the transplant was not an "absolute,
immediate necessity" to preserve life. \textit{Id. at} 187. The court held that it was inconceivable
that a statute absolutely prohibiting donation of a minor's property by his parents af-
forded "less protection to a minor's right to be free in his person from bodily intrusion to
the extent of loss of an organ unless such loss be in the best interest of the minor." \textit{Id.}

\textsuperscript{212} See 45 C.F.R. §§ 46.208(a)(2), .209(a) (1976). The regulations provide, however,
that the risk must be minimal to a fetus \textit{in utero}, \textit{id. §} 46.208(a)(2), and that research
activities directed toward a viable fetus \textit{ex utero} must conform to regulations respecting
experimentation with human subjects, \textit{see id. §} 46.209(c). The utility of this limitation is
open to some question, however, since the degree of risk may be impossible to gauge in
advance.
tection as minor children, and that parental consent is a sufficient safeguard under the circumstances. In either event, whether parental consent alone suffices to protect fetuses should be determined by analyzing the different contexts in which fetuses may be subject to nontherapeutic research.

b. *Fetus in utero*

Where both parents desire a child, they acquire a growing emotional attachment to the fetus throughout pregnancy; and, following birth, both parents are responsible for its maintenance and support, including the provision of medical services. They are clearly the parties most concerned about the welfare of their future child; therefore, it makes sense to assume that they will act to safeguard the interests of the maturing fetus *in utero,* particularly as these interests largely coincide with their own.

c. *Previable fetus scheduled for abortion*

A distinctly different picture exists in the case of a previable fetus scheduled for abortion. Here it can be argued that, where abortion is not necessary to protect maternal life or health, the parents have consigned the fetus to death. They are hardly the parties who should then be charged with protecting its interests; moreover, any research on it would, by definition, be nontherapeutic. Hans Tiefel has observed:

> [T]he pregnant woman cannot be assumed to be the parental guardian of the fetus when non-therapeutic experiments are proposed in connection with a planned abortion. For when the woman has decided for whatever reasons not to become a parent—and there certainly are reasons which justify an abortion—then rights that depend on the parent-analogy are obviously no longer appropriate.

On the other hand, it can be argued that few abortions are motivated by malice toward the fetus. The absence of a father, a lack of financial resources to support a child, the youth of the parents, or a need to defer childrearing because of career demands

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114 Written comments submitted (April 24, 1975) by Hans O. Tiefel, Kennedy Fellow in Medical Ethics at Harvard University, to the Subcommittee of the Massachusetts Legislature on Human Experimentation and Clinical Investigation (in conjunction with *Hearings on Mass. Gen. Laws ch. 113, § 12J* (1975) held on March 7, 1975) at 8.
are examples of nonmalicious motives. In none of these cases would the parents necessarily be insensitive to the rights of their developing child; and this would be particularly true where an abortion is necessitated by the health needs of the mother.

The issue, then, is not whether maternal consent should be required prior to research on a fetus scheduled for abortion, but whether it is sufficient, standing alone, as a protective device. Approval by an independent review board could be required as an additional measure to guard the interests of the fetus. Alternatively, a procedure similar to that used when a minor donates a kidney might be appropriate: This procedure entails, in addition to parental consent, appointment of a guardian ad litem to obtain the imprimatur of the court.

d. Nonviable fetus ex utero

Similar checks on the consent authority granted to parents by the regulations seem desirable in the case of aborted nonviable fetuses. Supplementing parental consent to research on such fetuses with other protective provisions is both more sensible and more humane than the approach incorporated in several state statutes which terminate parental rights over the fetus should it survive, except when the abortion is performed to preserve the mother's life or health. Under these statutes, parents would be unable to consent even to performance of therapeutic procedures on the aborted fetus.

211 Review procedures are, in fact, required prior to initiation of fetal research where federal funding is involved. See notes 231-44 and accompanying text infra.


213 LA. REV. STAT. ANN. §§ 13:1569-70 (Supp. 1977); Mo. ANN. STAT. § 188.040 (Vernon, Cum. Supp. 1977). The Louisiana statute regards a fetus which survives an abortion as a neglected or dependent child and gives jurisdiction over proceedings involving the child to the juvenile court. Missouri regards the aborted child as an abandoned ward of the state and places it under the jurisdiction of the juvenile court; the mother and the father, if he consented to the abortion, lose all parental rights or obligations vis-à-vis their aborted offspring.

214 These statutes may be open to constitutional attack on due process grounds because parental rights are forfeited automatically without any showing of actual or pending neglect. Cf. Stanley v. Illinois, 405 U.S. 645 (1972). The degree of protection of fetal rights afforded by these statutes is also questionable in that the state-appointed guardian is potentially indifferent.
e. **Dual consent**

With limited exceptions, the regulations require consent by both parents in order to conduct research on a fetus, whether *in utero* or *ex utero.*\(^{21}\) As a means of protecting fetal interests, this dual consent requirement constitutes an important additional safeguard. But, for the fetus *in utero*, is dual consent justifiable after *Roe v. Wade*\(^{22}\) and *Planned Parenthood v. Danforth*?\(^{22}\)

Specifically, does the mother’s privacy interest give her the sole right to consent?\(^{22}\)

In *Roe*, the Supreme Court confined its discussion of fundamental privacy to the pregnant woman planning an abortion. Once conception has taken place, and the fetus is growing within her, the choice to abort the fetus is her right alone. The Court specifically eschewed any consideration of a father’s rights,\(^{22}\) and this primacy of the mother was reaffirmed in *Danforth.*\(^{12}\) Neither *Roe* nor *Danforth*, however, granted a pregnant woman absolute

\(^{21}\) See note 192 and accompanying text *supra*.

\(^{22}\) 410 U.S. 113 (1973).

\(^{22}\) 96 S. Ct. 2831 (1976).


Since *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), the Court has slowly carved out a zone of personal liberty which is immune to state intrusion, absent the nearly unattainable showing of a compelling state interest. In general, this zone of privacy encompasses intimate matters associated with marriage, family, and sexual relations. The Supreme Court has enunciated the right in cases dealing with sterilization, *id.*, the use of contraception by married persons, *Griswold v. Connecticut, supra*, and by unmarried persons, *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and the choice of marriage partner, *Loving v. Virginia*, 388 U.S. 1 (1967). *But see Doe v. Commonwealth’s Atty.*, 96 S. Ct. 1489, *rehearing denied*, 96 S. Ct. 2192 (1976), *aff’d* 403 F. Supp. 1199 (E.D. Va. 1975), in which the Supreme Court seemingly narrowed the scope of the privacy right by affirming (without comment) a lower court decision upholding a Virginia sodomy statute which prohibited private consensual homosexual acts between adults. Since the statute patently infringed on intimate sexual matters, the conclusion to be drawn is that the privacy right is restricted to heterosexual relations.

\(^{22}\) 410 U.S. 113, 165 n.67 (1973).

\(^{22}\) 96 S. Ct. 2831 (1976). The Court struck down a spousal consent requirement for abortions, holding that a state cannot delegate to a father power which it does not itself possess. *Id.* at 2841.
bodily autonomy.\textsuperscript{225} Simply because a woman possesses a privacy right in the first two trimesters to retain a fetus or to have it expelled from her womb, it does not follow that she possesses unfettered discretion to do with the fetus as she pleases in any other respect. While her right to refuse an invasion of her body is undoubtedly fundamental,\textsuperscript{224} it is less clear that she possesses a fundamental privacy right to invade the body of her fetus for experimental purposes. Or, if her maternal interest in the fetus is a fundamental right included within the notion of privacy, it would seem to follow that paternal rights should be on an equal footing.\textsuperscript{227}

\textsuperscript{225} The Court in Roe said:

The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some \textit{amici} that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. . . .

We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.


\textsuperscript{226} \textit{See In re Smith}, 16 Md. App. 209, 295 A.2d 238 (1972), which upheld a minor's right to refuse an abortion her mother bought for her.

\textsuperscript{227} In Planned Parenthood v. Danforth, 96 S. Ct. 2831 (1976), Justice Blackmun, writing for the majority, concluded

that the State cannot "delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy."

\textit{Id.} at 2841. By speaking in terms of delegation, the Court appeared to deny the existence of a natural or fundamental right of fatherhood, although it stated that

[s]ince it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor. \textit{Cf. Roe v. Wade}, 410 U.S., at 153 . . . .

\textit{Id.} at 2842. Mr. Justice Stewart, in a concurring opinion in which Mr. Justice Powell joined, went somewhat farther, saying "that a man's right to father children and enjoy the association of his offspring is a constitutionally protected freedom"; however, in choosing between these competing rights, he concurred that the balance weighs in the woman's favor. \textit{Id.} at 2850-51. Mr. Justice White, concurring in part and dissenting in part, disagreed:

[T]he State is not . . . delegating to the husband the power to vindicate the State's interest in the future life of the fetus. It is instead recognizing that the husband has an interest of his own in the life of the fetus which should not be extinguished by the unilateral decision of the wife. It by no means follows, from the fact that the mother's interest in deciding "whether or not to terminate her pregnancy" outweighs the State's interest in the potential life of the fetus, that the husband's interest is also outweighed and
Certainly a prospective father has a substantial interest in the fate of his unborn child, an interest ranging from possible emotional attachment to a state-compelled duty of maintenance and support. A father may wish to shield the fetus in utero from unnecessary potential harm or pain; and there is no logical reason why his wishes in this regard should be outweighed by those of the pregnant woman, as they are in the case of abortion. The mother’s freedom to decide whether or not to terminate a pregnancy is not impaired if she is prevented from authorizing research. Since experimentation is not designed to benefit her physically, no predominant health interest can be claimed. The father is simply asserting a legitimate interest in protecting the fetus. Since he is a copartner in the conception, it cannot be said that the woman alone should speak in this protective capacity. And if there are sound reasons to support maternal and paternal consent to experimentation on a fetus in utero, these reasons should be even more persuasive once a fetus has been expelled from the womb.

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may not be protected by the State. A father’s interest in having a child—perhaps his only child—may be unmatched by any other interest in his life. See Stanley v. Illinois, 405 U.S. 645, 651 . . . .  
Id. at 2852 (footnote omitted). As the Chief Justice and Mr. Justice Rehnquist joined in the dissent, a total of five of the justices joined in either the concurring or dissenting opinion; it thus seems that a majority of the Court recognizes the fundamental nature of paternal rights.

Where a pregnant woman’s health may be endangered and experimental procedures are indicated, the regulations permit medical intervention with her consent alone. See 45 C.F.R. § 46.207(b)(1) (1976).

To the extent that a decision to withhold therapeutic research might impinge on the woman’s abortion decision, it would probably be unconstitutional under the reasoning of Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood v. Danforth, 96 S. Ct. 2831 (1976).

Support for this position may be inferred from Stanley v. Illinois, 405 U.S. 645 (1972), although the case can be distinguished as it did not address the issue of informed consent. Stanley involved an Illinois statute which presumptively held a father unfit, because of his unwed status, to be the guardian of his children following their mother’s death; yet custody by natural or adoptive married parents or by an unwed mother could only be terminated through a neglect proceeding. Finding a denial of Stanley’s due process and equal protection rights guaranteed by the fourteenth amendment, the Court stated: “The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection.” Id. at 651. This language evidences an expanding recognition of paternal rights and a desire to eliminate sexual stereotypes; it strongly suggests that, in the context of consent to fetal research, the father should stand on a co-equal footing with the mother.
2. Review Procedures

In order to expose hidden biases and unconsidered perils, many commentators have suggested review by a committee prior to commencing research activities on human subjects. A review committee is probably a useful safeguard, if for no other reason than that it forces researchers to openly articulate their procedures and objectives. This experience alone may induce the experimenters to alter research design or to halt unethical research altogether. The extra delay and bureaucratic formality imposed by committee review is a relatively trivial burden to insure meticulous care in protecting incompetent subjects.

The federal regulations require committee review, in some cases by two committees, for research proposals involving human subjects. The process is complex. In the case of experimentation on a fetus, every proposed research activity must be reviewed and approved in the first instance by an Institutional Review Board. No proposal may be funded unless Board approval is certified to the Department. The Institutional Review Board's scope of re-

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231 Comment, Non-therapeutic Medical Research Involving Human Subjects, 24 Syracuse L. Rev. 1067, 1093 (1973). See also Robertson, supra note 186, at 264, 268. It has been suggested that these review committees not be associated in any way with institutions sponsoring research. Note, Experimentation on Human Beings, 20 Stan. L. Rev. 99, 109 (1967). Also recommended is inclusion on the committees of physicians who are not involved in research as well as those who are. Lewis, McCollum, Schwartz, & Grunt, Informed Consent in Pediatric Research, 16 Children 148 (1969). One commentator has recommended a panel, fifty percent of whose members would be drawn from the community. See Comment, Non-therapeutic Medical Research Involving Human Subjects, supra at 1093. Community representation is suggested because the decision to proceed with research often involves normative judgments; but it has also been questioned on the ground that outside "experts" and laymen may be no more capable than parents or physicians at resolving complex social and ethical questions posed by a particular project. Robertson, supra note 186, at 265. Even though normative, non-technical judgments are often required, these judgments frequently must be meshed with a thorough understanding of the technical aspects of a project. Lay members of review committees tend to rely on those with greater technical expertise. Not surprisingly, the success of these committees has been cited as less than spectacular. Id.

232 45 C.F.R. § 46.102(a) (1976). The Department's regulations concerning fetal experimentation do not preempt state law: "Nothing in this subpart shall be construed as indicating that compliance with the procedures set forth herein will in any way render inapplicable pertinent State or local laws. . . ." Id. § 46.201(b). A number of state fetal experimentation statutes (see supra note 32) impose greater restraints than the federal regulation; and researchers must conform with these local standards even after they obtain HEW approval.

233 45 C.F.R. §§ 46.102, 46.205(3)(b) (1976).
view is broad: It determines not only whether a proposed activity conforms to the general standards for research on human subjects, but also whether the activity is permissible under the applicable standards governing research on the fetus. While it is still too early to assess the precise functioning of these boards, in all likelihood they will: (1) monitor the informed consent process; (2) periodically (at least once a year) monitor research activities already approved to insure that there are no unexpected problems or risks for research subjects; (3) determine that prior animal testing has been performed; (4) insure that there is only "minimal risk" to the fetus; and (5) insure that researchers take no part in decisions as to timing, methods, and procedures used to terminate pregnancies and are excluded from evaluating the viability of fetuses used in research.

Upon receiving certification of approval by an Institutional Review Board, the Secretary of HEW has three options: He may grant final approval, reject the proposal, or request further advice from an Ethical Advisory Board. The Secretary will exercise this latter option when, in his opinion, a research activity raises complex medical, legal, social, and ethical problems which require close scrutiny and review. The regulations prescribe that two Ethical Advisory Boards be established and that they be composed of individuals competent to deal with these kinds of problems in the context of fetal experimentation. In addition:

A Board may establish, with the approval of the Secretary, classes of applications or proposals which: (1) Must be submitted to the Board, or (2) need not be submitted to the Board. Where the Board so establishes a class of applications or proposals which must be submitted, no application or proposal within the class may be funded by the Department or any component thereof until the application or proposal has been reviewed by the Board and the Board has rendered advice as to its acceptability from an ethical standpoint.
This provision enables an Ethical Advisory Board, with the approval of the Secretary, to review every research proposal in a given class. For example, since the fetus scheduled for abortion and the nonviable ex utero fetus are particularly vulnerable, an Ethical Advisory Board could require that all research proposals involving such fetuses be submitted to it for careful review. This procedure would constitute a desirable supplemental mechanism, in addition to parental consent, for protection of fetal rights. While the Secretary is not bound by a Board’s recommendation, a finding that a proposal fails to conform to acceptable ethical standards will carry great weight.

B. Mechanisms Not Prescribed by Federal Regulations

1. Physician Advocates

Another possible protective device is a requirement that a physician who is not one of the researchers be present in any research situation to be responsible for the research subject as a patient. This physician would communicate the progress of research faithfully to the parents or guardian, make sure that their consent is truly informed, insure that every precaution is taken, and withdraw the fetus from the research if the risk of harm is unnecessary or too great.

Although this protective device has merit, it duplicates many of the duties of the Institutional Review Boards. Having both a review committee and a physician advocate would probably be an unnecessary additional restriction on researchers in most situa-

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14 See text accompanying notes 216-17 supra.

14 In particular, the Boards should closely scrutinize any research in which the purpose “is to develop new methods for enabling fetuses to survive to the point of viability.” 45 C.F.R. § 46.209(b)(1) (1976). I recommend that the following standards be applied by the Ethical Advisory Boards for this class of research:

(1) The general rule should be that researchers may not alter the duration of fetal life; and the development of an artificial placenta should be a specific, narrowly limited exception to the general rule.

(2) There should be no reasonable alternative to the use of nonviable fetuses as research subjects (e.g., could a possibly viable fetus who might benefit from this research be used instead of a nonviable fetus?).

(3) The degree of bodily invasion of the proposed experiment should be considered a relevant factor in determining its ethical propriety.

(4) There should be a showing that the proposed experiment will result in the development of important biomedical knowledge which cannot be obtained by other means.

tions. Moreover, the presence of an additional, independent phys-
icians would constitute an unwarranted interference with the re-
searcher's professional responsibility, especially in the context of therapeautic experimentation.

2. Litigation

Another significant method of quality control—indeed, within the medical profession currently, perhaps the most effica-
cious method—is after-the-fact litigation, usually in the form of suits for malpractice. Applied to fetal experimentation, litigation would permit the gradual development and testing of legal doc-
trine in this very perplexing area. A common law approach would avoid sweeping generalizations enunciated in regulations in favor of an adjudication of liability and assessment of damages in specific cases. Over a period of time it would probably provide the best guide to the behavior of physician-researchers. Unfortun-
ately, the rate of development in medical research frustrates an unhurried case-by-case analysis of concomitant legal problems. In addition, although rules pieced out in judicial opinions may ultimately be of critical importance in regulating the scope of research activities, it will be necessary first to modify the legal doctrines which can be used as a basis for assessing liability. The present body of judicial opinions relating to research in general is of limited quantity and usefulness; and most of these cases embody criteria which apply imperfectly or not at all to the facts of fetal experimentation.

a. Contract

Suit based on a contract theory, for example, presupposes an express or implied contract that the physician will perform professional services in return for reasonable compensation from the patient. An initial problem presented by an action in contract is identification of the parties other than the doctor. In the context of therapeutic experimentation, presumably the parents or guardian of an in utero fetus would constitute a party, the fetus not being a "person" under the fourteenth amendment. If ex utero, however, the fetus may be regarded as an incompetent

\[^{146}\] J. WALTZ & F. INBAU, MEDICAL JURISPRUDENCE 40-41 (1971).
\[^{147}\] See note 117 and accompanying text supra.
minor child capable of bringing suit in its own name as a third party beneficiary of the contract. On the other hand, when non-therapeutic research is performed on an *ex utero* fetus, questions are raised respecting the third party beneficiary status of the fetus—no benefit to the fetus being contemplated—and the adequacy of consideration from the researcher. Moreover, measurement of damages may be extremely difficult, depending on the fetus' stage of development (nonviable or viable) and status (*in utero* or *ex utero*).

b. *Tort*

Difficulties similarly arise in the application of tort theories to fetal research. For example, a physician has a duty to inform the patient or the patient's representative of "all of the material facts of the treatment proposed, including risks of death or serious bodily harm, the probability of success, the alternatives to the treatment (including nontreatment), and their risks and probabilities of success." Where the patient or his representative consents but foreseeable collateral risks are not disclosed, a negligence issue—failure to obtain informed consent—is presented.

If, in light of the patient's condition, the probability of success, and the severity and likelihood of harm, good medical practice requires therapeutic research, the physician is only obligated to disclose those risks which he knows or reasonably should know. Where nontherapeutic research is involved, however, the result is much less clear: Can nontherapeutic research ever con-

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24 Nontherapeutic research on a fetus *ex utero* also raises the issue of whether the contract agreement to perform nonbeneficial procedures on a "child" is void as against public policy.


26 An action for battery might also be instituted:

> [T]heories of assault and battery are to be employed only where the defendant doctor has operated on a part of the body as to which no consent was obtained or where the doctor has simply acted viciously and committed a true battery.

J. Waltz & F. Inbau, *supra* note 246, at 156.

27 If therapeutic research is not dictated by good medical practice, obtaining informed consent to the risks will not protect the physician from liability. *Id.* at 200-01.

28 *See generally id.* at 191.

29 As yet, decisional law in the United States with respect to this type of research is virtually nonexistent. Comment, *Non-therapeutic Medical Research Involving Human*
stitute good medical practice, given that the research subject is not expected to receive any benefit? Must every conceivable risk be mentioned? It could be maintained that the standard of care is not good medical practice but good research practice, and that, in the latter context, the major risk to be disclosed is the very fact that not all risks may be foreseen in advance.\footnote{244}

A natural corollary of this dilemma is posed by the common law rule that "a physician has the obligation to his patient to possess and employ such reasonable skill and care as are commonly had and exercised by reputable, average physicians in the same general system or school of practice in the same or similar localities."\footnote{255} Physicians are required to adhere to generally accepted tenets of medicine, although majority and minority views regarding certain therapeutic practices are tolerated when there is no evidence that one school is clearly the most efficacious. By definition, however, an experimental procedure is not generally accepted practice; and a physician may be acting at his peril when he utilizes an innovative therapy.\footnote{256} In a 1935 decision which enunciated a more liberal view,\footnote{257} the Supreme Court of Michigan recognized society's need for experimentation to further medical progress; nevertheless, it held that therapeutic research procedures were permissible only if they did "not vary too radically from the accepted method of procedure."\footnote{258} In a few cases since that time, however, courts have permitted relatively extreme departures from accepted practice when the patient has consented and the physician has acted prudently under the circumstances.\footnote{259}

Subjects, 24 Syracuse L. Rev. 1067, 1071 (1943). See also J. Waltz & F. Inbau, supra note 246, at 181 n.11.

See G. Annas, supra note 249.

J. Waltz & F. Inbau, supra note 246, at 42.

Carpenter v. Blake, 60 Barb. 488 (N.Y. Sup. Ct. 1871), rev'd on other grounds, 50 N.Y. 696 (1872). The court stated:

[When the case is one as to which a system of treatment has been followed for a long time, there should be no departure from it, unless the surgeon who does it is prepared to take the risk of establishing, by his success, the propriety and safety of his experiment.]

Id. at 524 (emphasis added).


Id. at 282, 261 N.W. at 765.

Quality control by way of malpractice actions presents other, equally troublesome problems in the context of fetal research. To bring a successful suit, plaintiffs must prove a causal relationship between the researcher's conduct and the injury which occurs. For the fetus in utero, this task may be formidable: Twenty percent of all pregnancies terminate in spontaneous abortions, usually the result of gross fetal abnormalities, and many children are born with greater or lesser degrees of impairment. In view of these facts, it may be nearly impossible to link a relatively innocuous experiment with a defect or to establish that an experiment enhanced an existing defect. It may also be an arduous proposition to establish damages, even if liability can be proved.

c. Strict liability

These multifarious difficulties suggest resort to the doctrine of strict liability, particularly with respect to nontherapeutic research. There is appeal in the notion that an experimenter should proceed at his peril, that he has exclusive control of the experimental situation and should be held liable without fault if an injury occurs. Through resort to insurance, the costs—as well as the advantages—of medical research would be distributed among all recipients of medical services.

Despite its appeal, however, this approach presents difficult, perhaps insurmountable, policy choices. The spectre of strict liability might seriously chill the initiation of valuable research. Where other controls are present, such as consent and committee review, immunity from liability for nonnegligent injury may be a necessary price to pay for the substantial benefits to medical knowledge which fetal research may yield. This consideration has particular weight where the research is therapeutic and where doctor and patient, or, in the case of fetal experimentation, doctor and parents, are both in search of the best therapy. In this situa-

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170, 179-80 (1957). In Karp, the Fifth Circuit upheld a directed verdict for a physician where the plaintiff failed to present expert testimony that use of a previously untried mechanical heart was negligent. Apparently, the court felt that an experimental, but therapeutic, procedure is proper where the patient consents and conventional modes of treatment offer little hope of survival.


tion, parents and fetus are in a sense joint venturers with the physician. It seems harsh to hold a doctor solely responsible under the circumstances, at least when a nonnegligent injury occurs.262

3. Compensation Fund

If strict liability is an unacceptable approach in a society dedicated to the advancement of knowledge through research, some other mechanism for providing compensation, independent of traditional notions of contract or tort, is desirable. When an injury occurs to a fetus or its mother which involves expenses over a lifetime, staggering sums may be involved. Compensation through a suit for malpractice may be insufficient or unobtainable, e.g., if proof of causation is insufficient; yet parents should not be required to shoulder the entire risk alone. Take, for example, the case of a fetus ex utero with no apparent chance of survival. The parents are told that a new experimental technique may save the fetus, but that no one can predict the harm which may occur through its use. Faced with this cruel choice, some parents will consent in desperation to use of the technique. Others will understandably hesitate or refuse, in part fearing the economic hardship which may result if they cannot obtain compensation for nonnegligent injury. In addition, a doctor confronted with the possibility of strict liability despite his exercise of due care may equally be tempted to forego life-saving efforts in marginal cases.263

The present system offers essentially two choices if an injury occurs: If the injury results from negligence which can be proved, the negligent party must pay damages to the extent he is able; if the injury results from causes unrelated to negligence, the victim (or those responsible for the victim) must shoulder the entire cost. This system is rigid and inequitable. It is important, on the one hand, to make researchers or their sponsoring institutions bear the costs of their mistakes as a way of insuring quality control;


263 Note, however, that at least 18 state fetal experimentation statutes require physicians to take measures to preserve the life of a viable fetus following an abortion. 4 FAMILY PLANNING POPULATION REPORTER at 111-12 (1975).
but the fear of personal liability may dry up some kinds of useful research; and the actual recovery of money damages by a victim may be insufficient. On the other hand, if a subject is participating in research for the benefit of medical science, his ability to recover for injuries should not be limited to cases where fault can be demonstrated. Injuries constitute a research cost which should ultimately be borne by the research industry and society rather than by the unfortunate subject.

Society should underwrite a portion of this cost through establishment of a compensation fund. Victims should be reimbursed from the fund upon proof of injury and a showing that a substantial purpose of the research was nontherapeutic, i.e., designed to benefit society rather than the subject. Compensation should be allowed for both negligent and nonnegligent causes of injury. In both situations, payment of the total amount of compensation should be allocated among the researcher, the research institution, and a national fund, a scheme similar in nature to workmen's compensation. The amount paid by each party might constitute a percentage of the whole; however, the preferable scheme would make the researcher and the research institution jointly liable for damages up to a fixed amount, with the national fund obligated to pay the remainder. The liability of the researcher and research institution would be lower in the case of nonnegligent injuries, e.g., $200,000, and higher where negligence could be proved, e.g., $500,000.

The higher amount of recovery for negligence is intended to apply pressure on a researcher and research institution to exercise due care. Also, by imposing strict liability for nonnegligent injuries, this scheme discourages researchers from conducting experimentation until all risks are minimized. It provides a strong incentive for Institutional Review Boards to recommend against

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285 Until the efficacy and cost of the fund is determined, compensation should be limited to injuries arising from nontherapeutic research. Serious consideration should also be given, however, to compensating injuries arising from therapeutic research. Does not society benefit from therapeutic as well as nontherapeutic research?

undertaking research projects until every precaution has been taken to avoid injury. As stated by Professor Calabresi:

[Approval by [a review committee] of a particular experiment will require conscious consideration not only of the possible payoff (either in market or scientific terms), but also of the risks, converted to money, that the project entails. This may not deter many experiments, but it may cause those involved in the most risky or least useful ones to consider carefully whether or not the experiment is worth it, whether or not it is best done by those who propose to do it, and whether there is an alternative, and safer, way of obtaining approximately the same results.287]

Establishing the federal compensation fund described above would serve at least two important objectives. By relieving researchers and research institutions of liability for very substantial awards of damages, it would not inhibit worthwhile research. At the same time, by furnishing compensation only if damages exceed certain amounts,288 it would encourage a maximum amount of care. Such a fund, established through appropriations from general tax revenues, would adequately represent society's stake in medical research.

CONCLUSION

For research on the fetus, two obvious issues are presented. The first is a matter of definition: Is the fetus a person entitled to protection? The answer to that question shapes the second issue: What protections should be afforded a fetal research subject during the various stages of its development?

At least for the foreseeable future, Roe v. Wade has conclusively settled that a fetus in utero is not a person entitled to constitutional protection under the fourteenth amendment. But a mother's fundamental right to abortion does not imply a corresponding right to experimentation; as a potential human being, the fetus in utero is entitled to substantial protection. If this potentiality is lost (as in the case of a fetus to be aborted or a nonviable fetus), other factors, including the "dignity" of the fetus, require significant safeguards before research is undertaken. Although a nonviable, ex utero fetus is arguably in a differ-


288 A court, probably sitting without a jury unless there is an allegation of negligence, would determine the total award; or a special tribunal could be set up for this purpose.
ent, and less protected, status for research purposes than other human beings, its "personhood" should be assumed if the necessary indices of life are present. A definition of humanness should not depend solely on the present state of technological development; rather, defining the nonviable fetus as a person will spur research efforts to expand the period of viability.

The regulations of the Department, by requiring consent by both parents and by establishing a hierarchy of review committees, comprise significant safeguards. As a prospective control, however, the role of the review committees is insufficiently defined with respect to both the in utero fetus to be aborted and the nonviable fetus. Lastly, a compensation fund is not mandated by the regulations; such a fund should be established as a means of insuring maximum care in research efforts and as a device to allocate more fairly the costs of research which benefits us all.
DEFERENCE TO STATE COURTS IN THE ADJUDICATION OF RESERVED WATER RIGHTS

BY CHARLES M. ELLIOTT* and KENNETH BALCOMB**

INTRODUCTION

On March 24, 1976, the Supreme Court of the United States held that the jurisdiction of a federal court to determine the United States' claims to reserved water rights, including claims asserted on behalf of Indian tribes, should yield to the adjudicatory process of a Colorado water court.¹ *Akin v. United States* culminated nearly a decade of litigation as to the proper forum for the adjudication of reserved right claims. This decision preserves the efficacy of the Colorado water adjudicatory system and confirms the salutary purpose of the McCarran Amendment.²

** Partner, Delaney & Balcomb, Glenwood Springs, Colorado; LL.B., 1948, University of Colorado.

Both authors express their appreciation to Robert L. McCarty, McCarty & Noone, Washington, D.C., and David W. Robbins, First Assistant Attorney General, State of Colorado, who, along with the authors, were attorneys on the case, for their comments.

¹ Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) (this case is more commonly known by the name of its companion case, *Akin v. United States*) [hereinafter cited as *Akin*]. Although the federal claims were filed in a single action, two separate petitions for writ of certiorari were eventually filed. Both were granted and the cases were consolidated for hearing. 421 U.S. 946 (1975).
² 43 U.S.C. § 666 (1970), commonly known as the "McCarran Amendment," authorizes the joinder of the United States in certain adjudications of water rights. In full text, it provides:

(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.
Although the doctrine of abstention was expressly circumscribed and held inapplicable, deference to the state water court was nevertheless found to be proper upon considerations of "wise judicial administration." Significantly, the claims asserted by the United States on behalf of two Indian tribes were found to be no basis for denying the power to adjudicate federal reserved water rights to the Colorado court.

I. THE IMPLIED RESERVATION DOCTRINE

The doctrine of implied reservation of water rights was recently outlined by the Supreme Court in *Cappaert v. United States*: 5

This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams. 4

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(c) Nothing in the Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.


4 244 U.S. at 817.

5 It is also frequently referred to as the reserved rights doctrine or the *Winters* doctrine. *Winters v. United States*, 207 U.S. 564 (1908).

6 96 S. Ct. 2062 (1976).

7 Id. at 2069 (citations omitted). In *Cappaert*, the Court considered a Government claim to reserved waters appurtenant to Devil's Hole, which was established in 1952 as a
The Supreme Court first applied the doctrine of reserved rights in *Winters v. United States* in regard to the Fort Belknap Indian Reservation in Montana. For several decades after *Winters*, it was a generally accepted notion that the judicially created doctrine was "a special rule of Indian law." With only this limited exception, the states, not the Federal Government, were believed to be the source of all rights to the use of water within their boundaries.

 detatched unit of the Death Valley National Monument. Devil's Hole is a limestone cavern which contains a pool inhabited by a unique species of fish, commonly known as Devil's Hole pupfish, which were isolated from their ancestral stock when the prehistoric Death Valley Lake System dried up. For survival, the pupfish depend upon a partially submerged rock shelf. The water in the pool, which covers the rock shelf, comes from a huge aquifer which extends beneath approximately 4,500 square miles of land.

Acting pursuant to state law, the Cappaerts pumped groundwater from wells about two and one-half miles from Devil's Hole for use on their ranch. During periods of their pumping, the water level in Devil's Hole dropped, exposing a greater area of the rock shelf and endangering the continued survival of the pupfish.

The Court avoided extending the doctrine of reserved rights to groundwater by finding that the pool was surface water. *Id.* at 2071. There was, however, no hesitation in declaring that reserved rights can be protected "whether the diversion is of surface or groundwater." *Id.* at 2072. The Court upheld an injunction which required the Cappaerts to limit their pumping so that a certain water level, necessary to preserve the pupfish, is maintained in the pool. See generally *Note, Federally Reserved Rights to Underground Water-A Rising Question in the Arid West*, 1973 *Utah L. Rev.* 43.

7 207 U.S. 564 (1908). Although the 1888 treaty which established the Indian reservation was silent as to water rights, the Court said:

The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. *The United States v. The Rio Grande Dam & Irrig. Co.* 174 U.S. 690, 702; *United States v. Winans*, 198 U.S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. *Id.* at 577. The reserved right to 1,000 miner's inches of water, not appropriated under state law, was to be protected against diminishment by subsequent upstream appropriators who held valid Montana water rights. Without the water, the national policy of changing the Indians to a pastoral people would have been frustrated. Additionally, the Court noted the rule that any ambiguity in a treaty with Indians must be resolved in their favor.

*F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW* 105 (1971) (Report NWCL-71-014 prepared under contract with the National Water Commission). Reserved water rights were found for Indian reservations in several instances. See, *e.g.*, *United States v. Ahtanum Irrig. Dist.*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957); *United States v. Walker River Irrig. Dist.*, 104 F.2d 334 (9th Cir. 1939); *United States v. Conrad Investment Co.*, 156 F. 123 (D. Mont. 1907), *aff'd*, 161 F. 829 (9th Cir. 1908). For discussion of reserved waters for Indian reservations see generally *E. CLYDE, INDIAN WATER RIGHTS* 377 (R. Clark ed. 1967); *Bloom, Indian "Paramount" Rights to Water Use*, 16 *Rocky Mt. Min. L. Inst.* 669 (1971).
The claim of the states to exclusive dominion over water rights, excluding reserved rights for Indians, was thought to have been recognized and strengthened by the Supreme Court in *California Oregon Power Co. v. Beaver Portland Cement Co.* In construing the Acts of 1866 and 1870 and the Desert Land Act of 1877, which because of their express recognition of and deference to state-decreed water rights were the keystones of the states' position, the Court remarked:

What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states . . . with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain.  

The optimism of the states, engendered by *Beaver Portland*, was dashed two decades later in *Federal Power Commission v. Oregon.* There the Court made a clear distinction between public lands, such as those involved in *Beaver Portland*, and reserved lands such as the Indian reservation and power site reservation which were before the Court in *Pelton Dam.* The Acts of 1866, 1870, and 1877 were held to be inapplicable to reserved lands and waters appurtenant thereto. Thus, there appeared to be federal rights, independent of state law, to the use of waters appurtenant to reserved lands.

It was not until 1963 in *Arizona v. California* that the full scope and potential effects of the doctrine of reserved rights became apparent. After a massive evidentiary proceeding, a special

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8 295 U.S. 142 (1935). (This case is generally referred to as *Beaver Portland.*)  
12 349 U.S. 435 (1955). (This case is generally referred to as *Pelton Dam.*)  
13 Public lands are those federal lands subject to disposition under the public land laws. Reserved lands are the federal lands set aside for public purposes and are not subject to private entry or disposition. *Id.* at 448.  
14 *Id.*  
master, appointed by the Supreme Court, concluded, *inter alia*, that in addition to its power to reserve waters by implication for Indian reservations, the United States could similarly reserve waters for national parks, forests, monuments, recreation areas, fish and wildlife refuges, and Bureau of Land Management lands. However, the United States' claims were subjected to a strict burden of proof and were found to be *de minimus* in most instances. The Supreme Court expressly confirmed the extension of the implied reservation doctrine to non-Indian reservations and generally adopted the special master's report.

Western waters users have been concerned about the implied reservation doctrine because of its "uncorrelated mystery" and "ethereal" character, and because of the extensive public land acreage in the West. In particular, reserved lands such as national forests and parks are frequently the fountainheads of western water supplies. The unasserted reserved rights of such lands cloud the character of state-decreed water rights because the existence, points of diversion (if any), places of use, priorities, and amount of reserved rights remain largely unknown. State administration, planning, and adjudications are disrupted and frustrated by these uncertainties. Water resource development may

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17 *Id.* at 592-94.
20 Some 46% of the total land area in the West is public land. Approximately 88% of the runoff from public lands in the eleven coterminous western states is derived from national forests and about 59% of the total annual runoff in those states comes from national forests. *See Public Land Law Review Commission, One Third of the Nation's Land* 141 (1970); C. *Wheatley, supra* note 12, at 386.

Although the amount of water to be claimed for most reserved rights is expected to be minimal, substantial claims may be made for Indian and oil shale reservations. Holland, *Mixing Oil and Water: The Effect of Prevailing Water Law Doctrines on Oil Shale Developments, 52 Denver L.J.* 657 (1975); *Note, A Proposal for the Quantification of Reserved Indian Water Rights, 74 Colum. L. Rev.* 1299 (1974).
be similarly impeded.21 Owners of state water rights particularly object to the tenet of the doctrine that no compensation is paid for damage to water rights which become subordinate to reserved rights.22

II. JURISDICTIONAL DISPUTE

Since the mid-1950's, Congress has entertained legislation to define federal-state relations in water matters and, in particular, to address the reserved rights doctrine.23 None of these legislative proposals had succeeded, however, when the jurisdictional battle over reserved rights adjudication erupted in 1967 in Colorado.

Upon petition of the Colorado River Water Conservation District, the District Court in and for Eagle County, Colorado initiated an adjudication of water rights in the Eagle River and its tributaries.24 Notice of this proceeding was served upon the Federal Government pursuant to the requirements of the McCarran Amendment for joining the United States.25 The United States moved that it be dismissed from the action for lack of jurisdiction based upon the Government's sovereign immunity. The motion was denied. The United States then applied to the Colorado Supreme Court for a writ in the nature of prohibition on the contention that its reserved water rights were not within the purview of the McCarran Amendment's waiver of sovereign immunity and, therefore, could not be adjudicated in state court. The state supreme court denied the writ and declared:

21 For further discussion of the problems engendered by the doctrine see F. TRELEASE, supra note 8, at 117-30.
22 Id. at 147m.
24 The Colorado River Water Conservation District was established as a public agency in 1937 by the state legislature to promote "the conservation, use and development of the water resources of the Colorado River and its principal tributaries" and "to safeguard for Colorado, all water to which the state of Colorado is equitably entitled under the Colorado River Compact." Colo. Rev. Stat. Ann. § 37-46-101 (1973).
25 See note 2 supra.
For the reasons already expressed as to the promotion of orderly procedure, we hold that it was the purpose and intent of the McCar- ran Amendment that it be used to obtain jurisdiction over the United States with respect to its reserved water rights.27

The Supreme Court of the United States granted a petition for a writ of certiorari in order to consider the important jurisdictional question.28 In 1971, in United States v. District Court in and for the County of Eagle,29 the Government’s argument that the McCarran Amendment did not submit reserved right claims to the jurisdiction of Colorado’s courts was tersely repudiated by a unanimous Court:

We reject that conclusion for we deal with an all-inclusive statute concerning “the adjudication of rights to the use of water of a river system” which in § 666(a)(1) has no exceptions and which, as we read it, includes appropriative rights, riparian rights, and reserved rights.30

In a companion decision, United States v. District Court in and for Water Division No. 5,31 the Court, again unanimously,
held that the judicial proceedings established by the Colorado Water Right Determination and Administration Act of 1969 were sufficient to constitute a general adjudication within the meaning of the McCarran Amendment. Mr. Justice Douglas again affirmed the Colorado Supreme Court judgment and stated:

As we said in the *Eagle County* case, the words "general adjudication" were used in *Dugan v. Rank*, 372 U.S. 609, 618 to indicate that 43 U.S.C. § 666 does not cover consent by the United States to be sued in a private suit to determine its rights against a few claimants. The present suit, like the one in the *Eagle County* case, reaches all claims, perhaps month by month but inclusively in the totality; and, as we said in the other case, if there is a collision between prior adjudicated rights and reserved rights of the United States, the federal question can be preserved in the state decision and brought for review.

Following these decisions, the United States submitted its claims in Colorado Water Divisions 4, 5, and 6 pursuant to the 1969 Adjudication Act and in various district courts under the 1943 Adjudication Act. A master-referee was appointed to consider the federal claims in a single proceeding and on August 6, 1976, a Partial Master-Referee Report was submitted.

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14 See note 2 supra.
15 401 U.S. at 529-30.
16 Water Div. No. 4, Cases W-425 through 438; Water Div. No. 5, Cases W-467 through 469; Water Div. No. 6, Cases W-85 and 86; District Court in and for Summit County, Civil Action 2371; District Court in and for Eagle County, Civil Action 1529 and 1548; District Court in and for Grand County, Civil Action 1768.
17 Reserved water rights were found for national forests, parks and monuments, public springs and water holes and mineral hot springs. The priority dates were antedated to reflect the date the reservation and purpose of water use were established. For example, no minimum stream flow rights were recognized until the June 12, 1960 enactment of the Multiple Use Act, 16 U.S.C. § 528, which first declared fish and wildlife activities and outdoor recreation to be national forest purposes. Additionally, reserved rights on national forests were subordinated to state appropriations under the terms of the Organic Act of 1897, 16 U.S.C. §§ 473, 475-78, 479-82, 551 (1970), which grants the use of waters within national forests for domestic, mining, milling, and irrigation purposes under state law.

The master-referee granted the Government that amount of water reasonably necessary to effectuate the purposes of each reservation but held that the United States must follow certain quantification procedures. Under the doctrine of estoppel, two parties which
III. Akin v. United States

On November 14, 1972, less than eight months after Eagle County and Water Division No. 5 were decided, the Federal Government instituted an action in federal court for the adjudication of its claims to the use of water in the San Juan River Basin in southwestern Colorado. This action was brought by the United States in its own right and as trustee for the Ute Mountain Ute and Southern Ute Indian tribes. The complaint sought a determination and decree of federal water rights, both appropriative and reserved, as against 968 known defendants plus all unknown claimants of interest to water in the Mancos, La Plata, Animas, Florida, Los Pinos (Pine), Piedra, Navajo, and San Juan Rivers and water tributary thereto in the state of Colorado. The United States also prayed for the appointment of a water master to administer the respective rights of all users as determined in the adjudication. Reserved water rights were asserted in connection with the Ute Mountain Ute and Southern Ute Indian Reservations, Mesa Verde National Park, San Juan National Forest, Yucca House and Hovenweep National Monuments, public waterhole and spring reservations, hot spring reservations, and certain Bureau of Reclamation Projects in the San Juan River Basin.

The initiation of the federal action was viewed by many Colorado water interests as an attempt to circumvent Colorado's hard-fought victories in Eagle County and Water Division No. 5. The United States Supreme Court had declared Colorado's water courts to be experienced, competent forums for the adjudication of federal reserved as well as appropriative rights. Did it not make common sense to utilize the state water courts with their well-defined procedures instead of a removed, less equipped federal court to conduct a massive water rights adjudication? The complaint's prayer for a water master to administer whatever rights had acquired water rights and acted in reliance upon the actions of the Federal Government were held to be protected from the detrimental assertion of reserved rights. The Master-Referee's Partial Report is being reviewed by the water court.


38 These waters are within the San Juan Basin and are tributary to the Colorado River Basin. They constitute a part of Colorado's Water Division No. 7 which also includes a substantial portion of the Dolores River Basin. COLO. REV. STAT. ANN. § 37-92-201(1)(g) (1973). A map of Water Division No. 7 is produced in the appendix to this article.
were decreed was particularly bothersome. It gave rise to fears of confusion and conflicts between the water master and the existing state administrative scheme. 39

Despite the commencement of the federal suit, the United States was served on December 22, 1972 40 under the McCarran Amendment to join Water Division No. 7 proceedings and to assert all of its claims to water in the Division. The Government responded in the state action by filing its claims, both reserved and appropriative, in the Dolores River drainage, but omitting its claims in the San Juan River drainage which had been filed earlier in federal court. 41

In the federal action, several defendants and intervenors moved to dismiss the complaint for lack of jurisdiction and upon considerations of abstention and comity. The United States had

39 The administration and distribution of the waters within Colorado rest with the State Engineer. The State Engineer has appointed a division engineer in each of the seven water divisions. Numerous water commissioners on the staff of each division engineer perform the necessary field work. Water rights are administered and distributed in accordance with court decrees which set priorities by historic date of appropriation for certain amounts of water for each right. For a further discussion of Colorado's administrative structure and scheme see G. RADOSEVICH, K. NOBE, D. ALLARDICE, & C. KIRKWOOD, EVOLUTION AND ADMINISTRATION OF COLORADO WATER LAW: 1876-1976 (1976); NATIONAL WATER COMMISSION, A SUMMARY DIGEST OF STATE WATER LAWS 155-73 (1973); Carlson, Report to Governor John A. Love on Certain Colorado Water Law Problems, 50 DENVER L.J. 293 (1973).

40 The January 3, 1973 date cited by the Court in Akin referred to the date of service under the Federal Rules of Civil Procedure 4(d)(4) upon the U.S. Attorney in Denver and upon the Attorney General in Washington; service under the McCarran Amendment was achieved on December 22, 1972. 424 U.S. at 806.

41 On October 6, 1976, the reserved right claims in the Dolores River drainage were rebuffed by the Colorado District Court in and for Water Division No. 7. Relying upon California Oregon Power Co. v. Beaver Portland, 295 U.S. 142 (1935), Stockman v. Leddy, 55 Colo. 24, 129 P. 222 (1912), United States v. District Court in and for the County of Eagle, 169 Colo. 555, 458 P.2d 760 (1969), the McCarran Amendment, and the history of Colorado's entry into the Union, the court held that in Colorado there can be no water rights reserved, at least subsequent to the admission of Colorado to the Union in 1876. In re Application for Water Rights of the United States of America, Cases W-1120-73 through W-1139-73 and W-1143-73 through W-1148-73, Oct. 6, 1976 (Findings of Law of Case and Order).

42 The Colorado River Water Conservation District, the Board of Water Commissioners of the City and County of Denver, the Southwestern Water Conservation District, the Mancos Water Conservancy District and the State of Colorado appeared in the action to urge dismissal of the federal claims. The Southern Ute Indian Tribe, the Ute Mountain Ute Indian Tribe and the National Tribal Chairman's Association appeared as amici curiae through the Native American Rights Fund to urge retention of federal jurisdiction.
invoked the jurisdiction of the district court under the following statute:

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.43

This jurisdictional claim was contested on the ground that the McCarran Amendment was an Act of Congress which “otherwise provided” for specific state court jurisdiction. Once service was completed under the Amendment, it was argued that there could be no jurisdiction under 28 U.S.C. § 1345 to adjudicate federal water rights.

Even if federal court jurisdiction existed, the court was urged to decline to exercise it under the doctrine of abstention, which vests the court with the discretionary authority to dismiss or to stay an action even though the court is possessed of the requisite jurisdiction.44 Abstention was first announced as a doctrine in Railroad Commission of Texas v. Pullman Co.45 and has been approved by the Court on numerous occasions where the benefits of deferring to a state court outweighed the harm of dismissing or postponing a federal action.46 The defendants and intervenors in Akin argued that under the guidelines of Burford v. Sun Oil Co.47 and Alabama Public Service Commission v. Southern Railway Co.48 abstention was proper to avoid disruption of a state program and state policy.49 Specifically, although reserved water rights may be created independent of state law, they must be

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44 The limited circumstances in which a court may invoke the doctrine of abstention were delineated by the Supreme Court in Akin. See note 63 infra.
45 312 U.S. 496 (1941).
49 In Burford, abstention was deemed appropriate to avoid federal conflict with the Texas oil well drilling regulatory program. Railroad activity which was subject to a regulatory scheme under the jurisdiction of a state public service commission was the state interest deferred to in Alabama.
administered in a priority system with water rights established under state law. Also, as water rights in a priority system are interrelated by virtue of their common source of supply, reserved rights would necessarily be entwined with appropriative rights in an administrative scheme. Furthermore, abstention had been recognized as proper where the subject matter of the lawsuit was water—a unique resource of great concern to the state.

The doctrine of comity was also advanced as a basis upon which the federal court should decline jurisdiction. Comity refers to a judicial policy of avoiding federal-state conflicts over matters within the normal sphere of state activity. Federal jurisdiction was attacked as an unnecessary and substantial interference with Colorado’s water right adjudication and administrative system and inconsistent with the longstanding congressional policy of deferring to state law and state proceedings in water right matters.

The United States argued in rebuttal that the McCarran Amendment did not preclude the exercise of jurisdiction under 28 U.S.C. § 1345. The Amendment merely authorized joinder of the

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52 Mr. Justice Black, in Younger v. Harris, 401 U.S. 37 (1971), described comity as:

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. . . . What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

United States but did not bar the Federal Government from utilizing federal courts for water adjudications. The United States asserted it had initiated suit before its joinder in the state action and, as sovereign, should have its choice of forums. Abstention "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it," and should not be invoked to dismiss their action; the doctrine has generally been confined to instances where a federal constitutional question might be mooted or affected by an underlying issue of state law. The United States claimed Akin involved no unresolved question of state law but rather posed questions of federal law which a federal court normally should resolve. Similarly, comity was a restricted doctrine applicable only to situations involving state criminal or quasi-criminal suits and, if it was to be applied at all in Akin, would require the state court to yield to the federal court which had first obtained jurisdiction.

Additionally, as amici curiae Indian groups pointed out, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history," and, since water rights for Indian reservations were before the federal court, deference to a state forum would be inappropriate. In fact, the United States and the Indian groups argued that federal courts were the exclusive forum for the adjudication of reserved waters claimed for the Indian reservations and the state court had no jurisdiction over such claims. The McCarran Amendment did not expressly include Indian water rights and, in light of the longstanding policy against state jurisdiction over Indian matters, they urged that it not be interpreted to encompass Indian reserved rights. Support for this exclusion from the Amendment was claimed to be found in Public Law 280 which, inter alia, contains limitations on state civil jurisdiction over Indian lands and water rights.

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55 Id. at 189; Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).
The federal district court decided to abstain in recognition of the presence of applicable and workable state law and the state proceeding. In adopting a practical approach, the court cited a desire to avoid a duplicative and piecemeal adjudication and administration. The state forum was declared to be able to fully and adequately adjudicate all issues including those concerning the Indian reservations.

The United States prosecuted an appeal to the Tenth Circuit Court of Appeals which reversed the order of dismissal. The court concentrated upon the effect of the McCarran Amendment upon federal court jurisdiction. The district court had avoided that issue by its determination to abstain from exercising any jurisdiction it may have had. The circuit court held that the McCarran Amendment leaves federal jurisdiction under 28 U.S.C. § 1345 unimpaired and that the Amendment “does not express an intention that the United States shall utilize state courts for the purpose of litigating its claims to water.”

After finding federal jurisdiction, the Tenth Circuit turned to the abstention question. In abrupt fashion, the court concluded that the case before it did not fit within any of the extremely narrow areas in which abstention was proper. The Federal Gov-

shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.


58 Civil No. 4497 (D. Colo., July 30, 1973). The district court issued no written opinion.

59 United States v. Akin, 504 F.2d 115 (10th Cir. 1974).

60 Id. at 118.
ernment had won the race to the courthouse and the presence of the United States as plaintiff seeking to establish national rights militated strongly against the invocation of abstention. Therefore, the court of appeals directed the district court to proceed with the adjudication.\(^{41}\)

The Supreme Court granted certiorari to consider the important questions of whether the McCarran amendment terminated jurisdiction of federal courts to adjudicate federal water rights and whether, if that jurisdiction was not terminated, the District Court's dismissal in this case was nevertheless appropriate.\(^{2}\)

On March 24, 1976, the Court reversed the court of appeals and reinstated the district court's dismissal of the action. However, Mr. Justice Brennan, writing for six members of the Court, rejected the district court's reliance on the doctrine of abstention as the basis for declining federal jurisdiction.\(^{1}\) Deference to the state forum was held proper because "in situations involving the contemporaneous exercise of concurrent jurisdictions,"\(^{3}\) exceptional circumstances like those present in Akin can warrant dismissal of a federal complaint. Thus, the Court reaffirmed Colorado's position that federal reserved rights should be adjudicated in state court.

Although the petitioners did not raise the issue, the Court first considered whether the McCarran Amendment repealed the


\(^{2}\) 424 U.S. at 806. The order granting certiorari to the two petitions appears at 421 U.S. 946 (1975). The petitions were supported by a joint brief from the States of Arizona, California, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington and Wyoming.

\(^{3}\) Abstention was declared to be appropriate in only three general categories: First, where a federal constitutional issue might be mooted or presented in a different posture by a state court determination of a pertinent state law issue; second, where there are difficult questions of state law "bearing on policy problems of substantial public import whose importance transcends the result in the case at bar" and federal jurisdiction would be disruptive of state policy efforts; and third, where federal jurisdiction has been invoked to restrain state criminal, quasi-criminal nuisance, or tax collection proceedings. The Court held that Akin did not fall within any of these categories. 424 U.S. at 817.

\(^{4}\) Id.
jurisdiction of the district court under 28 U.S.C. § 1345. Upon review of the language and legislative history of the Amendment and citing the rule disfavoring an implied repeal, it was concluded that the McCarran Amendment did not bar federal district court jurisdiction under § 1345 and the district court had jurisdiction to hear the case.

The Court held, however, that the McCarran Amendment grants the right to join the United States in a state proceeding to determine reserved rights held on behalf of Indians. The Amendment's language, legislative history and fundamental purpose were held to command an all-inclusive construction. The Court failed to find any support for the argument that Indian reserved rights were substantially different from other reserved rights. Further, the Court rejected the notion that state court jurisdiction was inimical to Indian interests.

Even though abstention principles were inapposite, deferral to the state proceeding was justified on consideration of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." As an example of wise judicial administration, Mr. Justice Brennan cited the rule that courts generally yield to the first court which assumes jurisdiction over property.

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45 See text accompanying note 43 supra.
46 424 U.S. at 809.
47 It has been argued that Indians themselves reserved water rights which they already owned prior to any land reservations established by the United States. Under this reasoning, Indian water rights are paramount rights and their priority could pre-date the land reservation. See Veeder, Indian Prior and Paramount Rights for the Use of Water, 16 Rocky Mt. Mineral L. Inst. 631 (1971). However, the Court held in Akin that the reserved water rights of Indian reservations are owned by the United States just like those of national parks and forests. 424 U.S. at 810.
48 "Mere subjection of Indian rights to legal challenge in state court, however, would no more imperil those rights than would a suit brought by the Government in district court . . . ." Id. at 812.
50 A Motion for Leave to File Petition for Rehearing and Petition for Rehearing by amici curiae Indian groups urged reconsideration of the dismissal of the claims asserted on behalf of the Indian reservation. The motion was denied. 96 S. Ct. 2239 (1976).
52 This rule was not applied but its underlying rationale of avoiding piecemeal litiga-
In *Akin* there were several factors which permitted dismissal of the federal suit under this pragmatic principle. The policy evinced by the McCarran Amendment itself speaks against piece-meal or concurrent adjudication of water rights in a river system. Water rights are best determined in unified proceedings such as those available under Colorado's comprehensive state system. Additionally, the Court found the following factors to be significant: First, the absence of any substantial federal court proceedings prior to the joinder of the United States in the Water Division No. 7 adjudication; second, the extensive involvement of state decreed water rights; third, the 300 mile distance from the state court in Water Division No. 7 to the federal court in Denver; fourth, the Government's adjudication of reserved rights in Colorado's water courts pursuant to Eagle County and Water Division No. 5. Thus, in order to promote the wise use of judicial resources, the jurisdiction of the federal district court was required to yield to that of the state water court.

*Akin* provides an avenue by which Colorado can deal with the troublesome reserved rights doctrine in a familiar and convenient forum. Acting pursuant to the McCarran Amendment, Colorado interests can require the United States to present all of its water claims, including those for Indian reservations, in the state's water courts. Thus, the "uncorrelated mystery" of reserved rights can be dispelled.

The advantages of a water right adjudication in state rather than federal court could be substantial. The Idaho Supreme Court has held that under the McCarran Amendment, the United States is bound by Idaho state law at least to the extent of requir-
ing quantification of reserved rights in a general adjudication.\textsuperscript{74} Similarly, each state forum will be able to conduct an integration of reserved rights into its water rights system in the manner it views to be most consistent with state law. Of course, should any state adjudication be improperly antagonistic to the federal claims, the United States Supreme Court has stated that all questions concerning the adjudication of reserved rights, including the volume and scope of particular rights, may be reviewed after final judgment in the state court.\textsuperscript{75}

Despite the Supreme Court's emphatic holdings in the Colorado trilogy of \textit{Eagle County}, \textit{Water Division No. 5}, and \textit{Akin}, other Western States may face resistance in attempting to join the United States under the McCarran Amendment. The doctrine of prior appropriation is the bedrock of the Western States' water law systems. However, divergent economic and political policies and the particularities of the water situation in each state have led to the enactment of differing adjudicatory and administrative systems. Many of these systems are now primarily administrative in constrast to Colorado's judicial adjudicatory scheme.\textsuperscript{76} Since the McCarran Amendment's waiver of sovereign immunity has been limited to proceedings in the nature of a general adjudication,\textsuperscript{77} the United States may attempt to defeat joinder in an action which differs from the historic concept of a judicial proceeding in which there is a complete ascertainment of all rights in a water source.\textsuperscript{78} However, the Colorado trilogy demonstrates that the McCarran Amendment must be construed in a practical manner to effectuate the intent of Congress to allow the determination of all federal water claims in a state forum. The efforts of the United States to narrowly construe the concept of a general adjudication were totally rebuffed in \textit{Eagle County} and \textit{Water Division No. 5}. \textit{Akin} provides further ammunition for state inter-


\textsuperscript{75} United States v. District Court in and for the County of Eagle, 401 U.S. 520, 525-26 (1971); United States v. District Court in and for Water Div. No. 5, 401 U.S. 527, 529-30 (1971).

\textsuperscript{76} See \textit{National Water Commission, supra} note 39.


ests by adding considerations of "the conservation of judicial resources and comprehensive disposition of litigation"7 to any battle between state and federal forums. This latest pronouncement should be of significant assistance to other states who wish to join the United States in a state proceeding.

**Conclusion**

*Akin* is a milestone in the turbulent history of federal reserved rights adjudication. In Colorado, *Akin* concludes a trilogy of fiercely contested jurisdictional battles between the Federal Government and state water interests. All water rights, including federal reserved rights and Indian claims, will be determined in state court under state procedures and will be administered under the state system. Hopefully, this marks the final attempt by the United States to circumvent the common sense policy of the McCarran Amendment allowing all federal water rights claims to be litigated in state courts. Other Western States should find support in *Akin* for joining the United States under the McCarran Amendment to allow determination of reserved rights in their local forums.

In a broader context, *Akin* represents a laudatory step in the allocation of judicial power between the federal and state systems. Abstention, with its rather inflexible criteria, is no longer the only doctrine under which federal courts may decline to determine a controversy within its jurisdiction. Quite remarkably, the Court has declared that "the virtually unflagging obligation of federal courts to exercise the jurisdiction given them"8 may be waived where there are dominant practical considerations for utilizing a state forum. While the caution of the Court indicates that the standard for dismissing a complaint from federal court on considerations of judicial administration will not be easily met, *Akin* welcomes attention to practical concerns when a federal court is confronted with a federal-state jurisdictional conflict. The Court's pragmatic focus enhances the legitimate role of state courts in our dual judicial scheme.

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8 424 U.S. at 817.
DEVELOPMENTS IN REGULATION: ADJUSTMENT CLAUSES

BY JOHN A. CARVER, JR.*

INTRODUCTION

Utility regulation is an arcane process which depends for its effective functioning more upon a large measure of public confidence in process and personnel than upon its intrinsic merit. Unfortunately, as the ingredient of confidence erodes among consumers, investors, legislators, the academic community, the media, and other segments of both the regulatory and regulated community, mechanisms which trigger recurrent and seemingly automatic rate increases come under special attack. Adjustment clauses are in this category.

Adjustment clauses have been known since 1917 and are currently in use in some form in most of the states. They are a regulatory device to adjust rates for cost changes without all of the procedures used for traditional rate cases. In economic terms, they are a form of “indexation” designed to counter the effects of inflation.

The full range of adjustments which qualify for analysis and discussion is large. Generally, this paper is concerned with rate adjustments authorized to become effective pursuant to the terms of an antecedent tariff. Some of these rate adjustments are “automatic”; others are subject to or require hearings, notice, audit, or other regulatory action which is definitionally short of

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* Professor of Law and Director, Natural Resources Program, University of Denver, College of Law.


2 Since most of the attention of legislatures and utility regulatory agencies has been directed to the workings of adjustment clauses for the electric and gas utilities, particularly the former, most of the data on the use of such clauses are on such utilities. State-by-state analyses have been compiled in this area. NATIONAL ECONOMIC RESEARCH ASSOCIATES, INC., THE FUEL ADJUSTMENT CLAUSE: A SURVEY OF CRITICISMS, JUSTIFICATIONS AND ITS APPLICATION IN THE VARIOUS JURISDICTIONS (1975), reprinted as STAFF OF SUBCOMM. ON OVERSIGHT & INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE & FOREIGN COMMERCE, 94th CONG., 1ST SESS., REPORT ON ELECTRIC UTILITY AUTOMATIC FUEL ADJUSTMENT CLAUSES, App. 1 (Comm. Print 1975); CONGRESSIONAL RESEARCH SERVICE, FUEL ADJUSTMENT CLAUSE ACTIONS IN THE ELECTRIC AND GAS UTILITY INDUSTRIES, 1973-74: A STATE-BY-STATE STATISTICAL ANALYSIS (1975), reprinted in 121 CONG. REC. S4963-67 (daily ed., Mar. 24, 1975).
that required in a full rate proceeding. The adjustments are dependent upon variables such as fuel costs and taxes. Some adjustments are called "tracking" or "pass-through" adjustments because the variable component is itself controlled by regulation, as where changes are tied to rates fixed by the same or another regulatory body. Rate adjustments may be tied to various general price indices,\(^3\) to return on equity,\(^4\) to taxes,\(^5\) and to the capital costs associated only with particular facilities such as environmental facilities.\(^6\)

Terminology should be viewed with suspicion, particularly the use of the term "automatic." Courts and commissions in the past have sometimes called all adjustment clauses "escalator clauses." The term "escalator clause" is more apt for incremental price increases\(^7\) at regular or fixed intervals. A true adjustment clause is designed to work both upward and downward as the base factor to which it is tied moves up or down.

In the main, the discussion in this paper is confined to adjustments in rates for the so-called fixed utilities, i.e., electric, gas, water, and combinations thereof, and it covers both federal and state action, wholesale and retail applications, and related rate design implications. Outside the scope of this paper are clauses which enable the downward adjustment of rates in order to meet competition,\(^8\) and fuel clauses negotiated by municipalities in states not having a regulatory commission.\(^9\)

A number of measures at the federal level have been pursued,

\(^3\) The New Jersey Board of Public Utility Commissioners allowed a telephone company an annual adjustment to the cost of salaries and wages determined by the national guideline increase of 6.2% less productivity increase of 4.0% or 2.2%. *In re Adjustment Clause in Tel. Rate Schedules*, 3 P.U.R.4th 298 (N.J. Bd. of Pub. Util. Comm’rs 1973).


\(^8\) Trigg, *supra* note 1, at 978 n.79. These were in limited use when gas utilities sought to protect their business from unregulated competition.

\(^9\) Id. at 987.
and a legislative definition for "automatic adjustment clauses" has been proposed.\textsuperscript{10} The attention given to electric utility fuel adjustment clauses by the House of Representatives Committee on Interstate and Foreign Commerce, Subcommittee on Oversight and Investigations,\textsuperscript{11} highlights the fact that adjustment clauses are being characterized by ratepayers, and by some legislators and regulatory commissions, as faulty policy and contrary to the public interest, and as a means of permitting "over-charges" by utilities. Speaking specifically of fuel adjustment clauses, the Moss Subcommittee's Report is flatly condemnatory:

Automatic fuel adjustment clauses, regardless of design, are inherently flawed and anti-consumer because of their tendency to seriously undermine the incentive of utilities to minimize fuel costs.\textsuperscript{12}

The subject has been considered by other committees of the Congress, including the Joint Economic Committee,\textsuperscript{13} and the Senate Committee on Government Operations under the continuing leadership of Senator Metcalf.

In the states, the activity concerning such clauses is principally reflected in the rate cases decided by the state commissions,\textsuperscript{14} but there has also been legislative reaction responsive to criticisms of the workings of the adjustment clauses.\textsuperscript{15} The Na-

\textsuperscript{10} H.R. 12461, § 203(b)(3)(A), 94th Cong., 2d Sess. (1976), defines an adjustment clause as:

[T]hat part, if any, of a rate schedule for the sale of electric energy which provides for automatic adjustment of a rate to reflect a change in whole or in part of the fuel component (including applicable taxes, tariffs, or similar charges) per-kilowatt-hour of the cost of providing electric services.


\textsuperscript{12} \textit{Moss Comm. Report} 3, Finding No. 4.

\textsuperscript{13} \textit{Gasoline Distribution, Hearings Before the Subcomm. on Consumer Economics of the Joint Economic Comm., 93d Cong., 2d Sess. (1974)}.

\textsuperscript{14} See note 2 supra.

\textsuperscript{15} This action has ranged from outright prohibition to procedural controls. \textit{See Moss Comm. Report} 45 (NERA study), reporting that West Virginia has required hearings on each adjustment, and \textit{Moss Comm. Report} 1 n.3, noting that North Carolina abolished fuel clauses as of September 1, 1975.
tional Association of Regulatory Utility Commissioners (NARUC) has supported adjustment clauses tied to fuel costs, but opposed any mandatory federal legislation which would limit individual state determinations in one direction or the other.\textsuperscript{16} A study by a NARUC committee recommended that NARUC prepare a model fuel clause.\textsuperscript{17} Criticism of fuel adjustment clauses has been intense in consumer circles\textsuperscript{18} and consumer organizations presented much of the testimony considered by the Moss Committee.\textsuperscript{19} There are inconsistencies in the remedies proposed by critics of the regulation process. For example, the proposed Energy Independence Act would have required state utility regulatory agencies to permit fuel adjustment clauses;\textsuperscript{20} other measures considered by the 94th Congress would limit or prohibit fuel adjustment clauses.\textsuperscript{21}

Another complication presented to those responsible for reconciling the competing pressures is the activity of the Federal Power Commission, which is sometimes thought to "lead" the state commissions. The Federal Power Commission has taken a conservative position, adopting a rule on fuel cost adjustments for electric utilities which calls for a single base cost for fuel,\textsuperscript{22} and also permits only the inclusion of the charge for energy and not other charges associated with purchased fuel costs. It requires the filing of fuel purchase contracts as tariffs subject to suspension, unless the particular fuel is under general price regulation. However, taxes associated with fuel cost increases are permitted to be included, and the Commission mandates that adjustments for

\textsuperscript{16} Moss Comm. Hearings 3-32 (Testimony of Ralph H. Wickberg, President, NARUC).
\textsuperscript{17} SUBCOMM. OF STAFF EXPERTS ON ECONOMICS, NARUC, ECONOMIC PAPER No. 1R, reprinted in Moss Comm. Report, App. C.
\textsuperscript{18} See, e.g., The Fuel Adjustment Caper, 39 CONSUMER REPORTS 837 (Nov. 1974).
\textsuperscript{19} Among the identified organizations were Save Our Cumberland Mountains, Environmental Action Foundation, Toward Utility Rate Normalization (TURN), and East Tennessee Research Corp. Moss Comm. Hearings, Index at iii-v.
\textsuperscript{20} H.R. 2633 and S. 534, 94th Cong., 1st Sess., Title VII (1975).
\textsuperscript{21} See particularly H.R. 12461, 94th Cong., 2d Sess. (1976), known as the "Electric Utility Rate Reform and Regulatory Improvement Act." Section 203 thereof would limit the kinds of adjustment clauses which could be approved by state agencies; section 305 similarly would control the Federal Power Commission.
\textsuperscript{22} FPC Docket No. RM76-6 (Sept. 3, 1975), adopted with changes, 18 C.F.R. § 35.13(b)(4)(iii) (1976).
fuel cost increases be spread among users on a consumption basis, that is per kilowatt-hour of energy.

The Commission in its notice of proposed rulemaking expressed its philosophy:

We recognize the need for a fuel adjustment clause. Properly administered fuel clauses can accomplish legitimate public interest objectives. Fuel clauses serve as a cost of service type mechanism to pass through changes in actual, reasonably and prudently incurred costs of fuel (decreases as well as increases), ensure appropriate and timely cash flow to electric utilities by eliminating "regulatory lag", and reduce regulatory expense, administrative processing costs and the number of formal rate proceedings. These features of the fuel clause inure to the benefit not only of the public utility but also the customer and taxpaying public. However, improperly administered or inadequately regulated by governmental authority, fuel clauses can be inequitable and unfair.23

The legal and economic literature is generally sympathetic to adjustment clauses. John W. Kendrick, has concluded that communications utilities can properly utilize adjustment clauses:

The public utilities generally have productivity performance records of which they can be proud. Hyperinflation threatens productivity advance through profit erosion. Automatic cost adjustments seem to be the answer, but only if combined with efficiency incentives which will motivate utility managements to continue to achieve at least as good a record of productivity advances in the future as in the past.24

I. RECENT DEVELOPMENTS

Foy25 and Trigg26 have documented regulatory commission consideration of adjustment clauses from about 1917. Disapproval of requested clauses has usually been for the asserted reason that the adjustment clause technique is incompatible with the spirit and purpose of regulatory law and confusing to the consumer.27

The most significant recent development is the decision by the New Mexico Public Service Commission to allow an adjust-

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25 Supra note 7.
26 Supra note 1.
ment in rates based upon the utility's return on equity falling above or below a range of 13.5% to 14.5% in the preceding annual period.28

In Texas, where utilities are not yet generally under statewide commission regulation, the city of Houston has agreed that Houston Lighting & Power should have a "cost-of-service adjustment clause" that will lead to increases in rates whenever the costs of labor (excluding executive salaries), depreciation and the interest requirement of bonds go up faster than revenues.29

Illinois Bell submitted an adjustment clause which, although it was rejected by the Illinois Commerce Commission,30 reflects a recognition of the interrelationship between cost increases and productivity increases. As proposed, the clause would assign weights to changes in both costs and productivity to keep the company reasonably whole at the rate of return level authorized by the commission.

A different twist in the recent developments concerning adjustment clauses is presented in the rejection by an FPC administrative law judge of a proposal by United Gas Pipe Line which would allow its purchased gas tracking adjustment tariff to reflect declining sales volumes.31 There is now pending before the Federal Power Commission a proposed rule to deal with purchased gas cost adjustments. It would limit the number of purchased gas adjustments to two a year, prescribe the semi-annual adjustment dates, and would cover both pipeline and producer supplier costs.32

Schiffel concludes that the use of automatic fuel rate adjustments "is a useful regulatory tool that has probably not been abused," but, reflecting the more conservative of the views of generally approving commentators, he thinks the "extension of such clauses to costs over which the company has some control and which are relatively stable would appear to be inappropriate as well as unnecessary."33

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29 As reported in Electrical Week, Apr. 19, 1976, at 1.
II. THE LEGAL BASES OF ADJUSTMENT CLAUSES

One theory supporting adjustment clauses is that the rate adjustment when made has already been subjected to appropriate procedural and substantive requisites. An adjustment clause enables the utility to recover its costs more rapidly than under orthodox rate proceedings but not to increase its rates above allowable costs. Adjustment clauses also save the regulatory agency from becoming bogged down with rate cases. The legal standards of regulation remain unchanged. The regulatory agency definitionally is without lawful power to turn its regulatory responsibility over to the company, so when a rate is increased "automatically," the theory is that the company is acting pursuant to a tariff which has been fully considered.

A utility is constitutionally entitled to have the opportunity to recover the costs of rendering service to the public, and such costs include a fair rate of return on the rate base. The "prudence" of the costs incurred is subject to regulatory supervision. Consequently, an adjustment clause usually takes the form of a fixed rule, determined to be just and reasonable in the underlying rate proceeding, accompanied, at least by implication, with the finding that it does not become less so by reason of its provision for subsequent changes in rates, upward or downward, based upon the occurrence of future events. In a word, adjustment clauses are not per se illegal. Some state cases have involved the issue of compliance with statutory requirements, but few of the illegality contentions have been sustained.

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34 North Carolina ex rel. Utilities Comm'n v. Edmisten, 27 N.C. App. 171, 217 S.E.2d 201 (1975); City of Norfolk v. Virginia Elec. & Power Co., 197 Va. 505, 90 S.E.2d 140 (1955). The Virginia court's language has been frequently cited:

The proposed escalator clause is nothing more or less than a fixed rule under which future rates to be charged the public are determined. It is simply an addition of a mathematical formula to the filed schedules of the Company under which the rates and charges fluctuate as the wholesale cost of gas to the Company fluctuates. Hence, the resulting rates under the escalator clause are as firmly fixed as if they were stated in terms of money.

197 Va. at 516, 90 S.E.2d at 148.


In some states, all adjustment clauses are prohibited. Thus far no state seems to have mandated them. Between these extremes, the state laws on the subject vary in their requirements on shortened proceedings before an adjustment clause-triggered increase in rates may become effective. Notice, and the filing of specified information, may be mandated.

Adjustment clauses which take effect without some hearing procedure, however shortened, are not for that reason freed from continuing regulatory supervision. Complaint procedures are almost universally available to challenge the rates of a utility which do not conform to the standard of being just and reasonable. In addition, the audit and inspection function of the regulatory agency may be directed particularly to the workings of adjustment clauses by explicit provisions in the order approving the rule.

The more complex the factors prescribed to trigger rate adjustments, the more complex becomes the task of regulatory surveillance. But even the very simple fuel adjustment or "pass-through" situations can present legal questions. One recent example of this involved an adjustment in rates based upon an increase in the price of Canadian gas carried by Pacific Gas Transmission Co. (PGT) to its parent, Pacific Gas & Electric (PG&E). The Federal Power Commission had approved a tariff under which fluctuations of the price of Canadian gas, as fixed by Canadian regulatory authority, would be reflected in the monthly billing arrangement between the transmission company and the customer utility, without prior Commission approval.

In a proceeding which arose out of a filing of a new contract between PGT and a Canadian affiliate, the Federal Power Commission instituted proceedings to determine whether PGT's tariff


37 See note 2 supra.

38 Moss Comm. Hearings 92; Schiffel, supra note 33, at 27.

39 In Pacific Gas Transmission Co. v. FPC, 536 F.2d 393 (D.C. Cir. 1976), the United States Court of Appeals for the District of Columbia upheld the use of section 5(a) complaint authority to require that before increasing its wholesale rates as authorized by an approved tariff, the company must file an application and seek approval under section 4, the rate filing section.

40 Id.
should be modified to redefine the elements includible on purchased gas costs in PGT's rates, and thereafter required that prior filings be made with the Federal Power Commission before any increases in the cost of Canadian gas could be passed on to the U.S. purchaser.

The Commission's position was upheld by the Court of Appeals for the District of Columbia Circuit in an opinion written by retired Supreme Court Justice Tom C. Clark. Justice Clark said that any other procedure would make the Federal Power Commission a rubber stamp for Canadian authority, since such action would subject gas consumers "to unjust and unreasonable rates fixed by the Canadian authority ipse dixit."

Since neither the Commission nor the Court of Appeals can control Canadian governmental authority which sets gas rates at the border, only the existence of cheaper domestic alternatives to supply the particular market should justify denying entry of the gas. Judge Bazelon, not always sympathetic to natural gas suppliers complaining about FPC regulation, suggested that the FPC might have conditioned its original grant of import authority, rather than amending the particular tariff in a procedure he called "peculiar." His comment on the majority's reasoning is cogent:

The fatal flaw in this reasoning is that it falsely assumes the tariff somehow disabled the Commission from responding to Canadian imposed price increases. In truth, the only measure the tariff precluded the FPC from taking was that the FPC could not temporarily or permanently prohibit PGT from recovering costs incurred because of the increases. The Commission has failed to explain why imposing a prohibition on cost recovery ever would be an appropriate or even plausible response to Canadian price increases. After all, PGT, not the Canadian government or Canadian producers, would bear the brunt of such a prohibition; the FPC concedes that had PGT been required to absorb even the initial 32 cent price increase for a short period of time it would have been driven out of business, and 2,000,000 consumers would have been deprived of 40% of their gas supply. Yet PGT plainly has no responsibility for or control over

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1 Id.
2 Id. at 396.
3 Id. at 397 (Bazelon, C.J., dissenting). Judge Bazelon began his dissent in this case by saying, "There is a certain attractiveness, I must admit, to the FPC's decision in this case..."
price increases mandated by the national Canadian government. PGT cannot even mitigate the impact of those increases by expanding production of non-Canadian gas since PGT's sole operations are in Canada. Thus, the Commission could not possibly question the reasonableness of PGT recovering costs imposed upon it by the Canadian government. This would be true even if those costs were unreasonable—a question the Commission expressly declined to consider. The Commission's actions in promptly approving all the increases PGT has requested since its tariff was modified strongly support this conclusion."

In another case involving the passthrough of Canadian gas costs, the Montana Supreme Court sustained a 1972 Montana Public Service Commission approval of a rate order containing a purchased gas adjustment clause which authorized the company to increase or decrease its charges, subject to commission review on a periodic basis. The commission held a hearing limited to the issue of the cost of Canadian gas in 1973 and allowed the passthrough. In 1974, however, the Montana Consumer Counsel sought to have the hearing expanded to cover all items of the cost of service. The Montana Supreme Court, reversing a district court ruling requiring the expanded hearing, said:

Consumer Counsel contends that the Commission is without power and jurisdiction to issue the 1974 rate order on the basis of a so-called "mini hearing"... The substance of his argument... is that the Commission is without power to approve a utility rate increase without conducting a full scale hearing and examination of all factors that affect a fair rate of return for the Company.

Here the Company did not apply for an increased rate of return... Instead, the Company's application simply sought to maintain this rate of return... by "passing through" to its customers the tremendous increases in the costs of purchased gas and royalty expense. Under such circumstances, the rate of return and annual net earnings were not germane to the Company's application, and a full scale hearing into factors affecting the rate of return and general rate structure of the Company was beyond the scope of the inquiry before the Commission.

In our view the underlying justification for the use of "automatic adjustment clauses" and procedures lies in the realities of the market place. As the cost of purchased gas and royalty expense of the utility rise or fall, a corresponding increase or decrease in the

"Id. at 397-98 (Bazelon, C.J., dissenting)."
prices charged its customers must occur. Otherwise the utility will either be driven out of business or it will reap windfall profits. Today, in a period of rapid increases in costs of these items to the utility, the former consideration is paramount; at another time, the situation may be reversed and the latter may be the principal concern. Automatic adjustment clauses and procedures are simply a means whereby rapid fluctuations in these costs to the utility can be reflected in equally rapid and corresponding changes in prices charged the utility's customers.  

Matters other than the recovery of costs are properly considered by commissions and courts, even in adjustment clause situations. For example, the Federal Power Commission, while considering a proposed rate increase for resale customers, determined that it lacked authority to take into account the fact that state regulation of the resale customer prevented it from recovering its added wholesale costs. This exposed the customer to a "price squeeze" in having to pay more at wholesale than he could charge his own retail customers. This holding was reversed by the Court of Appeals for the District of Columbia and the United States Supreme Court affirmed. While adjustment clauses were not involved in that case, the situation could arise under their application.  

After a regulatory commission has agreed that it is in the public interest to adjust rates to track certain classes of costs more rapidly than would be possible by full rate case procedures, is it logical for the commission to limit the recovery of costs to a specified percentage increment? The Michigan Public Service Commission limited a fuel adjustment clause to no more than 90% of the experienced cost increase; an equivalent provision is contained in the proposed "Electric Utility Rate Reform and Regulatory Improvement Act." Such provisions postulate a duty on the part of the investors to bear a percentage of the burden of attrition.  

It has been suggested that adjustment clauses are a part of a natural progression in the move from rate hearings, to ratemak-

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47 See note 21 supra.
ing through rulemaking procedures, to regulation by formula. When the rate of return was deemed a stable item in the ratemaking formula, inflationary and deflationary pressures were sought to be accommodated in the rate base valuation process. "Trending" of rate base valuations was never automatic, and generally was not judicially validated, but the objectives sought to be accomplished were the same as those sought in adjustment clauses.

The ratemaking process long tended to be less rather than more formulary. *FPC v. Hope Natural Gas Company* represented very nearly the outer limits of departure from formulas. The ability of the regulatory commissions to frame their decisions to avoid judicial interference with their policymaking prerogatives has been severely challenged by shortage allocation and environmental issues. Hearings, particularly full-scale hearings, have become tools capable of being manipulated by the competing forces with commissions being caught in the middle. The poignant discussion by the New Mexico Commission of the "tyranny of the rate case" is illustrative:

The essential situation . . . is that traditional, adversary, formal service rate proceedings, which are occurring with ever increasing frequency and urgency, are simply proving both inadequate to the task and too time and energy consuming. In short, this commission and its staff are subject to the tyranny of continuous rate cases, and our other regulatory responsibilities are neglected in the consequence. . . . As mentioned earlier, service costs have become a moving target which scarcely holds still long enough to be quantified, with the result that even the most painstaking determination of an energy utility's test-year costs, annualized and adjusted to current levels, and service rates fixed at levels to cover such costs, often prove woefully inadequate by the time the rates become effective. All too often during the past several years, newly authorized service rates have failed to cover the energy utility's rapidly increasing total costs of service, with the result that, while its operation, maintenance, tax, depreciation and amortization costs may be covered, its capital costs are not, even though the service rates were carefully designed to do so. When the earnings stability and reliabil-

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50 Schiffel, *supra* note 33.
52 320 U.S. 591 (1944).
ity of an energy utility are reduced, the market responds by increasing its costs of capital and the customer inevitably suffers.53

Legislative consideration of such problems, undoubtedly influenced by the volume and intensity of consumer complaints about rate increases, seems to be devoted much more to the hearing process and its length than to the substantive issue of attrition and how to meet it. The right of a utility to file for an increase deemed necessary for its continuance of adequate service to the public is an essential substantive due process aspect of utility regulatory methodology.54 Thus, legislative proposals to forbid "pancaked" rate filings, the filing of a second, third, or fourth rate case while earlier ones are still not finally determined,55 is likely to present important issues for courts to resolve.56

III. ECONOMIC CONSIDERATIONS

The conventional wisdom that regulation results in lower rates has been academically57 and politically58 challenged. So has the conventional wisdom that low rates are preferable to high rates in all circumstances. The comments of William W. Lindsay, now Associate Chief of Economics at the Federal Power Commission, are apt on the latter point:

What has perhaps not been so widely recognized is the fact that regulatory lag also interferes with the ability of rates to perform

54 Particularly is this true where, as is usually the situation, the regulatory commission can suspend a rate filing for no more than a specified number of months. Although rates thereafter collected are subject to refund, the company has the cash flow necessary to keep it in operation, if its contentions turn out to be wholly or partially correct.
56 Such provisions could revive the Ben Avon Doctrine, Ohio Valley Water Co. v. Ben Avon Bureau, 253 U.S. 287 (1920), that a claim of confiscation requires a fair opportunity for submitting that issue to a judicial tribunal for independent determination of both law and facts.
58 Council of Economic Advisers, 1975 ECONOMIC REPORT TO THE PRESIDENT. Chapter 5 addresses "Government Regulation," and contains these comments:
This discussion of governmental regulation suggests that existing laws and institutions are imposing significant costs on the economy. . . . Precise estimates of the total costs of regulation are not available, but existing evidence suggests that this may range up to 1 percent of gross national product . . . .

Id. at 159.
another of their principal functions—that of demand control. Recent proposals to revise traditional electric rate structures, whether or not one happens to believe they are misguided, have served to emphasize the proposition that the amount of electricity taken is affected by the price charged. Since the amount of resources allocated to the production and distribution of electricity depends on the demand for the service and the latter depends on the level and structure of rates, resources will be misallocated to the extent that rates fail to reflect costs. In this sense, among others, prices which do not reflect costs are not in the public interest.9

Much of the legal framework within which the economy of the United States operates is predicated on the assumption of reasonable price stability in the general price level, and reminds us that "indexation" might well be a cure as well as a palliative for inflation, citing Friedman's argument that by reducing the windfall gains to government and other groups (in this case, presumably, ratepayers) and by more promptly transmitting disinflationary tendencies throughout the economy, these clauses may serve a basic economic objective beyond that of either the ratepayers or the investors.41


40 Kendrick, supra note 24, at 299. This may be an appropriate place to note that the assumption of price stability was central to the thinking of Justices Brandeis and Holmes in their concurrence in Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 276 (1923) and thus contributed mightily to the adoption of the original cost methodology for valuation of rate base. Justice Brandeis said, dissenting from the opinion but concurring in the judgment:

Engineers testifying in recent rate cases have assumed that there will be a new plateau of prices. . . . The course of prices for the last 112 years indicates, on the contrary, that there may be a practically continuous decline for nearly a generation; that the present price level may fall to that of 1914 within a decade; and that, later, it may fall much lower.

Id. at 303 n.16.

Query: Would we now be utilizing fair value rather than original cost methodology to keep pace with inflationary pressures if Justice Brandeis had more clearly foreseen the future? Future query: Are we approaching the more prescient suggestion of Professor A. J. G. Priest who said:

The Brandeis technique for determining a public utility's rate base can remain simple even under conditions of inflation if an appropriate factor is developed for expressing high-value dollars in terms of dollars which have lost much of their purchasing power. Tailor-made price indices accurately and honestly predicated on a utility's experience have provided such a solution in a number of instances. The use of general price indices in such circumstances has been condemned, but specific indices which are generally applicable to the property examined plainly are less subject to criticism.


41 Kendrick, supra note 24, at 300.
Any study of adjustment clauses must begin with the question of their role in combatting or contributing to inflation. It was the supposed contribution to inflation which most preoccupied the Moss Subcommittee. One of its “findings” was that “automatic fuel adjustment clauses have accounted for nearly two-thirds of the $8 billion increase in the price of electricity in 1974.” This is a misleading statement. The differential, if any, between the actually experienced increased costs of furnishing electric service, and the rates charged to recover these costs, is a valid inquiry, but using an adjustment clause does not itself establish the existence of a differential.

The New Mexico Public Service Commission’s experiment has intriguing economic, legal, and administrative consequences. The commission’s adjustment clause is tied to return on the equity of the common stockholders. The commission did not agree that this amounted to a guaranty of investor profit or that it contributed to inflationary pressures. With an elliptical, but discernible reference to the Stiglerian hypothesis that regulation does not really affect prices very much, the commission said:

The cost or rate of return a public utility must pay or be able to pay in order to obtain common equity funds from the private capital markets is set for the company by the market, not by this commission or the company.

The commission was orthodox in its conclusion that the cost of common equity capital is simply another cost of furnishing service not generically different from any of its other costs.

Any adjustment clause case must begin by determining the base rates against which the adjustments should apply. The New Mexico Commission tempered the effect of its adjustment clause by differentially scaling downward the base levels below the rates being collected under bond, so that the company was allowed to raise the rates for its large use customers proportionately less

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45 Id.
46 The schedule is as follows:
than its smaller use and residential customers, presumably because the former could be expected to bear the heaviest burden of the future effects of the adjustment clause, applied by a specified per kilowatt hour amount. The right to stay any requested adjustment, pending a hearing and resolution of contested issues was reserved; and reports of the company were required to be available for public inspection.87

One provision of the New Mexico Commission's order is conceptually inconsistent. An existing monthly fuel cost adjustment procedure was continued in effect.88 Perhaps this was to maintain separate visibility in a customer's bill for this particular item of cost. In theory, the cost of service indexing keyed to return on common equity obviates all other adjustment clauses.

The relationship between adjustment clauses and another regulatory mechanism put forward to combat the effects of inflation, inclusion of construction work in progress in rate base, was also discussed by the New Mexico Commission. Construction work in progress is financed with either debt or equity, so the formula should not provide for the inclusion of an offsetting allowance for funds during construction as a revenue item. The company was allowed to capitalize the allowance for funds used during construction and add it to the plant account only with respect to non-revenue-producing investment such as environ-

<table>
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<th>Service Category</th>
<th>Requested Increase</th>
<th>Allowed Increase</th>
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<tr>
<td>Residential</td>
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</tr>
<tr>
<td>Overhead</td>
<td>13.7%</td>
<td>11.1%</td>
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<tr>
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<td>17.3</td>
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<td>15.3</td>
<td>15.3</td>
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<tr>
<td>Water and Sewage</td>
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<td>6.7</td>
</tr>
<tr>
<td><strong>Average Increase</strong></td>
<td>11.5%</td>
<td>9.7%</td>
</tr>
</tbody>
</table>

Id. at 121.
87 Id. at 123.
88 Id. at 122.
mental equipment, and transmission, distribution, and miscellaneous additions. On the other hand, the allowance for funds during construction which was related to investment in generating capability was required to be included as a revenue item, and capitalized, thus deferring recovery in rates of the cost of capital associated with such investment until after the plant goes on line. The FPC has changed its rules with a similar distinction being made.

The equivalent of the legal question of confiscation is presented in economic policy terms in the matter of dilution of stock value, and in the matter of comparing the costs and benefits of maintaining coverage ratios (earnings as a multiple of debt service costs) and, ultimately, in the matter of measuring the costs of utility bankruptcy. The latter question was emphasized in testimony before the Moss Subcommittee, when a utility witness said that in view of the increase in the delivered price of coal by 131% over a one year period, the company would have been unable to pay its bills when due, and would most likely have been bankrupted, if it had not had an adjustment clause.

The New Mexico Commission discussed the costs of attempting to finance expansion for a company whose common stock value is below book value:

[If a utility continually attempts to sell common stock at prices below inevitably declining book values to raise that portion of its new capital requirements dictated by the need to keep its debt capital ratio in reasonable balance, sophisticated investors and ultimately the entire market may soon be unwilling to buy at any price.]

The commission also reacted favorably to testimony which quantified the cost of losing a bond rating level:

Quite logically, these [rating] institutions perceive increases in debt ratios and declines in coverage ratios as indicative of an increase in risk to the investor and downrate the securities of the public utility accordingly, with the result that the cost of new debt and preferred stock capital to it is increased by the capital market

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46 Id. at 124.
48 Moss Comm. Hearings 716.
proportionately . . . [T]he current difference between the cost of AA and A rated utility bonds and preferred stocks is 0.89 per cent. Estimating that approximately 85 per cent of the capital necessary to finance PNM's five-year construction budget—i.e., $625,760,000, must be generated externally or from the private capital markets, that 65 per cent of this amount must be raised by the sale of bonds and preferred stock, and that the new plant in which it will be invested will have a 30-year life, . . . retention of PNM's AA rating would result in 30-year savings in the amount of approximately $110 million.13

IV. ADMINISTRATIVE PROBLEMS

To obtain administrative approval, the advantages of adjustment clauses must be found to outweigh the disadvantages. The regulatory agency must be persuaded that adjustment clauses are adequately resistant to abuses which frustrate regulatory objectives. This presents various administrative problems.

The process of balancing competing interests in having or not having a full rate case involved accepting trade offs. The expectation approaching certainty that costs will increase, not decrease, during the period following a rate determination, has dominated ratemaking for a number of years. Rate models which incorporate anticipated future changes, such as in financing, revenues, rate base, taxes, depreciation, and operating expenses, are routine. Rates are fixed upon a cost-of-service which may be based upon a "forward test year." 14 The policy argument as to inclusion of construction work in progress in the rate base is summarized in a recent FPC order as follows:

The allowance of CWIP in the rate base involves a judgment that it is equitable for present ratepayers to provide funds that would otherwise be provided by future ratepayers. At the present time, there is only one area where the Commission has agreed for all companies that this outcome would be equitable. This is in the area of facilities which are required because of the current generation's commitment to the control of pollution, or its consumption of existing stocks of natural resources. Thus, we will allow the inclusion of CWIP in rate base where the construction is of facilities to be used for pollution control, or for the conversion to the burning of other fossil fuels of plants which now burn oil or gas. In these cases, it is the profiltacy of the present generation which requires the new facilities, and we

13 Id. at 130-31 (footnote omitted).
consider that the equitable argument favoring this allocation of costs is sufficient to tip the balance in favor of the allowance of CWIP on these facilities.\textsuperscript{73}

In theory, at least, the nature of ratemaking precludes a company's realized rate of return from matching that used for ratemaking purposes except as a transient coincidence. The pressures of inflation have resulted in commissions candidly allowing rates of return higher than otherwise might have been allowed in order that the time period between rate cases can be extended.

It may be less than fair, therefore, to make too much of the comparison of the workings of adjustment clauses against the alternative of full rate cases. A well-designed adjustment clause can permit a ratemaking agency to allow a lesser revenue level than would be the case if it did not have the adjustment clause.\textsuperscript{76} Adjustment clauses may well be more certain and more favorable to consumers than alternative regulatory devices. Nevertheless, the administrative problems associated with adjustment clauses are frequently presented as if the alternative of a full hearing procedure was a model of certainty.

In any adjustment clause situation, as in ratemaking without such clauses, the traditional objective is to maintain sufficient incentives for management to reduce costs by making a wise choice among alternative generation modes, by hard bargaining with suppliers of labor, materials, and fuel, by shrewd selection among financing alternatives, and by alert planning and supervision.

The psychology of utility management is not the subject of this paper. However, there is a massive difference between the incentive of a professional's pride in doing a good job and the incentive of staving off bankruptcy for an extra month or so. The regulatory agency must furnish incentives to the management of the regulated utility. Do adjustment clauses reduce incentive? Requiring a full rate hearing for every increase is administratively burdensome, and the disarray among the states' attitudes about adjustment clauses reflects to a degree differences in their views about the tradeoff between incentive and administrative conveni-
ence, more than it does a difference in view about the recovery of proved costs.

The Moss Committee hearings emphasized administrative problems, including one it called "over-collection." In an adjustment clause context, this is basically not different from the circumstance that realized revenues sometimes exceed projected revenues. This is not called over-collection. Experience usually varies from projection and it can occur in an adjustment clause context.

The California Public Utilities Commission split on treatment of such a variation in a situation where the mix of hydro and fossil fuel generation changed. By a 3-2 rate decision, the commission required PG&E and Southern California Edison to "refund" $203 million because of the "over-collections." The dissenting commissioners said that "while we can concur in the revision of the fuel-cost-adjustment clause from a forecast basis to a recorded basis, we dissent when the majority decides to exceed the law to order refunds." The company announced that the decision would be appealed.\textsuperscript{77}

The skewing of rate design is a more substantive matter, but critics of this effect generally fail to realize that it works in favor of the low load factor residential users at the expense of the high load factor industrial and commercial customers. The characterization of this differential as a "windfall profit" seems to be highly inappropriate.\textsuperscript{78}

Another administrative problem is one discussed in connection with Philadelphia Electric Company. The company's tariff excludes nuclear fuels from the workings of its fuel adjustment clause. Investment per kilowatt in nuclear generation so far exceeds conventional fossil generation, that inclusion of nuclear fuel without recognition of this fact would heavily penalize the nuclear utility until it can include the new investment in its rate base.\textsuperscript{79} Fuel clauses are administratively difficult to handle where several companies are part of an integrated system. Derivation of a base cost for a particular company's fuel, procured from long

\begin{footnotes}
\footnotetext{77}{Wall Street Journal, Apr. 28, 1976, at 15, col. 2.}
\footnotetext{78}{Moss Comm. Hearings 361.}
\footnotetext{79}{Id. at 354.}
\end{footnotes}
term contracts, from captive mines, and from spot purchases, is
difficult. The supervision or audit of fuel purchasing practices
is relatively easy on a post hoc basis, and critics of the workings
of fuel clauses can easily insist that the company should have
operated its system differently. Therefore, requiring purchase
contracts to be submitted for review is becoming more common.81

Accommodating efficiency factors into adjustment clauses
was extensively discussed by the West Virginia Public Service
Commission,82 in considering a situation where one regulated
company used a variable efficiency factor, and another used a
fixed efficiency factor. In the former, heat rating and line loss
factors are determined each month, whereas in the latter, a fixed
line loss and constant heating rating are determined.

The list of theoretical arguments against an adjustment
clause is long. It is to be expected that to the extent adjustment
clauses withstand the current legislative attack, the design of the
clauses themselves will be influenced by the same considerations
which are urged in connection with such current social objectives
as inhibiting demand, aiding conservation, and advancing envi-
ronmental quality.83

Regulatory lag is always under attack, but the “lag factor”
is an affirmative tool of those opposed to rate increases. Compet-
ing forces might find an area of compromise by agreeing upon a
fixed delay period, or a fixed discount factor. The need to pass
costs along to the customers and the countervailing need to keep
utility management on its toes to save costs might be served in
this fashion. Some lag factor clauses are adopted on the legalistic
ground that a delay in the workings of a clause is necessary for
procedural fairness, to give those affected by the increase an op-
portunity to file complaints and trigger review procedures.

CONCLUSION

The process of ratemaking is legislative, but by tradition and
by statute it has always been required to be conducted in the full-

80 Id. at 730.
81 Id. at 731.
Comm'n 1975).
83 See Avery, Social and Economic Factors in Rate Design, ABA PUB. UTIL. LAW
SECTION ANNUAL REPORT 48 (1975).
hearing format of adjudication. Roger Crampton has contributed considerable insight in his discussion of the rapid expansion of the use of formal evidentiary hearings in administrative decision-making in some fields, while simultaneously such use is under attack in other areas. His paper in the Virginia Law Review relates primarily to the judicialization of the process of nuclear power siting, but what he says about how we should think about procedures is apt on the adjustment clause versus full rate hearing issues. Instead of using talismanic phrases like “fairness” and “due process,” we might follow his suggestions and compare procedural alternatives in terms of whether they further the accurate selection and determination of relevant facts and issues, further the efficient disposition of business, and meet a standard of “acceptability” to the public.

On the test of accuracy, it seems that a well-designed adjustment clause is superior to the full hearing, for the reasons articulated by the New Mexico Commission. The possibility of the traditional full hearing being more accurate than the rates reflecting the workings of a fully litigated rule on adjustments is about equivalent to the comparison of a stopped clock being more accurate than a clock running fast or slow.

As to efficiency, the same can be said. The regulatory process has bogged down to the point of scandal, and the recommendations of the Moss Committee and others as to how to handle the growing crisis are ludicrous. The prescription of more money and more personnel for the regulatory process, or for the use of rules forbidding the “pancaking” of rate cases as if the tide of cost increases could be held back by regulatory or legislative fiat is simply unrealistic.

However, the matter of acceptability may be the shoal upon which not just adjustment clauses, but utility regulation as we have known it, will founder. It is undeniable that the current of sentiment against energy producing and energy delivering companies in this country is running strong. It is unfortunate indeed that the public is being misled into believing that somehow a cost passed through to consumers through the workings of an adjust-

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44 Crampton, A Comment on Trial-Type Hearings in Nuclear Power Plant Siting, 58 Va. L. Rev. 585 (1972).
Adjustment clause is not a real cost. The financial integrity of all utilities is presently shaky, and public confidence is at a very low ebb. In many ways, the utilities are victims of their own past successes, because their achievement of economies of scale and their technological advances for a long time cancelled out the upward pressures of inflation. It is no longer possible to look forward to productivity gains cancelling out the increased costs related to inflation.

The issues are not legal ones. The applicability of an adjustment clause is almost always determinable upon policy grounds dependent upon legislative rather than adjudicative facts. Therefore, due process in a constitutional sense does not demand the kind of adversary hearing which the critics of these clauses seem to assume.

Neither are the issues economic. What should be said here is that the discipline of economics is a fertile field for further empiric research to assist the regulatory process, particularly in the design phase where so many of the administrative problems have been identified.

Adjustment clauses do not deserve the criticisms which have been leveled against them, but decrying the criticisms will have no effect. A positive case must be made, showing that they offer a way to maintain the values and traditions of a regulatory system which has served the public for more than a hundred years.
NOTE

EQUAL PROTECTION: MODES OF ANALYSIS IN THE BURGER COURT

INTRODUCTION

The 1971-1976 Terms of the Supreme Court have produced significant developments in equal protection. Among the more important of these have been the modes of analysis employed in this area of constitutional law. The Burger Court inherited from its predecessor a rigid, two-tier model of equal protection. In the

1 A two-tier or "new" equal protection evolved during the Warren Court era. No mention was made of a bifurcated form of analysis in an important article appearing in 1949 which predicted the emergence of an active equal protection. Tussman & tenBroek, The Equal Protection of the Laws, 37 CALIF. L. REV. 341 (1949). The authors predicted, however, that race would become a "forbidden classification." Id. at 352-59. In 1966, Justice Harlan was still able to argue:

It is suggested that a different and broader equal protection standard applies in cases where "fundamental liberties and rights are threatened"

... which would require a State to show a need greater than mere rational policy to justify classifications in this area. No such dual-level test has ever been articulated by this Court, and I do not believe that any such approach is consistent with the purposes of the Equal Protection Clause...


More recently, Justice Stevens has indicated an unwillingness to accept the two-tier analysis.

There is only one Equal Protection Clause. It requires every State to govern impartially. It does not require the courts to apply one standard of review in some cases and a different standard in other cases. Whatever criticism may be levelled at a judicial opinion implying that there are at least three such standards applies with the same force to a double standard.

I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion. I also suspect that a careful explanation of the reasons motivating particular decisions may contribute more to an identification of that standard than an attempt to articulate it in all-encompassing terms...


Indeed, nothing on the face of the fourteenth amendment compels two-tier analysis. For most of its history, equal protection has had only one level of scrutiny, today's version of minimum scrutiny. E.g., City of New Orleans v. Dukes, 96 S. Ct. 2513 (1976); McGowan v. Maryland, 366 U.S. 420 (1961); Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955); Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). This low degree of scrutiny was particularly appropriate for economic regulation, the area in which equal protection was
Warren Court era, minimum scrutiny almost always resulted in upholding the legislation under attack, while strict scrutiny had the opposite effect. Since the outcome of a two-tier analysis was foreordained by the level of scrutiny applied, the real contest centered on whether or not the classifications or interests at stake called for minimum or strict scrutiny. The Burger Court has radically altered this game by closing the door on the recognition of "new" suspect classifications and fundamental, constitutional interests. Constitutional inquiry now focuses more meaningfully on the means and ends of legislation to ascertain whether or not it will pass muster under the appropriate level of scrutiny. Unlike

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1 Chief Justice Burger expressed his displeasure with these automatic results in Dunn v. Blumstein:

> Some lines must be drawn. To challenge such lines by the "compelling state interest" standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection.

405 U.S. 331, 363-64 (1972) (Burger, C.J., dissenting). Professor Gunther expressed the same observation in 1972:

> The Warren Court embraced a rigid two-tier attitude. Some situations evoked the aggressive "new" equal protection, with scrutiny that was "strict" in theory and fatal in fact; in other contexts, the deferential "old" equal protection reigned, with minimal scrutiny in theory and virtually none in fact.


3 In his analysis of the 1971 Term, Professor Gunther suggested that the Court would
the Warren Court, the Burger Court has used minimum scrutiny to strike down legislation\(^6\) and has also upheld legislation against strict scrutiny.\(^6\)

Faced with a dramatic alteration in the modes of constitutional analysis, state and lower federal courts and commentators have attempted to identify governing principles or patterns.\(^7\) Lower courts which cannot discern with reasonable clarity the constitutional standards which should guide their decisions must guess at the right answer, and must, sometimes, guess wrongly.\(^8\) Constitutional uncertainty also breeds an increased number of appeals, resulting not only in congested dockets but also in greatly increased expense for the litigants and the public. Legislators as well are caught in this web, since they must draft laws conforming to prevailing constitutional standards. Part I of this Note will examine developments in the area of strict scrutiny and Part II will examine the alternatives to a rigid, two-tier equal protection analysis.

I. STRICT SCRUTINY

A. Suspect Classifications

During the Warren Court era, the rigid, two-tier analysis left focus on the "means" selected by a legislature, and that the Court would leave to the discretion of legislatures, at least for equal protection purposes, the determination of appropriate legislative "purposes" or "ends." Gunther, supra note 2. Thus, he postulated, the Court would avoid inquiry which would be strongly suggestive of substantive due process. While Gunther's model has won a following in the lower courts, e.g., Isakson v. Rickey, 550 P.2d 359 (Alas. 1976), it has not always carried the day in the Supreme Court. United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 533-38 (1973); Nowak, Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications, 62 GEO. L.J. 1071, 1071-72 (1974); Comment, Constitutional Law—Two Eligibility Criteria Created by the 1971 Amendment to the Food Stamp Act Ruled Unjustifiably Discriminatory and Violative of Due Process, 78 DICK. L. REV. 788 (1974).


little doubt about the outcome, once it was clear whether strict or minimum scrutiny would be applied.\(^9\) Nevertheless, flexibility was retained, inasmuch as the Warren Court was always somewhat foggy about which classifications or interests would turn a case into one requiring strict scrutiny.\(^10\) Given the inclination to

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\(^9\) Gunther, supra note 2, at 8; see Note, Developments in the Law, Equal Protection, 82 Harv. L. Rev. 1065, 1076-1132 (1969).

Classifications which have been found suspect are: race, Loving v. Virginia, 388 U.S. 1 (1967); alienage, Graham v. Richardson, 403 U.S. 365 (1971); and nationality, Oyama v. California, 332 U.S. 633 (1948). Interests which have been found to be fundamental in the constitutional sense are: voting, Kramer v. Union Free School Dist., 395 U.S. 621 (1969), \textit{but see} Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973); travel, Shapiro v. Thompson, 394 U.S. 618 (1969), \textit{but see} Sosna v. Iowa, 419 U.S. 393 (1975); and procreation, Skinner v. Oklahoma, 316 U.S. 535 (1942). Whenever a suspect classification or fundamental constitutional interest is impinged on, the legislation must satisfy three criteria: The means selected must be necessary; the means must serve a compelling need; the means must serve a legitimate state purpose. Note, \textit{The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria}, 27 Vand. L. Rev. 971, 996-1006 (1974).

Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680, \textit{cert. granted}, 45 U.S.L.W. 3570 (U.S. Feb. 22, 1977), presents the Court with the question it ducked earlier in DeFunis v. Odegaard, 416 U.S. 312 (1974). That question is whether affirmative action programs in which race is an intentional component must be tested against and can satisfy the compelling interest standard. In \textit{Bakke} the California Supreme Court held that a state medical school's affirmative action program violated federal equal protection because it did not satisfy the less restrictive alternative requirement of the compelling interest test. Broad language in a subsequent United States Supreme Court decision, United Jewish Organizations v. Carey, 45 U.S.L.W. 4221 (U.S. Mar. 1, 1977), offers hope that \textit{Bakke} will either be overturned or, at a minimum, the Court will set some standard by which affirmative action programs can be established to conform to constitutional mandate. In \textit{United Jewish Organizations} the Court upheld a reapportionment plan which was admittedly drawn with racial considerations in order to satisfy the Voting Rights Act, 42 U.S.C.S. § 1973 (1975). Although only the Chief Justice dissented and Justice Marshall did not participate, there is no one thread which can be pulled from the Court's decision. For himself and three others, Justice White observed that the fourteenth amendment does not mandate "any per se rule against using racial factors" in reapportionment. 45 U.S.L.W. at 4226. Justice Brennan's concurring opinion briefly discusses three objections to "benign discrimination." First, benign discrimination may become a facade behind which disadvantageous treatment is perpetuated. If courts are unable to distinguish the benign from the invidious programs, that would weigh heavily against the use of affirmative action. Second, remedial programs might stimulate racism and may stigmatize intended beneficiaries. Third, even a benign policy may seem unjust to those adversely affected by it. 45 U.S.L.W. at 4229. Justice Brennan has elsewhere indicated that a carefully prepared affirmative action policy may satisfy the compelling interest standard. Kahn v. Shevin, 416 U.S. 351 (1974) (dissenting opinion).

\(^10\) In Carrington v. Rash, 380 U.S. 89 (1965), the Court was faced with a portion of the Texas Constitution which impinged on both the right to vote and the right to travel. With a choice between resting its decision on either one of these interests, the Warren Court did not clearly rest its decision on one or the other as the \textit{ratio decidendi}. This soft
strike down a particular legislative scheme, the Court always seemed to be able to reach out and find a classification or interest calling for strict scrutiny.\textsuperscript{11}

The Burger Court's rebellion against this flexible approach blossomed in \textit{San Antonio Independent School District v. Rodriguez}.\textsuperscript{12} In that case the Court was squarely asked to find that a school financing scheme which discriminated against poor

method of decision-writing was carried over by the Warren Court into areas where neither the interest nor the classification has been held, specifically, to require strict scrutiny. Thus, in Griffin v. Illinois, 351 U.S. 12 (1956), the Court applied strict scrutiny when confronted with a legislative scheme which required criminal appellants to file a transcript in order to obtain full appellate review and where the state would not provide free transcripts to indigent appellants, thereby limiting the right of appeal. In applying strict scrutiny, the Court did not indicate whether it was doing so because of poverty or the criminal appeal process, or whether both were necessary to invoke this degree of review. It was this fortuity that the Burger Court seized upon in \textit{Rodriguez}. No prior Supreme Court case had held poverty to be a suspect classification and, as far as the Burger Court could help it, no one ever would. Similarly, no prior case had held education to be a fundamental interest. Brown v. Board of Educ., 347 U.S. 483 (1954), and all of its progeny, up until \textit{Rodriguez}, had involved both race and education. It had never, therefore, been necessary to hold expressly that education was a fundamental interest. It came as something of a shock to find out, in \textit{Rodriguez}, that education was not, of itself, sufficient to invoke the higher tier of scrutiny. Thus, by making hard-nosed distinctions, as in \textit{Rodriguez}, the Burger Court has been able to escape from the broadest reaches of the Warren Court legacy.

Although the Warren Court's process was open-ended, it had in fact produced only a smattering of interests or classifications which would, either alone or in combination, invoke strict scrutiny. See discussion in notes 9-10 \textit{supra}.

\textsuperscript{11} 411 U.S. 1 (1973). The California Supreme Court reached a result diametrically opposed to \textit{Rodriguez} on state equal protection grounds. Serrano v. Priest, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) (\textit{Serrano II}). As \textit{Serrano I} makes clear . . . our state equal protection provisions, while "substantially the equivalent of" the guarantees contained in the Fourteenth Amendment to the United States Constitution, are possessed of an independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable. We have recently stated in a related context: "[I]n the area of fundamental civil liberties—which includes . . . all protections of the California Declaration of Rights—we sit as a court of last resort, subject only to the qualification that our interpretations may not restrict the guarantees accorded the national citizenry under the federal charter. . . . Accordingly, decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law.

people created a suspect classification. Speaking through Justice Powell, the Court declined the invitation. Prior cases involving poverty, such as *Douglas v. California*\(^\text{13}\) and *Harper v. Virginia Board of Elections*,\(^\text{14}\) were distinguished with the observation that the factor which called strict scrutiny into play in those cases was the "absolute deprivation" of a particular right, such as the right to take a criminal appeal or access to the ballot, rather than a classification based on poverty as such. Another factor which Justice Powell indicated militated against recognition of poor people as a suspect class was that the Texas financing plan did not operate to discriminate *solely* against poor people nor against *all* poor people. Justice Powell then articulated a standard to be used in determining whether or not a particular classification should be recognized as being suspect:

The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.\(^\text{15}\)

Since announcing this test the Court has not recognized any new classification as suspect.\(^\text{16}\)

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\(^\text{13}\) 372 U.S. 353 (1963).


\(^\text{15}\) 411 U.S. at 28. This was a transparent warning that the Burger Court would not listen favorably to pleas for recognition of "new" suspect classes. Advocates for the recognition of sex and illegitimacy as suspect classifications were undeterred. Framed as it was, Justice Powell's test did not foreclose recognition of either as a suspect class. To the contrary, the test seemed to have been drawn with gender-based discrimination in mind, at the very least; it is an understatement, rather than an exaggeration, to say that both classes, but most especially women, have been saddled with disabilities, have been subjected to purposeful unequal treatment, and have been and still are, for the most part, politically powerless. Moreover, the Supreme Court itself has said that women and illegitimates are special disfavors of the law. *Mathews v. Lucas*, 96 S. Ct. 2755 (1976) (illegitimates); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (women). Nonetheless, the Court has so far refused to hold, by a majority vote, that either classification is suspect. *Craig v. Boren*, 97 S. Ct. 451 (1976) (sex); *Mathews v. Lucas*, 96 S. Ct. 2755 (1976) (illegitimacy).

\(^\text{16}\) In addition to sex and illegitimacy, the Court has declined to recognize age as a suspect classification. *Massachusetts Bd. of Retirement v. Murgia*, 96 S. Ct. 2562 (1976). Although the Court has traditionally applied strict scrutiny to state programs discriminating against aliens, *Graham v. Richardson*, 403 U.S. 365 (1971), the Court backed away from this degree of scrutiny in a recent decision upholding a federal Medicare program denying benefits to resident aliens who had been in the United States for less than five
Justice Marshall sharply dissented from the Court's holding and reasoning with respect to suspect classifications generally and poverty in particular. In neither *Griffin v. Illinois* nor *Douglas v. California*, Marshall emphasized, did the offensive scheme work an absolute deprivation of the right to take an appeal. In the one case, poor people were deprived of a transcript, and in the other they were deprived of an attorney, but in both cases poor people could still take an appeal. In *Harper v. Virginia Board of Elections*, the poll tax discriminated not merely

years. *Mathews v. Diaz*, 96 S. Ct. 1883 (1976). The denial of benefits was upheld as a reasonable fiscal measure based on the plenary power of Congress to regulate aliens.

There continues to be disquiet within the Court over the treatment to be accorded gender-based classifications. Of the four-member plurality in *Frontiero v. Richardson*, 411 U.S. 677 (1973), composed of Justices Brennan, Douglas, Marshall, and White, which would have designated sex as a suspect class, Justice Douglas no longer is on the Court. Of the three members who expressed a desire in that case to await the fate of the Equal Rights Amendment, Justices Blackmun and Powell would evaluate gender-based classifications by a “middle-tier” approach. *Craig v. Boren*, 97 S. Ct. 451, 463-64 (1976) (Powell, J., concurring); 97 S. Ct. at 466 (Blackmun, J., concurring). In his majority opinion in *Mathews v. Lucas*, 96 S. Ct. 2755 (1976), Justice Blackmun held that illegitimates should not be treated as a suspect class because illegitimacy does not carry the same obvious badges as do race and sex, nor has discrimination against illegitmates ever approached the severity or pervasiveness of legal and political discrimination against women or blacks. 96 S. Ct. at 2762. Given the parallels between race and sex which Justice Blackmun drew in *Mathews v. Lucas*, it may be that he would now vote to find sex a suspect class. Even if he were so inclined, there would still be no more than four votes to that effect. Justice Stevens has dissociated himself from two-tier analysis altogether, *Craig v. Boren*, 97 S. Ct. 451, 464-65 (1976) (Stevens, J., concurring), and would not, presumably, add the fifth vote which would be necessary for a majority of the Court to hold sex to be a suspect classification. The Chief Justice, and Justices Powell, Rehnquist, and Stewart have held fast to their position that sex is not a suspect class. Each of the four wrote an opinion in *Craig v. Boren*, supra. The majority opinion by Justice Brennan in *Craig v. Boren* is also interesting in that it suggests a more than minimal, but less than strict, scrutiny of a gender-based classification. It may be postulated that the “middle-tier” test for gender-based discrimination set out for the majority by Brennan in this case is not the “retreat” from the plurality position of *Frontiero v. Richardson*, 411 U.S. 677 (1973), over which Justice Rehnquist rejoices in *Craig*. If the Equal Rights Amendment is passed, it is difficult to see how the Court could avoid holding sex to be suspect. On the other hand, in view of the difficulties which the ERA is encountering, members of the Court seem to feel that by adopting a “middle-tier” test for gender-based discrimination now, and even assuming the ERA then fails, sex classifications would not be relegated to the same superficial minimal scrutiny analysis which the Chief Justice and Justice Rehnquist advocate in their separate dissents in *Craig v. Boren*. Further signs of internal Court disagreement over the definition of sex discrimination are evident in *General Elec. Co. v. Gilbert*, 97 S. Ct. 401 (1976).

against poor people who were unable to pay but it also operated to prevent from voting those who simply failed to pay, although able to do so. The Court struck down both aspects of the poll tax. Justice Marshall pointed out that these cases, upon which Justice Powell relied, did not support a holding that a classification is suspect only if it works an absolute deprivation of some right. Indeed, Justice Marshall said, an analysis of past decisions proved that the Court had focused on the relevance of the classification to the right denied.\(^2\) In Rodriguez, Justice Marshall would have looked at the relevance of the taxable wealth of a school district to the interests of school children in the education they would receive. Since the discrimination effected by such a classification was a function of group wealth, rather than personal wealth, and in no way reflected the individual’s abilities or needs, it was, Justice Marshall believed, invidious. Moreover, even within the terms of Justice Powell’s test, poor people were politically powerless to effect a more equitable financing scheme against certain opposition from a political majority opposing higher taxation. For these reasons Justice Marshall would have found the wealth-related classification affecting education in Rodriguez suspect.\(^2\)

Basic to understanding strict scrutiny in the Burger Court is a thorough understanding of Rodriguez. Its significance is less in its holding, though important, and even less in the test of suspectness that it enunciates and which Justice Marshall deflates; the true significance is the tone it sets—an inhospitable climate in which strict scrutiny stops growing and begins to shrink. In this atmosphere pleas for the recognition of sex\(^2\) and illegitimacy\(^4\) as

\(^{21}\) The highly suspect character of classifications based on race, nationality, or alienage is well established. The reasons why such classifications call for close judicial scrutiny are manifold. Certain racial and ethnic groups have frequently been recognized as “discrete and insular minorities” who are relatively powerless to protect their interests in the political process. Moreover, race, nationality, or alienage is “‘in most circumstances irrelevant’ to any constitutionally acceptable purpose.” Instead, lines drawn on such bases are frequently the reflection of historic prejudices rather than legislative rationality.


\(^{22}\) 411 U.S. at 120-24.

\(^{23}\) Frontiero v. Richardson, 411 U.S. 677 (1973). At least two state courts have held sex to be suspect—California and Washington. Sail’er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485
suspect classifications have not moved a majority of the Court. Spurious as Justice Powell’s three-pronged test for suspectness may be, its message is clear: No more suspect classes!

B. Fundamental Interests

The Warren Court’s catalogue of fundamental interests was neither large nor well-defined. Again, it was this weakness which the Burger Court attacked through Justice Powell in Rodriguez. In his opinion, Justice Powell moved quickly to defuse arguments that education is a constitutionally protected fundamental interest. He did not directly attack the importance of education. Instead, he undercut the supports on which this claim to extraordinary constitutional protection rested. Since the close of the era of substantive due process, the Court has been loath to find substantive rights in the fourteenth amendment, an onus shared by equal protection. Emphasizing this backdrop, Justice Powell announced another test:


26 See notes 9-10 supra.

27 Among the most noted substantive due process cases are Coppage v. Kansas, 236 U.S. 1 (1915), and Lochner v. New York, 198 U.S. 45 (1905). The doctrine fell into constitutional disrepute in the mid-1930’s, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), and has since been buried many times over, e.g., Ferguson v. Skrupa, 372 U.S. 726 (1963). To this day, however, black-robed justices denounce the reappearance of this doctrine, e.g., Vlandis v. Kline, 412 U.S. 441, 467-68 (1973) (Rehnquist, J., dissenting). See also Note, The Decline and Fall of the New Equal Protection: A Polemical Approach, 58 Va. L. Rev. 1489 (1972).

28 “Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties.” San Antonio Independent
Thus, the key to discovering whether education is “fundamental” is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

Applying this test, Justice Powell concluded that education is not a fundamental, constitutional right. It is not expressly guaranteed and he could find no basis for implying its guarantee. In particular, he rejected the “nexus theory” that education was impliedly guaranteed because of its central importance to the meaningful exercise of other guaranteed rights, such as freedom of expression and voting. Moreover, he added, even assuming education is essential to the exercise of these rights, this is not to say that the Constitution guarantees to each the most “effective speech or the most informed legislative choice.” To the extent there was any bare, minimum quantity of education necessary to exercise other constitutional rights, the Texas financing scheme, he held, did at least that much. By anyone’s reading, Justice Powell’s opinion is a studied effort to communicate the Court’s unwillingness to expand fundamental interests beyond voting, travel, and procreation.

Justice Marshall’s dissent is logically less compelling on this point than his critique of the Court’s treatment of suspect classifications. The difference between Justice Marshall and the majority is that Justice Marshall accepts the “nexus theory”—the more closely the interest is tied to other fundamental rights, the more searching the scrutiny it must withstand. While this argument has appeal and may serve to explain Warren Court strict scrutiny.


411 U.S. at 33-34. The California Supreme Court rejected this analysis and found education to be a fundamental right based on the state’s equal protection guarantees in Serrano v. Priest, 557 P.2d 929, 951, 135 Cal. Rptr. 345, 367 (1976).

411 U.S. at 36.

Id. at 110-17. Justice Marshall did not contend that the Warren Court had ever held public education to be constitutionally required. He argued that education has a special status in light of its close relationship to individual development and the exercise of constitutional rights. Id. at 111.
decisions, such as *Griffin v. Illinois*, it is more a matter of philosophical orientation than settled constitutional doctrine. Justice Marshall's flexible approach to the identification of fundamental interests is in sharp contrast to the narrow standard adopted by the Burger Court majority. This narrow standard allows the Burger Court to confine the holdings of Warren Court decisions to their facts without the discomfort of overruling precedent. At the same time, a begrudging, narrow standard for the identification of fundamental interests has the benefit of relative certainty in application. Moreover, an articulated standard lends itself more readily to the semblance of intellectual and constitutional integrity than an ad hoc balancing test which may appear to be, if it is not in fact, arbitrarily manipulated to fit the facts of the case.

C. Ignoring Precedent

While no fundamental interest or suspect classification bequeathed to the Burger Court has been specifically abandoned, the legacy has not always been faithfully applied. From time to time the Court has clearly "distinguished" controlling precedent on specious or wholly unarticulated grounds. Two decisions, *Sosna v. Iowa* and *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, illustrate this approach.

*Sosna* involved a challenge to Iowa's one-year residency requirement for divorce. It was argued that the scheme penalized the right to travel in violation of equal protection and hence should be tested against the compelling interest standard. Until 1975, legislation which impinges on the right of persons to engage in interstate movement should be measured by the strict scrutiny standard. Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

It was also urged that the legislation created an irrebuttable, conclusive presumption violating due process. 419 U.S. at 409. For an examination of this doctrine see text accompanying notes 49-85 infra. Justice Rehnquist rejected this claim, observing that Vlandis v. Kline, 412 U.S. 441 (1973), should not be construed as prohibiting bona fide
though the logic of prior cases considering durational residency requirements would seem to require strict scrutiny here, Justice Rehnquist dismissed those cases as not controlling, because, in his estimation, the residency requirements in those cases were only justified by administrative convenience and fiscal considerations. He urged that Iowa's interest in maintaining the integrity of its dissolution decrees against collateral attack in sister states was a different and, therefore, satisfactory ground of justification.

Justice Rehnquist's majority opinion is analysis by misdirection, artfully inviting analysis of the legislation by the wrong standard and then concluding that the legislation satisfies that standard. He achieved this result by giving an obscure answer to the question of whether strict scrutiny had been satisfied or even applied.

We therefore hold that the state interest in requiring that those who seek a divorce from its courts be genuinely attached to the State, as well as a desire to insulate divorce decrees from the likelihood of collateral attack, requires a different resolution of the constitutional issue presented than was the case in Shapiro, supra, Dunn, supra, and Maricopa County, supra. 8

The statement that this case "requires a different resolution of the constitutional issue" can be interpreted in either of two diametrically opposed ways. Does he mean here, that unlike Shapiro, Dunn, and Maricopa County, the scheme satisfies strict scrutiny? While the opinion does not say so directly, the answer must be no. The compelling interest standard is satisfied only if the state has chosen "means that do not unnecessarily burden constitutionally protected interests." 39 Justice Rehnquist made

residency requirements, citing Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), aff'd, 401 U.S. 985 (1971), which upheld a one year residency requirement for students qualifying for in-state tuition rates. Notwithstanding the state's monopoly on the divorce apparatus as the only legal means of dissolving a marriage relationship, Boddie v. Connecticut, 401 U.S. 371 (1971), and the severe hardship which a one year delay may impose, Justice Rehnquist found it unnecessary to require the state to make an individualized determination of residency for persons seeking divorce. 419 U.S. at 410.


38 419 U.S. at 409.

39 Memorial Hosp. v. Maricopa County, 415 U.S. at 263. See also Dunn v. Blumstein,
no effort to show that the Iowa statute met this burden, as well
he could not, since the state could determine the fact of residence
by other means, i.e., by individualized determinations. The
Iowa scheme, therefore, would fail the compelling interest test.
Therefore, it must be assumed that when Justice Rehnquist
spoke of a different resolution of the constitutional issue, he was
referring to the use of minimum scrutiny, rather than strict scruti-
ny. His argument that Iowa’s statute was justified by reasons
of full faith and credit and comity, rather than administrative
and budgetary considerations, goes to the question of whether
the preferred justifications satisfy the appropriate level of scruti-
nity, not to the more basic question of which level of scrutiny is
appropriate. Notwithstanding prior cases implicating the right
to travel—which had held that strict scrutiny must be applied—
Justice Rehnquist applied minimum scrutiny without articulat-
ing standards for not applying strict scrutiny. It seems apparent
that strict scrutiny was ignored, not because it was inappropriate
in light of the constitutional interest involved, but because the
Justices did not like the results its application would bring.

The Burger Court has also retreated from the use of strict
scrutiny in the case of voting. In *Salyer Land Co. v. Tulare Lake*

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419 U.S. at 419 (Marshall, J., dissenting). Prior to Sosna, a number of state and lower
federal courts had considered challenges to other divorce statutes with durational resi-
dency requirements. When the question was presented to the Alaska Supreme Court, it
held all residency requirements to be prima facie invalid as infringing on the fundamental
see McCoy, *Recent Equal Protection Decisions—Fundamental Right to Travel or
‘Newcomers’ as a Suspect Class*, 28 *VAND. L. REV.* 987, 1014-16 (1975); Comment, Sosna
v. Iowa: *A New Equal Protection Approach to Durational Residency Requirements?*, 22
**Basin Water Storage District,** the Court applied minimum scrutiny to uphold a voting system which restricted the right to vote in water district elections to resident landowners. Four years earlier, in *Kramer v. Union Free School District,* the Warren Court had applied strict scrutiny to a plan which deprived non-property owners and those who were not parents or guardians of public school children from voting on school district affairs. Because the right to vote is preservative of other rights, *Kramer* held, exclusions from the franchise must serve a compelling state interest. *Salyer* avoids this rule by creating a special purpose district exception. When this exception applies, the limitation on the franchise need only satisfy minimum scrutiny.

The grounds by which the Court in *Salyer* distinguished *Kramer*’s requirement for strict scrutiny are not sound. Justice Rehnquist said that the water district in *Salyer* was so specialized that it affected only the interests of a few people within its geographical boundaries. Moreover, the district’s purposes were limited to flood control and irrigation, and the economic burdens of the district did not fall on all district residents. He also noted that the district did not have general governmental powers. Because of these considerations, he found that the restrictions on the right to vote were “rationally based.” But, why he applied minimum scrutiny rather than strict scrutiny is not satisfactorily explained. The differences in the types of districts at issue in *Salyer* and *Kramer,* the fact the Court relied upon in justifying different standards, are insignificant in constitutional terms—a fact the Court made abundantly clear in another of its decisions, *Rodriguez.* In the latter case, the Court held education was not a constitutionally protected interest and did not require anything more than minimum scrutiny. The different standards of review in *Salyer* and *Kramer* thus cannot be justified on the ground that the educational interest involved in *Kramer* is entitled to special protection. Stripped of collateral issues, the constitutionally significant interest in both *Salyer* and *Kramer* is the right

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44 Among those excluded from the franchise were resident lessees of farmland and all landowners who were not farmers.


46 410 U.S. at 734-35.
to vote. There is no constitutional basis for protecting the right to vote in one kind of district more than in another. In the absence of a constitutional basis for applying different standards, the different results in Salyer and Kramer can only be explained as a conscious decision to ignore precedent. Ironically, it is this same ad hoc approach to determining the appropriate level of review which the Burger Court majority denounced in Rodriguez. 47

Both Sosna and Salyer reflect disturbing trends. Each case concerned fundamental constitutional rights, recognized as such in Rodriguez. Precedent called for the application of strict scrutiny. Yet, in neither case did the majority articulate sound reasons for ignoring precedent. This approach to constitutional adjudication is unprincipled and likely to cause unnecessary uncertainty in future cases. 48 Moreover, at a time when members of the

47 Justice Rehnquist's opinion stresses the "special district" aspect of a flood control and irrigation project. Two calamities in the western United States during 1976 involving flood control projects illustrate the interests of all residents in the affairs of such "special districts." The collapse of the Teton Dam in Idaho destroyed millions of dollars of property, farmland and non-farmland, in the flood plain below the dam. In Colorado, a flash flood in Big Thompson Canyon took over 100 lives and destroyed millions of dollars of property. Residents of these and similar districts can be expected to be less than enamored by proposals which restrict the franchise that determines the development of similar enterprises. Justice Rehnquist's minimum scrutiny standard would sacrifice these concerns too readily. It is precisely this danger that the Court sought to avoid by its holding in Kramer, a danger which has been let in the back door by Salyer's "special district" exception. The Salyer decision is to be admired neither for its specific holding nor for its unarticulated grounds for refusing to apply strict scrutiny to legislation which disenfranchises affected citizens.

48 The remarks of Professor Wechsler speak well to this problem, although made in the context of the shared powers of the three coordinate branches of government:

The Courts have both the title and the duty when a case is properly before them to review the actions of other branches in the light of constitutional provisions, even though the action involves value choices, as invariably action does. In doing so, however, they are bound to function otherwise than as a naked power organ; they participate as courts of law. This calls for facing how determinations of this kind can be asserted to have any legal quality. The answer, I suggest, inheres primarily in that they are—or are obliged to be—entirely principled. A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.

Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 19 (1959). Neither Sosna nor Salyer meets this standard. Another commentator put it this way: "According to common understanding, the general rule is that an appellate court is obliged to follow, or else somehow distinguish, its own earlier decisions, or at the least those elements of the case known as the ratio decidendi." Wise, The Doctrine of Store
Court have expressed concern over the Court's growing docket, this approach to decisionmaking can only encourage more appeals in areas of law that heretofore appeared settled.

II. ALTERNATIVES TO TRADITIONAL TWO-TIER ANALYSIS

The Burger Court's rejection of a rigid, two-tier equal protection analysis has been most evident in those cases where strict scrutiny has not been applied. For a time the Court experimented with the conclusive presumption doctrine of due process. Apparently, because this doctrine became little more than a surrogate for strict scrutiny and threatened to invalidate just about any law to which it was applied, this experiment seems to have been abandoned. Meanwhile, the Court has used minimum scrutiny with a vigor which, at times, clearly exceeds its deferential reputation. The problem lies in understanding what gives rise to the Court's varying degrees of analysis.

A. Conclusive Presumptions

An irrebuttable presumption exists if proof of one fact is conclusive evidence of the existence of a second fact. Constitutionally, the doctrine has its roots in the due process clause. Except for the Burger Court's brief fling in the area, the conclusive presumption doctrine has had an obscure career.49


49 The oldest and "best" known of the first generation of conclusive presumption cases is Schlesinger v. Wisconsin, 270 U.S. 230 (1926). That case held unconstitutional a statute which made any gift within six years of death taxable as though it had been made in anticipation of death. Heiner v. Donnan, 285 U.S. 312 (1932), struck down a similar statute as applied to a young man who had made a gift and was then struck dead by a bolt of lightning. Among other conclusive presumption cases are: Schwabe v. Board of Bar Examiners, 353 U.S. 232 (1957); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956); Skinner v. Oklahoma, 316 U.S. 535, 543 (1942) (Stone, C.J., concurring); United States v. Provident Trust Co., 291 U.S. 272 (1934); Ferry v. Ramaey, 277 U.S. 88 (1928). Carrington v. Rash, 380 U.S. 89 (1965), struck down a portion of the Texas Constitution, relying on equal protection instead of the conclusive presumption doctrine. Texas denied members of the armed forces the right to vote in Texas as long as they were in the military, if they had not been Texas residents before joining the military. The more recent conclusive presumption, due process cases can be, and probably should have been, analyzed in terms
Stanley v. Illinois\textsuperscript{50} is the first of the truly important conclusive presumption cases decided by the Burger Court.\textsuperscript{51} The Illinois statute in question made an unwed father unfit to retain the custody of his children after the death of the mother. Although he might be able to regain custody of his children as their guardian or by adoption, legally he was a stranger to them. No evidence was admissible to prove fitness to retain custody. Justice White's majority opinion, which alternated between equal protection and due process analyses, held that this administrative shortcut to determining parental unfitness deprived both the father and his children of due process.\textsuperscript{52} Chief Justice Burger would have reached an opposite result because he could find the word "presumption" nowhere in the statute.\textsuperscript{53}


\textsuperscript{51} Stanley was preceded by Bell v. Burson, 402 U.S. 535 (1971). No one dissented from Bell, but Chief Justice Burger and Justices Black and Blackmun concurred in the result. Bell invalidated a portion of the Georgia motor vehicle responsibility statute which automatically suspended the license of an uninsured motorist who had been involved in an accident and who was unable to or did not post a security. No hearing was held on the question of fault before the license was suspended and any offer of evidence regarding fault was not accepted. Thus postured, the case had heavy overtones of the procedural due process seen in Goss v. Lopez, 419 U.S. 565 (1975), and Goldberg v. Kelly, 397 U.S. 254 (1970). As eventually developed by the Burger Court, the conclusive presumption doctrine leaned more toward substantive due process. See Justice Rehnquist's dissent in Vlandis v. Kline, 412 U.S. 441, 463 (1973).

\textsuperscript{52} Among the decisions subsequent to Stanley which have arrived at similar results are Willmott v. Decker, 56 Haw. 462, 541 P.2d 13 (1975), and Phillips v. Horlander, 535 S.W.2d 72 (Ky. 1975). California has extended Stanley to uphold the right of a putative father to prove that he is the natural father, of a child born of a woman married to another man, in order to rebut the strong presumption that a child born to a married woman is a legitimate child of that marriage. In re Lisa R., 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975). See Comment, In re Lisa R.—Limiting the Scope of the Conclusive Presumption Doctrine, 13 San Diego L. Rev. 377 (1976). New York has refused to grant the unwed natural father a right to prevent the mother from putting the child up for adoption for the reason that the father could use this veto power to harm both the mother and the child. In re Malpica-Osrsini, 36 N.Y.2d 568, 331 N.E.2d 486, 370 N.Y.S.2d 511 (1975). See Comment, Constitutional Law—Fourteenth Amendment Equal Protection—Rights of the Unwed Father—Consent to Adoption, 61 Cornell L. Rev. 312 (1976). But see Adoption of Walker, 360 A.2d 603 (Pa. 1976).

\textsuperscript{53} Justice Blackmun joined in this dissent. Justices Powell and Rehnquist did not participate.

\textsuperscript{44} 412 U.S. 441 (1973).
shape. This case held unconstitutional the residency-nonresidency classifications employed by many states to determine who would be required to pay higher tuition at state colleges and universities. Connecticut classified students as state residents or as nonresidents at the time of their applications for admission. Once designated as a nonresident, students were required to pay nonresident tuition rates for as long as they attended the state institution. Justice Stewart rejected the preferred justifications of administrative convenience and fiscal conservation. Due process, he said, would not permit a permanent classification of nonresidency when such classification

is not necessarily or universally true in fact . . . when the State has reasonable alternative means of making the crucial determination. Rather, standards of due process require that the State allow such an individual the opportunity to present evidence showing that he is a bona fide resident entitled to the in-state rates.55

It was not the existence of two classifications which offended due process but the absence of any means to rebut the classification which imposed a heavier financial burden on those initially classified as nonresidents. While the state could maintain the basic classifications, it had to provide some means for determining which students had, subsequent to their admission, become bona fide state residents.56

Dissatisfaction within the Court with this mode of constitutional analysis is evident in the concurring and dissenting opinions. Justice White's concurrence was based on his finding that the legislation invidiously discriminated against several classes of bona fide state residents. He objected to the Court's use of due process, finding it a surrogate form of analysis for a problem rooted in equal protection.57 Chief Justice Burger's dissent also

55 Id. at 452. The plaintiff in this case had married a life-long Connecticut resident, had acquired a Connecticut driver's license and car registration, and had registered to vote in Connecticut.

56 The Court noted that it had previously upheld a Minnesota statute which allowed students to prove they had become bona fide residents and were therefore qualified for in-state tuition rates. Starns v. Malkerson, 401 U.S. 985 (1971), aff'd 326 F. Supp. 234 (D. Minn. 1970). Presence in Minnesota for one year was required before evidence of bona fide residency would be accepted.

57 Justice White also concluded that the Court was using a spectrum of standards in equal protection cases rather than a two-tier model:

[I]t must now be obvious, or has been all along, that, as the Court's assess-
argued that the Court was applying equal protection and had "sub silentio" adopted strict scrutiny without stating what constitutionally protected interest had been impinged. In addition, he argued that the Court's reasoning threatened thousands of statutes employing presumptions similar to the one held unconstitutional in this case. This concern was amplified in Justice Rehnquist's dissent. For him the majority opinion was a return to substantive due process.58

Disagreement over the use of the conclusive presumption doctrine intensified in Cleveland Board of Education v. LaFleur.59 This case upheld the challenge by pregnant teachers to school policies which compelled them to go on leave several months before the time they were to give birth. By way of defense, the schools argued that these arbitrary dates approximated periods during which pregnant teachers would be incapacitated and unfit to teach. In addition, the schools claimed that these policies facilitated classroom continuity and the school board's search for suitable replacement teachers.60 The majority of the Court found that...
these policies impinged on liberties regarding marriage and family life, liberties within the ambit of due process. Again, with Justice Stewart at the helm, the Court said that the presumptions of incapacity and unfitness were neither necessarily nor universally true, and, therefore, impermissibly burdened the decision to beget children. Administrative convenience "alone" could not justify what was otherwise a violation of due process.

The concurring and dissenting opinions clearly rejected the conclusive presumption doctrine in theory and as applied. Justice Powell concurred, relying on equal protection.

If the Court nevertheless uses "irrebuttable presumption" reasoning selectively, the concept at root often will be something else masquerading as a due process doctrine. That something else, of course, is the Equal Protection Clause.\footnote{Sewell, Conclusive Presumptions And/Or Substantive Due Process of Law, 27 Okt. L. Rev. 151, 160-61 (1974).}

It is in Justice Rehnquist's dissent, however, that the future of this doctrine is told. He outlines two irreconcilable goals in American law and its English antecedents. At the one extreme is individualized decisionmaking in the administration of governmental programs in order to meet the equities of each individual case. At the other extreme is lawmaking by broad classifications, without consideration of individual equities, which avoids decisionmaking by politically unaccountable, faceless bureaucrats capable of imposing, even if only subjectively, their own preferences and discriminations. More simply, the difference between individualized determinations and legislation by classification is the classic conflict between the rule of individuals and the rule of law. Justice Rehnquist finds in the conclusive presumption doctrine an attack on the essence of lawmaking itself. Legislating, by definition, involves drawing lines between those who shall be included and those who shall be excluded from a governmental program. To deny this power to legislatures is a return to the era of substantive due process.\footnote{414 U.S. at 652.} Moreover, the idea of individually tailored governmental decisions is a Trojan horse. Hidden within are millions

Commission, Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.10 (1975). 414 U.S. at 638-40 n.8. In General Elec. Co. v. Gilbert, 97 S. Ct. 401 (1976), the Supreme Court held that the EEOC regulation referred to in LaFleur and Geduldig, in so far as it applied to pregnancy disabilities, is an inaccurate construction of Title VII.
of bureaucrats. Given the choice between demanding that legislatures draft laws discretely and requiring that governmental decisions be determined on the facts of each case, Justice Rehnquist's arguments carry the day.83

In addition to this doctrinal debate, the conclusive presumption doctrine posed two other problems. First, what degree of scrutiny is appropriate in cases applying this doctrine? Second, when should this doctrine, rather than equal protection, be applied?

Notable for its absence in Stanley, Vlandis, and LaFleur is any discussion of the degree of scrutiny required by the conclusive presumption doctrine. While two-tier analysis is commonly associated with equal protection, this form of analysis has a due process analogue.44 To members of the Court and commentators alike, irrebuttable presumption analysis looked suspiciously like strict scrutiny in disguise. Indeed, in the principal cases in which the doctrine evolved, the objectives of administrative convenience and budgetary conservation were quickly dismissed as totally inadequate justifications.47

Faced with the emergence of a new due process doctrine, which seemed to apply strict scrutiny, and always keeping in mind the limitation placed on strict scrutiny in the equal protection context by Rodriguez, lower courts and commentators

48 Totally bedeviled, some lower courts took up the practice of basing their holdings on alternative constitutional grounds, equal protection and conclusive presumptions, thus proving again that the conclusive presumption doctrine is in reality little more than a
searched for the alchemic secret which seemed to turn an otherwise pedestrian case of equal protection minimum scrutiny into one of conclusive presumptions. Proof that conclusive presumption analysis would not reveal a principled ground of difference from equal protection analysis came in two cases striking down amendments to the Food Stamp Act. The amendments were aimed at eliminating abuses in the Food Stamp program, but Congress sought to achieve this objective by means which were more clearly aimed at harming politically unpopular groups—college students and "hippies." Factually, the problems presented by the challenges to these amendments were nearly identical. In one case, Congress sought to deny food stamps to any household which contained a person over 18 years of age who had been claimed as a federal income tax dependent by a person ineligible for food stamps in the two previous years. The statute was aimed at college children of wealthy parents. The scheme, however, excluded many who were otherwise eligible for food stamps and who were disqualified only because they lived in the same household with someone who had been claimed as a tax dependent. In the second case, Congress had sought to exclude from the program any person who lived in a household containing one or more unrelated persons. This scheme was aimed at "hippies" but included many more. In the first case, the Court struck down the legislation as an impermissible conclusive presumption while in the second case, decided on the basis of equal protection, the Court held that a Congressional desire to harm a discrete group was wholly irrational. In both cases the amendments were held to be overinclusive of those who were denied benefits in light of the abuses which Congress sought to eradicate.


* "Since the weapon of irrebuttable presumption analysis is always available and is inevitably lethal if applied to the full extent of its rhetoric, the question becomes one of determining when and for what generally inarticulated reasons the Court will trot it out." Canby, The Burger Court and the Validity of Classifications in Social Legislation: Currents of Federalism, 1975 Ariz. State L.J. 1, 25 (1975).

** United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973) (conclusive presumption) and United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) (equal protection). For commentary see authorities cited in note 59 supra.
Yet the two cases were decided on different constitutional grounds. Search as one will, there is no reason to be found why two identical problems should be decided on different constitutional grounds, unless the two forms of analysis are really the same.

Thus, by the time of LaFleur, three fundamental problems inhered in the conclusive presumption doctrine: Doctrinal disagreement over its legitimacy; uncertainty over the degree of scrutiny it required; and, difficulty in discerning when it, rather than equal protection, should be applied. By 1975 a majority of the Court was prepared to lay to rest this constitutional Dr. Jekyll-Mr. Hyde routine, and in Weinberger v. Salfi, the Court, per Justice Rehnquist, set out to limit the doctrine. In Weinberger, the district court had ruled that a Social Security program which provided benefits only to widows who had been married to the deceased insured for more than nine months was unconstitutional as creating a conclusive presumption that all marriages of shorter duration had been fraudulently entered into for the purpose of obtaining Social Security benefits. In reversing that decision, the Supreme Court effectively dealt with the three problems inherent in conclusive presumptions. First, the Court dealt with the legitimacy of the doctrine by holding it was to have no wider scope than the holdings of prior cases in which it had been applied.

We think the District Court's extension of the holdings of Stanley, Vlandis, and LaFleur to the eligibility requirement in issue here would turn the doctrine of these cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution.

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72 Interestingly, Justice Stewart joined in Justice Rehnquist's opinion. It may be that Justice Stewart, the author of the Court's opinions in Vlandis and LaFleur and the Justice who seemed the strongest advocate of the new doctrine, has been convinced by the dissents of prior cases.

73 422 U.S. at 772. It should be observed that prior cases were limited to their facts but not overruled. They can, therefore, be relied upon in cases dealing with forms of discrimination falling within their holdings. LaFleur was cited, subsequent to Salfi, as authority in Turner v. Department of Employment Security & Bd. of Review, 423 U.S. 44 (1975). Turner overturned a Utah unemployment compensation statute which made women ineligible for benefits over an 18-week period covering the 12 weeks prior to the expected birth and for 6 weeks thereafter. Accord, Sylvara v. Industrial Comm'n, 550 P.2d
Second, having limited the doctrine's scope, Justice Rehnquist went on to announce what level of scrutiny would be applied to these cases in the future. Henceforth, due process would be violated "'only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.'" Individualized determinations are no longer necessary "when Congress can rationally conclude not only that generalized rules are appropriate to its purposes and concerns, but also that the difficulties of individual determinations outweigh the marginal increments . . . they might be expected to produce.'" Third, having defined the appropriate degree of review as minimum scrutiny, the Court makes it unnecessary to determine when this doctrine, rather than equal protection, should be applied, as both doctrines apply the same degree of review and should produce identical results.

Any doubts that the Court had, for all practical purposes, buried conclusive presumptions were put to rest during the Court's 1975 Term. The Court ignored a perfect invitation to apply this doctrine in Massachusetts Board of Retirement v. Murgia, passing the opportunity by in favor of equal protection. At issue was the forced retirement of a police officer who had passed a rigorous physical only four months earlier. The retirement schedule was justified by the need for assuring public protection through the "physical preparedness of . . . uniformed officers." However, since the officer had recently been found physically fit, the statutory presumption of unfitness at age 50 was obviously not universally true. The case was an appealing one for the application of the conclusive presumption doctrine, since the state already had a routine physical examination program as a reasonable alternative means for ascertaining the critical fact

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868 (Colo. 1976) (Sylvara is a rare example of a state's attorney general confessing error on appeal and urging the state supreme court to rule a statute unconstitutional).


75 422 U.S. at 785.

8 Rebuttable presumptions do not raise constitutional problems unless the presumption itself is arbitrary. Lavine v. Milne, 96 S. Ct. 1010 (1976).

87 96 S. Ct. 2562 (1976).

88 Up to age 40 officers were examined every two years. Between 40 and 50, the officers had to pass an even more rigorous physical every year.
of fitness. The Court was careful to emphasize its respect for older persons and the importance of employment. Nonetheless, applying equal protection, the Court upheld the statute. Although clearly applicable, at least in its pre-Salfi formulation, the irrebuttable presumption doctrine was not even mentioned.

In another decision, *Mathews v. Lucas*, the Court sustained a Social Security survivors’ benefit scheme which disqualified illegitimates if they could not show that the insured natural parent was living with or supporting them at the time of that parent’s death. Legitimate children did not need to prove either fact. Even though the program was overinclusive of those illegitimates who were *not* dependent in fact, the Court upheld the classification on the ground of administrative convenience, clearly identifying the “applicable level of scrutiny” as minimum scrutiny.

The Court’s experiment with the conclusive presumption doctrine was short lived. It was obvious almost from the beginning that the doctrine was a substitute for equal protection. In its dissatisfaction with equal protection, the Court seemed to be looking for an alternative ground of decision. As an alternative ground, the conclusive presumption doctrine seemed promising. In time, this new doctrine became more rigid than the doctrine

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79 Comparing this case with *LaFleur* it is obvious that classifications based on sex are especially disfavored by the Court. In *LaFleur*, the interference with employment was only temporary. In *Murgia*, employment was permanently terminated. Although the impact of the sex-based discrimination in *LaFleur* was not as severe as the age-based discrimination in *Murgia*, the Court found an equal protection violation only in the case of sex discrimination.

80 In dissent, Justice Marshall urged that the Court should have applied a sliding-scale equal protection analysis rather than a two-tier analysis. He did not advocate conclusive presumption analysis.

81 96 S. Ct. 2755 (1976).

82 Prior to *Salfi*, administrative convenience was an especially unpopular justification in conclusive presumption cases.

[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Stanley v. Illinois, 405 U.S. 645, 656 (1972) (footnote omitted). In *LaFleur* the Court added, “[A]dministrative convenience alone is insufficient to make valid what otherwise is a violation of due process.” 414 U.S. at 647.

83 96 S. Ct. at 2764, citing *Salfi*, 422 U.S. at 772.

84 The dissenters would have sustained the attack on this legislation, relying on *Jiminez v. Weinberger*, 417 U.S. 628 (1974), which was decided on equal protection grounds.
it was intended to supplement, and the Court decided to abandon this new doctrine before it could gain wide application. Practically, as an evolving doctrine of constitutional law, the conclusive presumption doctrine does not appear to have a future.

B. **Minimum Scrutiny**

While strict scrutiny has hardly been a paragon of stability, and conclusive presumptions for a time engendered confusion, they pale before the fate of "traditional," deferential, minimum scrutiny in the Burger Court. Today, minimum scrutiny could be likened to a patient who has undergone plastic surgery. Whether the changes which have been wrought are merely cosmetic or are more substantial is a question to which there may not yet be a certain answer.

1. **Economic Regulation**

Most traditional discussions of minimum scrutiny somewhere make the observation that with one exception, *Morey v. Doud*, the Warren Court never used this level of scrutiny to invalidate legislation. *Morey* invalidated an Illinois statute regulating money orders which gave preferential treatment to American Express because of that corporation's acknowledged fiscal integrity. Late in the 1975 Term, *Morey* was overruled in *City of New Orleans v. Dukes*. In the area of economic regulation, *Dukes* held, only "invidious discrimination, the wholly arbitrary act" will violate equal protection. The Court's language implies that an especially wide berth will be afforded legislation regulating economics, apparently wider than will be allowed in matters of social legislation.

In overruling *Morey*, the Court adopted the views set forth in the dissenting opinions of Justices Black and Frankfurter in *Morey*. In both *Morey* and *Dukes* the constitutional challenge focused on legislative classifications which were reasonably based

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5 See note 73 supra.
7 96 S. Ct. 2513 (1976).
8 Id. at 2517, citing Ferguson v. Skrupa, 372 U.S. 726 (1963), which upheld a statute limiting the practice of debt adjustment to attorneys. *Dukes* involved a city ordinance limiting the number of pushcart vendors who could operate in an area of New Orleans to those who had been so engaged for a specified number of years.
on present facts and the legislative failure to provide for classification modifications in the event those facts changed in the future so as to make the present classification unreasonable. In Morey the majority seized upon this legislative failure to provide for modifications in the event of future changes as the ground for holding the legislation was arbitrary. Justice Frankfurter objected to this speculative ground for ruling that the statute violated equal protection. Should that contingency ever arise, he argued, there would be time enough to strike down the legislation. Many times before, he urged, the Court had at one time found a statute constitutional only to reach a different result when presented with changed circumstances. As indicated by its adoption of this dissent in Dukes, the Court will, in future economic regulation cases, look to the actual effects of legislation in determining its constitutionality, rather than speculating on abstractions and possibilities.

While prior decisions had indicated that the Court would not strike down economic legislation unless it was “wholly irrelevant to the achievement of the State’s objective,” there is a strong suggestion in Dukes that in this area there will be an even more deferential approach than is typical of low-tier scrutiny. Two implications suggest themselves from this case. First, if the Burger Court adheres to the rhetoric of two-tier equal protection

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90 354 U.S. at 474.
91 Justice Marshall did not join the Court’s opinion in Dukes, but concurred in the judgment without opinion. This is interesting because he has elsewhere indicated a strong preference for upholding legislative judgments in the area of economic regulation.

I find it hard to understand why a statute which sends a man to prison and deprives him of the opportunity even to be considered for treatment for his disease of narcotics addiction, while providing treatment and suspension of prison sentence to others similarly situated, should be treated under the same minimal standards of rationality we apply to statutes regulating who can sell eyeglasses or who can own pharmacies. This case does not involve discrimination against business interests more than powerful enough to protect themselves in the legislative halls.


in its traditional formulation, then social legislation may also come under this new, lowered level of scrutiny. Although there may be spill-over to this effect, especially in cases where it is difficult to determine whether the legislation is economic or social in nature, this possibility does not seem to be what the Court had in mind. A second interpretation might be that the Court has abandoned or is setting the stage for an abandonment of two-tier analysis. At the one extreme the Court could retain strict scrutiny for suspect classifications and fundamental, constitutional interests. At the other extreme it would apply a highly deferential minimum scrutiny in the field of economic regulation. Of course, that leaves social legislation in the middle—but just where cannot be said. It may be that social legislation will still be reviewed on the reasonable basis test of Dandridge v. Williams. Justice Stewart’s opinion in that case, however, begins with the premise that there is no reason for judging social and economic legislation by different standards under the equal protection clause. That argument has been undercut by Dukes. In any case, the logic of Justice Stewart’s argument rings hollow, as the fourteenth amendment was adopted in response to interferences with the exercise of social rights. Business advocates obtained the benefits of this amendment only by way of judicial afterthought. Regardless, government in a republic has as its raison d’etre the service of its natural citizens, economics being only subsidiary means to that end. Every reason exists, therefore, for subjecting social legislation to more exacting scrutiny than economic regulation. The Court’s decision in Dukes may pave the way for articulation of an intensified standard of scrutiny in the area of social legislation. While the Court seems to have in fact adopted such an approach in some cases, it has done so while adhering to the rhetoric of a rigid two-tier equal protection. The decision in Dukes makes it easier, should the Court wish to seize the opportunity, to articulate or formalize a standard for reviewing social legislation which conforms to what the Court has done in practice. Four of the concurring and dissenting opinions in Craig v. Boren, a 1976

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Id. at 487.

Id. at 485-86.


Term case involving sex discrimination, state that the thrust of the majority's opinion is the establishment of a "middle-tier" analysis for gender-based discrimination. It is of course entirely possible, if not more likely, that *Dukes* represents a narrow exception to what will otherwise remain a two-tier form of equal protection. Nonetheless, the possibilities are intriguing.

2. Gunther's Means-Oriented Test and Marshall's Sliding Scale

Two models of a "newer" equal protection have emerged. Professor Gunther's review of the 1971 Term led him to conclude the Court had adopted a "means-focused, relatively narrow, preferred ground of decision." He described the model as being interventionist without applying strict scrutiny. He predicted that the Court would examine the means chosen to further a particular legislative purpose, forsaking a review of legislative purpose, the latter inquiry being too close to substantive due process. With respect to the intensity of review, the model "would have the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must substantially further legislative ends." The
sliding-scale approach which Justice Marshall has advocated is the second model for a “newer” equal protection.\textsuperscript{103} This model would focus “upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the state interests asserted in support of the classification.”\textsuperscript{104} The more invidious the classification, the more important the interest affected, and the less important the governmental interest, the more rigorous should be the Court’s analysis.\textsuperscript{105}

The Supreme Court has never formally adopted either model. Indeed, the Court has never brought these two theories together in a head-to-head clash, but the Second Circuit did in \textit{Village of Belle Terre v. Boraas}.\textsuperscript{106} In examining an exclusionary

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\textsuperscript{104} \textit{Id.} at 21. See also Justice Frankfurter’s dissent in \textit{Morey v. Doud}, 354 U.S. 457 (1957).


\textsuperscript{106} This is really little more than a sophisticated balancing test. Note, \textit{The Mandate for a New Equal Protection Model}, 24 CATH. U.L. REV. 558, 585-87 (1975).

zoning ordinance Judges Mansfield and Oakes applied "a flexible and equitable approach, which permits consideration to be given to evidence of the nature of the unequal classification under attack, the nature of the rights adversely affected, and the governmental interest urged in support of it." The intensity of review under this test would depend on the relative value of the rights affected. To pass muster, the majority judges in Boraas observed, legislative classifications must "in fact" have a substantial relationship to a legitimate purpose. The dissenting judge, Timbers, declined the invitation to apply this test. Although he admitted that Supreme Court decisions indicated a departure from traditional two-tier analysis, he did not feel the Court had gone so far as to adopt the sliding-scale approach. He applied Gunther's model, but he did so less by way of conviction than by way of argument. In four sentences, however, he was able to capture the nature of the conflict between these two models.

A "sliding scale" approach may be appropriate in some contexts, but it seems to me inappropriate here. A court should not be required to attempt the impossible task of first assessing the precise value of the right or interest and then increasing or decreasing the intensity of its scrutiny accordingly. This approach would confer upon a judge wide discretion to overturn state and local legislation based largely on his own estimate of the value of competing interests—a highly abstract and individualistic determination.

The recent Supreme Court decisions, in my view, require a judge to make only the narrow value judgments needed in evaluating means.


108 476 F.2d at 821 (Timbers, J., dissenting).

109 Id. at 815 n.8.

110 Id. at 822. Judge Timbers was unconvinced that Supreme Court cases relied upon by the majority judges offered sound bases for formulating a general invigorated theory of minimum scrutiny. For example, he found Reed v. Reed, 404 U.S. 71 (1971), to reflect "an unexpressed special suspicion of sex classifications." 476 F.2d at 820. He also argued that Eisenstadt v. Baird, 405 U.S. 438 (1972), was so closely related to Griswold v. Connecticut, 381 U.S. 479 (1965), as to justify intense scrutiny on that basis alone. 476 F.2d at 820-21.

111 476 F.2d at 821 (footnote omitted). In a footnote, Judge Timbers indicated the Supreme Court may have adopted this "means-focused test" as a "technique to avoid the
What Timbers was rebelling against here is the same thing that bothered the Supreme Court in *Rodriguez*. The sliding scale does not articulate fixed standards for determining which interests and classifications should weigh more heavily than others—the critical element in deciding what degrees of scrutiny to apply. In this respect the sliding scale is a near mirror-image of the Warren Court's ill-defined process for identifying suspect classifications and fundamental constitutional interests—an approach the Supreme Court rather resoundingly rejected in *Rodriguez*. But to this objection, Justice Marshall gave an answer of sorts in *Rodriguez*, and whether or not he had in mind Judge Timbers' objections, his answer is at least responsive to the question Judge Timbers raised.

The majority is, of course, correct when it suggests that the process of determining which interests are fundamental is a difficult one. But I do not think the problem is insurmountable. And I certainly do not accept the view that the process need necessarily degenerate into an unprincipled, subjective "picking-and-choosing" between various interests or that it must involve this Court in creating "substantive constitutional rights in the name of guaranteeing equal protection of the laws," . . . . Although not all fundamental interests are constitutionally guaranteed, the determination of which interests are fundamental should be firmly rooted in the text of the Constitution. The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly. . . . Only if we closely protect the related interests from state discrimination do we ultimately ensure the integrity of the constitutional guarantee itself. This is the real lesson that must be taken from our previous decisions involving interests deemed to be fundamental.\(^{11}\)

However much Justice Marshall feels this gives certainty to the process of determining the relative degree of scrutiny which should be applied, the similarity of this approach to that of the

\(^{11}\) See text accompanying notes 9-32 supra.

\(^{12}\) 411 U.S. at 102-03 (footnote omitted).
Warren Court and the strong rejection of that approach by the Burger Court in Rodriguez would seem to destine Marshall's sliding scale to heroic dissents and oblique references in occasional, marginally important decisions.\textsuperscript{114} In contrast to the apparent rejection of Marshall's sliding scale, Gunther's model has never been clearly rejected by the Court and has been often cited. Yet, it remains in limbo. In the first place, insofar as it predicted that the Court would look to the means rather than the ends of legislative choices, it has not been entirely accurate.\textsuperscript{115} More significant, its emphasis on a means-oriented rather than "purposes" analysis has the appearance of a semantic argument akin to the debate over whether the chicken or the egg came first. For example, in United States Department of Agriculture v. Moreno\textsuperscript{116} the Court spoke of the denial of food stamps to "hippies" as being an impermissible legislative purpose. In that Moreno finds the purpose, rather than the means, a violation of equal protection, it violates a cardinal principle of the Gunther model. It is, however, possible to reconcile this case with the model, because, although the Court may have been particularly upset with a vicious classification, it may be argued that the classification did not rationally further the legislative goal of preventing welfare fraud. So construed, Moreno is a "means-focused" opinion and consistent with Gunther's model. An examination of some of the other cases on which Gunther relies would, conversely, show that they could be construed as inconsistent with the model. Weber v. Aetna Casualty & Surety Company\textsuperscript{117} is an example. Here the Court examined a workmen's compensation system which disadvantaged illegitimate children seeking recovery upon the death of the insured. The scheme was rationalized by the state as protecting and furthering legitimate family ties. Striking the statute down could be interpreted as consistent with Gunther's model, since the means chosen did not substantially further this interest. On the other hand, a close

\textsuperscript{114} A watered-down version of the sliding scale is visible in Marshall's opinion for the Court in City of Charlotte v. Local 660, Int'l Ass'n of Firefighters, 96 S. Ct. 2036 (1976). Arguably, this case is an example of how a balancing of the respective rights and interests can result in a relatively less intense degree of scrutiny under the sliding-scale approach.

\textsuperscript{115} United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973).

\textsuperscript{116} Id.

\textsuperscript{117} 406 U.S. 164 (1972).
reading of the case suggests that the Court was most offended by the apparent statutory purpose of visiting punishment for the parent's sins on the heads of the illegitimate children. Thus construed, Weber is, like Moreno, inconsistent with the Gunther model. Likewise, some of the Court's decisions dealing with gender-based discriminations can be analyzed as consistent or inconsistent with Gunther's model, depending on whether one prefers means or purpose-focused analysis. The Court's decisions in the area of sex would seem to be better explained, moreover, as resulting from a rebuttable judicial presumption, that gender-based discriminations do not serve a constitutionally permissible purpose. The fact that these cases are at least as susceptible to purpose-focused as means-focused analysis undermines the credibility of the Gunther model. It would be a mistake for litigants who are urging that a statute be found unconstitutional to couch their arguments solely in terms of whether the means substantially further a legitimate state purpose, and to assume that the purpose is legitimate. Litigants should also argue, in an appropriate case, that the purpose behind the legislation, whether facially apparent or to be inferred from a history of similar discriminations, is one that is not within the state's power to pursue. However the courts write their opinions, the legitimacy of the underlying purpose will continue to play an important role. To some this will be a return to substantive due process, but such complaints are the usual last resort of constitutional dissents.

Gunther's model also seems inadequate in describing the degree or intensity of review which the Court would apply. Gunther's only statement with regard to the intensity of review under this "interventionist" model was that it would require

"legislative means to substantially further legislative ends."\(^2\) This tells us very little about the actual intensity of review or how it differs from old minimum scrutiny. More significantly, to the extent that Gunther's model predicted intensified review on a general rather than selective basis, it is erroneous.\(^2\) Beyond the areas of sex and illegitimacy, intensified scrutiny has enjoyed little application.\(^2\) As a caveat, intensified review in *Eisenstadt v. Baird*\(^2\) can be attributed to its resemblance to *Griswold v. Connecticut*\(^2\) and the unusual penalty, pregnancy, which the statute would inflict for premarital and extramarital sex.\(^2\)

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\(^{121}\) Gunther, *supra* note 2, at 20.


\(^{123}\) See note 110 *supra*. Occasionally intensified scrutiny is applied in the area of criminal law. James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972). Thus, while the Court seems unwilling to follow Douglas v. California, 372 U.S. 353 (1963), or Griffin v. Illinois, 351 U.S. 12 (1956), in applying strict scrutiny to these areas of criminal law, United States v. MacCollom, 96 S. Ct. 2086 (1976) and Ross v. Moffit, 417 U.S. 600 (1974), the Court will reserve intensified review for the most noxious of schemes, *James v. Strange, supra*, and *Jackson v. Indiana, supra*. In *James*, Kansas had a system for recouping attorney's fees from indigent criminal defendants. In order to facilitate collection of this debt, the state deprived the debtor of the usual exemptions afforded to other debtors, such as the homestead exemption. The Supreme Court found this measure deprived the indigent debtor of the equal protection of the laws afforded to other debtors, because it deprived this narrow class of debtors of the means to keep their families together and made it more difficult for this class of persons to get on their feet again financially. *Jackson v. Indiana, supra*, is less a hallmark of intensified review than of revulsion to a proceeding that bore not the slightest trappings of fairness, and for that reason could have been decided on due process grounds alone. A 27-year-old, mentally-deficient, deaf-mute, who could neither read nor write and who was only able to communicate by sign-language at the level of a pre-school child, was committed to custody until he became capable of understanding the criminal charges which were filed against him. As his attorney pointed out, the defendant's mental condition was permanent and he would never gain the ability to understand the charges against him so as to be able to stand trial. In effect, the defendant had been committed to confinement for life, a term much longer than that provided for the acts with which he was charged. In addition, it is much more difficult to obtain the defendant's release from custody of this nature than from civil custody which is imposed because of the defendant's inability to care for himself. Altogether, this was too much for the Supreme Court.

\(^{124}\) 405 U.S. 438 (1972).

\(^{125}\) 381 U.S. 479 (1965).

\(^{126}\) The reach of either *Griswold* or *Eisenstadt* as a general constitutional attack on statutes criminalizing nonmarital sex was apparently restricted in *Doe v. Common-
Even in respect to gender-based classifications, the Court's application of intensified review has been erratic. Among the Court's decisions relating to gender-based discriminations, *Kahn v. Shevin* and *Geduldig v. Aiello* take a condescending approach rather than what might be described as an intensified form of review. \(^{131}\)


\(11^{st}\) Schlesinger v. Ballard, 419 U.S. 498 (1975), can also be criticized for taking a paternalistic approach to gender-based discrimination. This case upheld a mandatory retirement program for naval officers which had the effect of forcing earlier retirement for male officers than female officers. A majority of the Court upheld this plan as being based on a realistic assessment that promotional opportunities were more readily available in the Navy to men than women. Since mandatory retirement for male officers was related to promotions, the majority felt this scheme was fair. Justices Brennan, Douglas, Marshall, and White dissented. Justice Brennan would have measured all gender-based discrimination by the compelling interest standard, as he regards sex as a suspect classification. He went on to say that a benign racial or gender-based classification might pass that test, if in fact the differential treatment was both intentional and designed to achieve equality for all groups who were not equally situated. He did not find these factors present...
tax exemption for widows, but similarly situated widowers were not granted the exemption. Florida justified the special treatment of widows as compensating them for the extensive economic discrimination against women generally and as a method of alleviating loss of income by reason of the death of the marital party who was more likely providing marital income. Since sex is not recognized as a suspect classification, the majority found that this ameliorative purpose rationally justified the legislation.\(^{132}\) Brennan's dissent lashed out at this reasoning as exemplary of stereotyping which has characterized women as helpless and weak. Although he would agree that women had been discriminated against as a class, and that legislation for the purpose of assisting economically disadvantaged women would serve a compelling interest, the Florida statute failed to satisfy the standard of strict scrutiny which he believed was appropriate because it was not narrowly drawn for the benefit of needy widows only.\(^{133}\) Statutes such as those in Kahn, which provide a benefit to widows generally, and not merely to those who have been victims of discrimination, discriminate against widowers in violation of equal protection. In any event, the majority's position in Kahn, affording preferential treatment to widows generally, not merely those who are victims of discrimination, and at the same time allowing similarly situated widowers to be denied this benefit, would seem to fall short of anything like intensified review.

The majority position in Geduldig v. Aiello is even more irreconcilable with an intensified form of review. There, a California disability insurance program provided substitute income to those unable to work because of a disability not covered by workmen's compensation. With some very narrow exemptions all disabilities were covered, except for pregnancy. The majority upheld this discrimination on the transparently specious reasoning that

\(^{131}\) In reaching this holding, the Court relied upon Muller v. Oregon, 208 U.S. 412, 419-20 (1908) wherein it was observed that the physical condition of women justified special protective legislation for women as a class. 416 U.S. at 356 n.10. Muller is a model of paternalism.

\(^{132}\) See text accompanying note 39 supra.
the program did not deny benefits on the basis of sex, but did deny benefits on the basis of an "objectively identifiable physical condition with unique characteristics." To this the Court gratuitously added that there was no risk for which men were covered and women were not and vice versa. Justice Brennan's dissent again urged that classifications based on sex be subject to strict scrutiny.

Gunther predicted the Court would employ a form of intensified scrutiny which would require legislative means to substantially further legislative ends. He did not suggest the Court would apply varying degrees of review. Court decisions would indicate, however, that it has not been applying one, intensified degree of review. In Kahn and Schlesinger v. Ballard the Court seemed

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134 417 U.S. at 496 n.20.

The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those in Reed, supra, and Frontiero, supra.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.

Id. at 496-97 n.20. To illustrate the hypocrisy of this crafty definition of the relevant classes, the following hypothetical is posed. A similar insurance program includes all disabilities except sickle cell anemia. As a practical matter, only Blacks acquire this disease. Paraphrasing footnote 20: "The program divides potential recipients into two groups—diseased Blacks and nondiseased persons. While the first group is exclusively black, the second includes Blacks and non-Blacks." This logic is sophistic. The system described is racially discriminatory. For the same reasons, the system in Geduldig discriminated on the basis of sex. For a similar critique see Justice Brennan's dissent in General Elec. Co. v. Gilbert, 97 S. Ct. 401, 416 n.5 (1976).

135 417 U.S. at 496-97. In the field of race, the Court has held that mere equal application of the laws is not an end to constitutional inquiry under the equal protection clause. Loving v. Virginia, 388 U.S. 1, 8-9 (1966).

136 417 U.S. at 503. Justice Brennan rejected the majority's conclusion that the increased costs to the program for extending coverage to pregnancy disabilities could justify this exclusion. 417 U.S. at 501 n.5. Geduldig came before the Court postured solely on the constitutional issues. Guidelines issued by the Equal Employment Opportunity Commission in 1972 would forbid such practices under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000 (1970). EEOC, Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.10 (1975). In a 1976 Term case the Supreme Court held that the Commission's regulation was an inaccurate interpretation of Title VII. General Elec. Co. v. Gilbert, 97 S. Ct. 401 (1976).

to apply a reduced level of intensity when reviewing legislation which treated women more favorably than men, while it applied a more intense review in *Frontiero v. Richardson*\(^{138}\) when the only question involved was discrimination adversely affecting women. In *Craig v. Boren*, a case involving discrimination against men, Justice Brennan said that “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives,”\(^{139}\) a test which four

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\(^{139}\) 97 S. Ct. 451, 457 (1976). In *Califano v. Goldfarb*, 45 U.S.L.W. 4237 (U.S. Mar. 2, 1977), a plurality of four Justices applied this more intense form of review in affirming a lower court decision which found unconstitutional sex discrimination in social security survivors benefits under the Federal Old Age, Survivors and Disability Insurance Act, 42 U.S.C. §§ 401-31 (1970). Under the plan, widows of insured husbands were entitled to benefits as a matter of law on the death of the husband. Widowers of insured wives were eligible only if they could show that at the time of the wife's death, she was providing more than one-half of the husband's support. Justice Brennan's plurality opinion for affirmation was joined by Justices Marshall, Powell, and White. Justice Stevens filed a separate opinion for affirmation. Justice Brennan found in this program discrimination against the women who had contributed social security taxes. Their spouses would not receive the same protection as the spouses of male insureds, since male survivors who could not prove dependency would not receive benefits at all, whereas survivors of male insureds received the benefits in all cases, even if they were not in fact dependent. Relying on *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), and *Frontiero v. Richardson*, 411 U.S. 677 (1973), Justice Brennan concluded that a program which presumes all women are dependent on their spouses is a product of traditional “role-typing” which has been found to violate equal protection. In contrast to Justice Stevens and the dissenters, Justice Brennan refused to analyze this scheme in terms of discrimination against the surviving husband, which would have brought the case closer to *Kahn v. Shevin*, 416 U.S. 351 (1974). More importantly, he distinguished *Weinberger v. Salfi*, 422 U.S. 749 (1975), which had held that social welfare programs would violate the constitution only if the discriminations they created were “utterly lacking in rational justification.” 422 U.S. at 768, quoting *Fleming v. Nestor*, 363 U.S. 603, 611 (1960). Where, as in *Califano v. Goldfarb*, the discrimination is based on gender-based classifications, *Craig v. Boren* requires the classification to satisfy the more rigorous intermediate standard: It must serve “important governmental objectives and must be substantially related to the achievement of those objectives.” 97 S. Ct. at 457.

Justice Stevens agreed with the four dissenters that the program should be measured against the justification of administrative convenience espoused in *Mathews v. Lucas*, 96 S. Ct. 2755 (1976). Alternatively, he would have upheld the program had it been motivated by a congressional desire to cushion the widow's loss of the income-producing spouse, as in *Kahn v. Shevin*, 416 U.S. 351 (1974). Unlike the dissenters, however, Justice Stevens found that this scheme satisfied neither of these justifications. In so doing, he relied on data in Justice Rehnquist's dissenting opinion which showed that about 10% of all widows were not in fact dependent. Payments to nondependent widows thus cost the government approximately $1 billion dollars annually. 45 U.S.L.W. at 4243 n.5. Considering the rather staggering costs imposed for the purpose of "administrative convenience," Justice Stevens could not accept this as justifying the different treatment of widows and widowers. Since
other Justices found to be the equivalent of "middle-tier" analysis. But then, in Geduldig, the Court seemed to have retreated all the way back to traditional, deferential minimum scrutiny. In this setting it would be unrealistic to argue that the Court has applied one degree of intensified review in cases dealing with sex. Indeed, the levels of review in this area seem paternalistic, depending on what the Justices believe is best on a case-by-case approach.\textsuperscript{140}

Thus, Professor Gunther's model, while it has never been repudiated by the Supreme Court, fails to explain the Court's modes of analysis. Rather than one intensified level of review, there seem to be many. Economic regulation, receiving the least scrutiny, is the bottom line. Strict scrutiny is the upper limit. In between there are varying degrees of review. Decisions in the area of sex have not been favored with a consistent intermediate intensity of review, and the same is true of decisions affecting illegitimates.\textsuperscript{141}

Oddly enough, just where Gunther's model fails, Marshall's sliding scale seems to succeed, though maybe not as he would wish. Insofar as the Court's scrutiny bears the marks of consistency at all, it seems to depend on the majority's view of the nature of the classification,\textsuperscript{142} the importance of the interest af-

\textsuperscript{140} Erickson, Kahn, Ballard, and Wiesenfeld: A New Equal Protection Test in "Reverse" Sex Discrimination Cases?, 42 BROOKLYN L. REV. 1, 53 (1975); Comment, Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination, 75 COLUM. L. REV. 441, 456-62 (1975). The Court's attitude can best be summarized in the words of one of its members, Justice Stewart: "[T]he female of the species has the best of both worlds. She can attack laws that unreasonably discriminate against her while preserving those that favor her." HARV. L. SCH. REC. 15 (March 23, 1973), quoted in Ginsburg, Gender and the Constitution, 44 U. CIN. L. REV. 1, 15 (1975). The inferior legal and economic status of women is the product of this chivalrous mode of thought. See Frontiero v. Richardson, 411 U.S. 677, 684-87 (1973) (plurality opinion).


\textsuperscript{142} Classifications relating to sex have been regarded more suspiciously than any other classification excepting those actually ranked as suspect classifications. E.g., Craig v. Boren, 97 S. Ct. 451 (1976); Stanton v. Stanton, 421 U.S. 7 (1975). Illegitimacy is regarded less suspiciously than sex. Mathews v. Lucas, 96 S. Ct. 2755 (1976). Almost every other
fected, and the importance of the governmental interest promoted by the legislative program. The difference between Justice Marshall's sliding scale and that of other Justices who apply it or recognize it is probably less in the mechanics of the test than it is in the more subjective evaluation of what importance should be attached to the various elements that are weighed in the balance. While Justice Marshall has articulated a "nexus classification is given even less scrutiny than sex and illegitimacy: E.g., age, Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562 (1976); poverty, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

The only interests which have consistently demanded much in the way of intensified review are those relating to the conduct of family life and the decision of whether or not to beget children. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Eisenstadt v. Baird, 405 U.S. 438 (1972). Other traditionally important interests, such as employment, education, housing, and welfare, have not seemed to merit the Court's intensified review. Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562 (1976); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Lindsey v. Normet, 405 U.S. 56 (1972); Dandridge v. Williams, 397 U.S. 471 (1970).

Administrative convenience and fiscal conservation are the two governmental interests most frequently advanced. Mathews v. Lucas, 96 S. Ct. 2755 (1976); Geduldig v. Aiello, 417 U.S. 484 (1974). The number and variety of governmental interests that can be advanced is as endless as the advocate's imagination.


At least three members of the Court, the Chief Justice and Justices Stewart and Rehnquist, have clung to the view that the only legislation which will violate equal protection is that which is totally lacking in rationality, in the spirit of McGowan v. Maryland, 366 U.S. 420 (1961), and Lindsey v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). The Chief Justice expressed his preference for this standard in Craig v. Boren, 97 S. Ct. 451, 467 (1976) (Burger, C.J., dissenting). Justice Stewart concurred in Rodriguez because the legislative scheme was not wholly arbitrary and capricious, although he would admit that it was "chaotic and unjust." 411 U.S. at 59. Justice Rehnquist has carried this absurd standard one step further. He has said that equal protection "requires neither that state enactments be 'logical' nor does it require that they be 'just' in the common meaning of those terms. It requires only that there be some conceivable set of facts that may justify the classification involved." Weber v. Aetna Cas. & Sur. Co., 406 U.S. at 183 (Rehnquist, J., dissenting). At least in application, if not in articulation, Justice Stewart's threshold for an equal protection violation measured by what is "totally irrational" is lower than that of the Chief Justice and Justice Rehnquist. Compare the concurring opinion of Justice Stewart with the dissenting opinions of the Chief Justice and Justice Rehnquist in Craig v. Boren, 97 S. Ct. 451 (1976). Justice Powell rejected that standard for measuring an equal protection violation, condemning the discrimination against illegitimates in Weber as "illogical and unjust." 406 U.S. at 175.
theory" for weighing these interests, that theory was rejected by the majority in Rodriguez. But the "nexus theory" may have been rejected by the majority in Rodriguez less because of the theory per se, than because of Marshall's interpretation of it. Marshall is, of course, associated with that wing of the Court which has emphasized the importance of individual liberties and civil rights in the constitutional setting. By contrast, the majority Justices in Rodriguez have leaned in the other direction, strengthening governmental powers. The "nexus theory" to which the Rodriguez majority objected was one which valued highly the rights of citizens generally. This majority has, nonetheless, applied a "nexus theory" of its own, more selective and narrow, and possibly more subjective than Marshall's. Justice Marshall's standard for intensifying review would depend upon the connexity between the right denied and rights enshrined in the Constitution. By contrast, the Burger Court has intensified review in only a few areas, and then inconsistently. It seems evident, however, that the degree of review is a function of which interests are deemed more important and which classifications are suspicious, if not suspect, in the minds of a majority of the Burger Court.

CONCLUSION

In 1968 Richard Nixon promised to appoint more conservative Justices to the Supreme Court. His four appointees have combined to form the core of the present conservative majority. This majority's reaction against the broader implications of the "new" equal protection is reflected in its reformulation of equal protection analysis.

The most dramatic change has occurred in the area of strict scrutiny. Although strict scrutiny is of relatively recent vintage, the new majority was unable or unwilling to throw it out completely. Instead, by narrowly reading precedent, the Court limited the range of cases to which it would apply the compelling interest standard. Willing to make hard-nosed distinctions from some of the Warren Court's less tightly reasoned opinions, this new majority was able to restrict strict scrutiny without actually overruling prior decisions.

Seemingly at the expense of strict scrutiny, traditional or

144 See text accompanying notes 28-32, 113 supra.
minimal scrutiny found itself armed with new strength, sometimes. While the Court has attempted to clothe its restriction of strict scrutiny with the appearance of objectivity, developments with respect to minimum scrutiny have been highly subjective and selective. For the most part, the invigorated and varying degrees of review have been carried out under the guise of a single standard—the traditional, deferential rational basis test. It is clear, however, that the traditional rational basis test has not always been applied. Depending upon the classification or interests involved, the Court may apply more stringent levels of review, very much in the nature of Justice Marshall’s sliding scale. The principal differences between Justice Marshall and the majority on this point are two. First, Justice Marshall weighs more heavily civil rights and civil liberties than does the Burger Court majority, which more frequently gives great weight to the interests of the government. Second, Justice Marshall admits that he applies a sliding scale.

From the model bequeathed to it by the Warren Court, the Burger Court has fashioned an equal protection more to its liking and manipulation. On the one hand, it has narrowly interpreted precedent in the area of strict scrutiny, thereby forcing more decisions to be decided by lower tier scrutiny. On the other hand, by selectively and subjectively escalating the intensity of review to be applied in the lower tier, the Court has been able to achieve the same results as by strict scrutiny, without being locked into a holding that the classification is suspect or that the interest is fundamental in the constitutional sense. Consequently, the Court has given itself the freedom to arrive at diametrically opposed results in future cases involving the same classification or interest.

Michael P. O'Connell
COMMENT

SECTION 14(b) AND Communication Workers v. Western Electric Co.: An End Run Around Preemption

INTRODUCTION

It is a widely accepted principle of federalism that Congress has almost entirely preempted the field of labor law. Preemption developed rapidly in this area after Congress adopted the Taft-Hartley Amendments to the National Labor Relations Act in 1947. One of the most significant of these amendments is section 14(b)—a partial exception to the general rule of preemption—which expressly permits individual states to enact legislation prohibiting union-security agreements. In those states which

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3 Section 14(b) provides:

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.


4 The term "union-security" describes a variety of arrangements, usually contractual, whereby union membership [or the payment of the equivalent of union dues] is made a condition of employment. The traditional types of clauses include: (1) the closed shop, which permits the hiring only of members of the appropriate union [this type of clause is now illegal in the United States]; (2) the full union shop, under which all employees must join the union within a certain period, typically within 30 days of hiring; (3) the modified union shop, which allows new members to withdraw from membership at stated periods, or exempts old employees who are not members; (4) maintenance of membership, which imposes no membership requirement, but does require employees who join the union to continue their membership; and (5) the agency shop, which requires non-union employees.

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have not prohibited such agreements, union-security contracts are permitted by section 8(a)(3) of the federal act.  

The question was recently raised before the Colorado Supreme Court of whether this authority ceded to the states by section 14(b) is limited to flatly prohibiting union-security agreements or whether the section allows states to regulate such agreements in other ways. In Communication Workers v. Western Electric Co., the Colorado Supreme Court construed section 14(b) in conjunction with the Colorado Labor Peace Act (CLPA). The court held that the State of Colorado could regulate (as well as forbid) union-security clauses by requiring a referendum in which three-fourths of those employees voting must approve negotiation of such a security agreement before it is legal. More significantly, the court upheld that portion of the Colorado statute which, in the process of regulating such agreements, affects the procedure by which recognized bargaining units are determined: The statute specifies that, in order for members of a bargaining unit to be eligible to vote in a union-security authorization referendum, the bargaining unit itself must have been deter-

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1 Provided. That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement . . . .

29 U.S.C. § 158(a)(3) (1970). The Colorado Supreme Court incorrectly stated in Communication Workers that this section, which now in effect prohibits the closed shop, "disclaimed a national policy hostile to the closed shop . . . ." 551 P.2d at 1078.


1 Colo. Rev. Stat. §§ 8-3-101 et seq. (1973). In Communication Workers, the Colorado Supreme Court cited to the 1963 Colorado Revised Statutes. This comment, however, will cite only to the 1973 codification. For a history of the CLPA see H. Seligson & G. Bardwell, Labor-Management Relations in Colorado 139-52 (1961).
mined by means of an election. The court’s decision appears to raise serious questions of federal-state conflict because the National Labor Relations Board, which has been granted sole authority to determine units for general collective bargaining purposes, does not necessarily require or even always allow an election to be held for determining the appropriate unit.

Following the decision by the Colorado Supreme Court, Communication Workers was appealed to the United States Supreme Court. The Supreme Court dismissed the appeal for want of a substantial federal question. This comment will discuss two issues raised by Communication Workers which could have been confronted by the Supreme Court on appeal: (1) Is Colorado’s authority under section 14(b) limited to prohibiting union-security clauses; or does it include the power to regulate such clauses by requiring employees to authorize negotiation of the clause by a three-quarters affirmative vote? (2) May Colorado regulate the determination of appropriate units for general collective bargaining purposes; if not, does section 14(b) authorize Colorado to regulate unit determination for the specific purpose of defining the group of employees who will vote in the union-security authorization referenda?

I. Communication Workers v. Western Electric Co.

The provision of the Colorado Labor Peace Act requiring a

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1 This unit election is to be conducted by the Colorado Division of Labor, COLO. REV. STAT. § 8-3-107(2) (1973), though COLO. REV. STAT. § 8-3-104(10) (1973) provides that an election conducted by “any tribunal having competent jurisdiction” will also be recognized. Presumably the NLRB has competent jurisdiction within the meaning of the section.


2 This type of dismissal is a decision on the merits. The precedential weight of this decision is not entirely clear, although a recent case appears to bind lower courts until the Supreme Court indicates otherwise. Hicks v. Miranda, 422 U.S. 332, 343-45 (1975). Elsewhere, in an extensive dissent, Mr. Justice Brennan has pointed out the danger of placing such weight on a summary disposition. Colorado Springs Amusements, Ltd. v. Rizzo, 96 S. Ct. 3228 (1976) (dissenting from the denial of a petition for a writ of certiorari).

3 Other issues in Communication Workers which will not be discussed here include: (1) the definition of an “all-union agreement,” COLO. REV. STAT. § 8-3-104(1) (1973); (2) whether the agreements in issue are “all-union agreements”; and (3) whether the referendum and collective bargaining unit requirements were intended by the state legislature to cover only those employers whose business affects intrastate commerce or also those employers, such as the appellee-defendants, who are engaged in interstate commerce.
referendum to authorize a union-security agreement has not been widely followed since its adoption in 1943. Given traditional management opposition to union-security agreements, it is surprising that the first court challenge to agreements executed in the absence of such a referendum did not come until recently.

There was no factual controversy in *Communication Workers*. It was stipulated that the National Labor Relations Board had recognized the Communication Workers as the exclusive bargaining agent for the employees of the appellee-employers in several states. Secret ballot elections to determine the appropriate bargaining units or their representatives had not been held by either the NLRB or the Colorado Division of Labor. In addition, the union-security referenda required under the CLPA had not been conducted. Nevertheless, the employers voluntarily entered into several collective bargaining agreements with the Communication Workers. Each of these agreements contained either a modified agency shop or a modified maintenance-of-membership clause, which required, as a condition of continued employment, the payment of union dues. The agreements provided an escape period, however, during which current employees could divest themselves of the obligation to pay dues. Those who did not so act during the escape period were obligated to continue paying dues; if they subsequently failed to pay dues, the union

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12 See note 89 infra.

13 See note 89 infra.


15 In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Court upheld the authority of the NLRB to issue bargaining orders to an employer who had committed unfair labor practices “which have made the holding of a fair election unlikely or which have in fact undermined a union’s majority and caused an election to be set aside.” *Id.* at 610. Thus, an employer may have to recognize the union as the representative of its employees even without a representation election. See generally R. Williams, P. James, & K. Hunn, *NLRB Regulation of Election Conduct* (1974).


17 See note 4 supra.
could, under the terms of the agreements, compel the employer to discharge them. The dispute arose when the employers refused to dismiss employees who ceased payment of their dues after the escape period. The employers contended that the union-security clauses were invalid for lack of compliance with the CLPA.

The CLPA provides that it is an unfair labor practice for an employer to

\[\text{encourage or discourage membership in any labor organization . . . by discrimination in regard to hiring, tenure, or other terms or conditions of employment; except that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees in a collective bargaining unit where three-quarters or more of his employees have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the director [of the Colorado Division of Labor].}^{18}\]

\[\text{COLO. REV. STAT. § 8-3-104(1) (1973), as it was used in Communication Workers, is synonymous with the better known term, "union-security agreement." It should be noted, however, that the Communication Workers vigorously argued that "all-union agreements" as defined by the CLPA were limited to closed shop agreements, which were legal under federal law prior to the Taft-Hartley amendments adopted in 1947, and that lesser agreements, such as an agency shop, were not included in this definition and thus were not subject to the referendum requirement. The Wisconsin Supreme Court, in International Union, UAW v. Wisconsin Employment Relations Bd., 245 Wis. 417, 429, 14 N.W.2d 872, 878-79 (1944), construed that state's referendum requirements for all-union agreements, Wis. STAT. ch. 57, § 111.06(1)(c) (1939), as amended Wis. STAT. § 111.06(1)(c)1 (Supp. 1.01 1976-77), in conjunction with 29 U.S.C. § 158(a)(3) (1970) and held that "all-union agreements" applied only to those agreements that required all employees in the bargaining unit to be members of the union. But see Public Serv. Co., 89 N.L.R.B. 418, 420-24 (1950). The definition of an "all-union agreement" in Wisconsin at that time, Wis. STAT. ch. 57, § 111.02(9) (1939), as amended Wis. STAT. § 111.02(9) (1974), referred to "all of the employes in such unit" as does the present Colorado statute, COLO. REV. STAT. § 8-3-104(1) (1973). Prior to Communication Workers the Colorado Division of Labor interpreted, as did the Wisconsin court, "all-union agreements" as referring only to union-shop clauses. A maintenance-of-membership agreement, for instance, does not require all employees to be members of the union. Therefore, referenda were not required by the Division of Labor to authorize agency-shop or maintenance-of-membership clauses. Interview with Robert Frey, Labor Mediator with the Colorado Division of Labor, in Denver, Colorado (Oct. 22, 1976) [hereinafter cited as Second Frey Interview]. Since most of the collective bargaining contracts in Colorado contain these latter types of union-security agreements, id., rather than union-shop clauses, few referenda were required by the Division.}\]

\[\text{COLO. REV. STAT. § 8-3-108(c) (1973) (emphasis added). There has been no judicial opinion in Colorado on whether this section requires a three-quarters vote of all employees in the unit or whether it requires approval of only three-quarters of those voting. The Colorado Attorney General has issued an opinion stating that only a three-quarter majority among those actually voting is required. [1949-50] COLO. ATTORNEY GEN. BIENNIAL REPORT 94.}\]
In upholding the employers' refusal to discharge non-paying employees, the Colorado Supreme Court affirmed the trial court's ruling that (1) the statute applies to employers engaged in interstate as well as intrastate commerce; (2) the union-security clauses in question fall within the Colorado definition of all-union agreements; and (3) section 14(b) permits states to regulate (as well as forbid) union-security clauses by requiring an authorization referendum. The Colorado Supreme Court also held, however, that determination of the appropriate collective bargaining unit by secret ballot election is "a condition precedent to any labor organization's right to enter into an all-union agreement with an employer under Colorado law." While the court recognized that this unit, determined under Colorado law for the specific purpose of a union-security referendum, might be different from the general purpose collective bargaining unit determined by the NLRB, it found Colorado's regulation of unit determination to be "merely an incident" of the authority ceded to the state by section 14(b).

Unit determination for general collective bargaining purposes has been preempted from the states. The Colorado Supreme Court, however, has carved out an exception to this policy,

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21 A collective bargaining unit in Colorado is defined as: an organization selected by secret ballot, as provided in section 8-3-107, by a majority vote of the employees of one employer employed within the state who vote at an election for the selection of such unit, except that, where a majority of such employees engaged in a single craft, division, department, or plant have voted by secret ballot that the employees of such single craft, division, department, or plant shall constitute their collective bargaining unit, it shall be so considered. Two or more collective bargaining units may bargain collectively through the same representative or where a majority of the employees in each separate unit have voted to do so by secret ballot, as provided in section 8-3-107.
23 551 P.2d at 1076.
24 Id. at 1079.
25 Id.
with the apparent approval of the United States Supreme Court,27 by holding that the state has authority to determine the appropriate unit for the specific purpose of union-security referenda.28

II. STATE REGULATION OF UNION-SECURITY CLAUSES

The Colorado Supreme Court’s interpretation of section 14(b) is supported, in part, both by a United States Supreme Court decision, and by a reading of the legislative history surrounding the adoption of the Taft-Hartley amendments. The text of section 14(b) provides:

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.29

In the absence of state legislation authorized by this section, unions are free to negotiate union-security agreements once they are recognized as exclusive bargaining agents.30 Employers, of course, are not required to agree to include such clauses in the collective bargaining contract. In the so-called “right-to-work” states, however, legislation has been enacted under section 14(b) that prohibits union-security agreements, even if both employers and unions wish to include such clauses in their collective bargaining contracts. Colorado’s statute as interpreted takes a middle position. The CLPA permits union-security agreements but only after two elections: the first to determine the bargaining unit; and the second, a referendum, in which three-quarters of the voting employees of the unit to be covered by the union-security


28 551 P.2d at 1078, 1079. The Colorado Supreme Court specifically pointed out that the unit determined by the state was only for the purpose of an all-union referendum. Id. Nowhere in the CLPA, however, is there such a limitation of the purposes for which a state unit is chosen.


agreement must affirmatively approve the negotiation of such an agreement.

The latter aspect of this two-step process, the referendum, appears to be compatible with section 14(b): The CLPA is patterned after the Wisconsin Employment Peace Act which was upheld by the Supreme Court in Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board. One of the primary issues in Algoma was whether the NLRB’s certification of a unit representative “ousted” the state from regulating remedies for violations of the state’s union-security statute. In Communication Workers the union argued that the language in Algoma upholding the right of a state to regulate under section 14(b) was vague. Specifically, it was urged that Algoma’s holding concerned only the state’s right to enforce a remedy against an employer who sought to give effect to a union-security clause that was illegal under state law. Had the Colorado Supreme Court accepted this narrow interpretation, Algoma would not have been considered dispositive of the referendum issue in Communication Workers.

The union’s reading of Algoma is not supported, however, by an examination of the briefs submitted in that case which indicate that the regulation-by-referendum issue was adequately argued by both sides. Since the Court was presented with this

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31 COLO. REV. STAT. § 8-3-108(c) (1973). See note 18 supra.
32 Wis. Stat. ch. 57, § 111.06(1)(c) (1939), as amended Wis. Stat. § 111.06(1)(c)1 (Supp. 1.01 1976-77). The Wisconsin all-union referendum requirement was amended in 1975 so that unions certified by elections conducted by the Wisconsin Employment Relations Board or the NLRB could negotiate and execute “all-union agreements” without an authorizing referendum. However, unions that are voluntarily recognized by the employer must still receive authorization through a referendum before entering into such an agreement.
33 336 U.S. 301 (1949).
37 Respondent Wisconsin Employment Relations Board relied on the legislative his-
issue, the decision should be read in that light. Further, as the following indirect reference indicates, the Supreme Court did implicitly sanction the Wisconsin referendum requirement:

It is argued, however, that the effect of this section [14(b)] is to displace State law which "regulates" but does not wholly "prohibit" agreements requiring membership in a labor organization as a condition of employment. But if there could be any doubt that the language of the section means that the Act shall not be construed to authorize any "application" of a union-security contract, such as discharging an employee, which under the circumstances "is prohibited" by the State, the legislative history of the section would dispel it.

The "circumstances" noted by the Court, under which application of a union-security clause was prohibited, stemmed from the union-security referendum, which then required a two-thirds affirmative vote. The union-security agreement in question had not been authorized by such a referendum and thus was illegal under Wisconsin law.

The legislative history of the Taft-Hartley Act also supports the argument that states may, under 14(b), regulate union-security agreements by requiring referenda. Both the Wisconsin and Colorado statutes were in effect and were considered by Congress when it enacted section 14(b). Indeed, it appears that this...
section was inserted to clarify Congress' intent that such statutes not be preempted by federal law. Therefore, section 14(b) does not seem to preclude states from requiring union-security referenda.

III. THE COLLECTIVE BARGAINING UNIT

A. The Colorado "Unit"

The Algoma decision appears to authorize state mandated union-security clause referenda. One question which was not raised in Algoma, however, was whether the state could also "regulate" the appropriate unit in which the referendum was to be conducted. In Communication Workers, the Colorado Supreme Court interpreted the referendum requirement under the CLPA as being closely, if not inextricably, tied to a determination of the appropriate collective bargaining unit. The court held that the CLPA mandates, as a prerequisite to the referendum, a secret ballot election to determine the bargaining unit.

The court did not, however, specify exactly what was intended by the term "collective bargaining unit." To add further confusion, the definition of such a "unit" under the Colorado statute is ambiguous. Usually, the term "unit" refers to the group of employees to be represented, not to the representative agent of that group. The unit might include the employees in an entire plant; or there may be several units within a single plant, each unit consisting of employees from separate crafts, divisions, or departments, and each unit having a different representative agent. The CLPA seems to confuse the concept of a unit with that of the representative agent of that unit, and the Colorado Su-

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12 "Nor can an essential part of an act, which colors the whole, be stricken as invalid and the remainder sustained." City & County of Denver v. Lynch, 92 Colo. 102, 108, 18 P.2d 907, 910 (1932).
13 See note 51 infra.
14 See discussion in note 46 infra.
15 Colo. Rev. Stat. § 8-3-104(4) (1973). The determination of the representative agent, usually a union, has also been preempted from the states:
The federal Board's machinery for dealing with certification problems also carries implications of exclusiveness. Thus, a State may not certify a union as the collective bargaining agent for employees where the federal Board, if called upon, would use its own certification procedure.
Supreme Court does not clearly indicate which of these concepts it is using. The different interpretations of what a "unit" refers to in the CLPA were presented to the court. While the Communication Workers maintain that a "unit" is the group of employees to be represented, the Teamsters Union, in an amicus brief, argued with some hesitancy that a "unit" in Colorado is the representative union. Brief for Colorado-Wyoming Joint Council of Teamsters No. 54 as Amicus Curiae at 14, Communication Workers v. Western Elec. Co., 551 P.2d 1065 (1976).

When the Colorado Supreme Court compares "certification or recognition under the Federal Act" with the "recognition/definition section" of the CLPA, 551 P.2d at 1077, it does not refer to La Crosse Tel. Corp. v. Wisconsin Employment Relations Bd., 336 U.S. 18 (1949), or Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767 (1947), both of which directly concern the preemption of unit determination. Instead, the court refers to NLRB v. Gissel Packing Co., 395 U.S. 575, 596-97 (1969), which deals primarily with the validity of NLRB orders instructing employers to bargain with the union as the exclusive representative of the unit. 551 P.2d at 1077. The question of the unit as the group of employees to be represented was not at issue in Gissel. A more appropriate comparison could have been made with Mallinckrodt Chem. Works, Uranium Div., 162 N.L.R.B. 387 (1966). Thus, while the Colorado Supreme Court did not explicitly state which interpretation of a collective bargaining unit it accepted, if either, the citation of Gissel would seem to indicate an implicit acceptance of a Colorado unit as referring to the representative agent itself. The more likely explanation, however, in view of the general meaning that usually attaches to the term "unit," is that the court was just imprecise in its choice of citations.

In examining the different sections of the CLPA it becomes apparent that the statute does not clearly indicate what constitutes a Colorado unit. Among the various descriptions are the following: (1) "Collective bargaining unit" means an organization selected by secret ballot." Col. Rev. Stat. § 8-3-104(4) (1973) (emphasis added); (2) "A unit chosen for the purpose of collective bargaining shall be the exclusive representative of all of the employees in such unit . . . ." Col. Rev. Stat. § 8-3-107(1) (1973) (emphasis added); (3) A "[representative] includes any person who is the duly authorized agent of a collective bargaining unit." Col. Rev. Stat. § 8-3-104(17) (1973); (4) A "[person] includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, or receivers." Col. Rev. Stat. § 8-3-104(16) (1973). These sections of the CLPA confuse the distinction between the group of employees to be represented, the unit, and the representative agent, usually the union. Furthermore, a comparison of the parallel sections of the Wisconsin Employment Peace Act upon which the CLPA was modeled indicates that the Colorado Legislature did not create these distinctions, as did the Wisconsin Legislature, and used the term "unit" to refer to both a group of employees and a representative agent. Compare Col. Rev. Stat. §§ 8-3-107(1)-(4) (1973) with Wis. Stat. §§ 111.05(1)-(4) (1974). Since the court has not clarified this point, the CLPA should be amended to avoid further confusion. The Colorado Division of Labor, however, had apparently, in administering the CLPA, differentiated these concepts prior to Communication Workers, despite the statute's ambiguity. Interview with Robert Frey, Labor Mediator for Colorado Division of Labor, in Denver, Colorado (Sept. 8, 1976) [hereinafter cited as First Frey Interview].
group of employees. By construing the CLPA to require a secret ballot election to determine the bargaining unit, if that unit is to be recognized for the purpose of negotiating a union-security agreement, the court appears to have raised a serious question as to whether there is a substantial conflict between state and federal law on unit determination.

B. Unit Determination and the Preemption Question

The issue of preemption arises because of the possibility that the procedures followed by the NLRB and the election conducted by the Colorado Division of Labor could result in the recognition of different bargaining units. The NLRB does not always require, or even always allow, elections for unit determination; the Board has discretion to decide when to allow a unit determination election. The Colorado Supreme Court's interpretation of the

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47 Since the Division of Labor has traditionally treated a "unit" as the group of employees to be represented, had the court intended to affect this practice and accept the Teamsters' suggestion that the CLPA might actually be referring to the representative union when using the term "unit," a more explicit statement of such would have been expected. See note 46 supra.

48 When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959) (emphasis added).

49 When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted. Id. at 245 (emphasis added).

46 See note 13 supra and note 50 infra.

49 29 U.S.C. § 159(b) (1970). In Mallinckrodt Chem. Works, Uranium Div., 162 N.L.R.B. 387 (1966), a craft severance unit election was not permitted, since the Board held that a separate craft unit would not be appropriate. This type of unit election, known as a "Globe election," Globe Mach. & Stamping Co., 3 N.L.R.B. 294 (1937), allows the employees to decide whether they want a union that represents the larger, more inclusive unit, or whether they want the smaller, more fragmented units. The Board will allow such an election only if it feels that either choice would be appropriate for collective bargaining purposes. In its decision in Mallinckrodt the Board set forth several factors that it would consider in determining whether a unit was appropriate, and, therefore, whether a unit election would be permitted:

1. Whether or not the proposed unit consists of a distinct and homogenous
CLPA would require a secret ballot election in all unit determination situations as a prerequisite to the unit's negotiation of an enforceable union-security agreement. The court said:

Inasmuch as no secret ballot election was conducted for the purpose of establishing a collective bargaining unit authorized to enter into an all-union agreement with Mountain States and Western Electric, C.W.A. is not entitled to enforcement of the all-union agreements provisions which are, in our opinion, invalid. Even if such an election had been held and an appropriately authorized collective bargaining unit had been established, the union security provisions here in issue would be invalid and unenforceable because of the lack of employee approval through an all-union referendum. 51

Because of the dissimilarity between the policies underlying the federal and state procedures, the resulting units could arguably be different. To illustrate, the NLRB must frequently balance
the policy of seeking stable labor-management relations, which is more often than not advanced by having a small number of larger units with which the employer must negotiate, against the employees' freedom to choose a smaller unit, which might represent a particular craft, department, or division. Generally, the Board disfavors fragmentation and larger units are thus preferred. Under the CLPA, however, there is a strong policy favoring the smaller unit, as is evidenced by the mandatory craft severance election held in conjunction with any unit determination election. Should Colorado recognize a unit different from that recognized by the NLRB, even if only for the limited and specific purpose of conducting a union-security referendum, employers would be compelled to negotiate with the same employees as members of different bargaining units for different purposes. This situation creates the very confusion which Board certification was, in the interest of preventing industrial strife, designed to avoid.

The United States Supreme Court outlined the reasons for federal preemption of the unit determination question in 

Bethlehem Steel Co. v. New York State Labor Relations Board.

Thus, if both [the state and federal] laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might come out with different ones as they have in the past. If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other. The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. We do not believe this leaves room for the operation of the state authority asserted.

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53 Dry Cleaners & Laundry Workers Local 304 v. Sunnyside Cleaners & Shirt Laundry, 146 Colo. 31, 37, 360 P.2d 446, 449 (1961). When a craft requests severance from the larger unit, the NLRB may or may not grant a Globe election. See note 50 supra. However, under the CLPA the Colorado Division of Labor has no such discretion. Once a craft severance election is requested, it must be conducted by the Division. COLO. REV. STAT. § 8-3-107(2) (1973).


55 Id. at 775-76 (emphasis added). The Board has also pointed out the potential
Against this background, it is difficult to justify the Colorado Supreme Court's holding that the state and the federal government can exercise concurrent power to determine the appropriate unit for the same group of employees. To answer this query by saying that Colorado's determination is limited and not general is to beg the more basic question of whether or not Colorado's intrusion into this area creates the potential for confusion and discord which the policy of federal preemption is designed to avoid.

It is also possible that the state units would include individuals who are not included in the Board unit. The state director is empowered to "determine which persons shall be qualified and entitled to vote at any election held by him" (C.R.S. 1973 Section 8-3-107(5)). Contrary to Section 9(b)(3) of the NLRA, 29 U.S.C. 159(b)(3), the Labor Peace Act does not preclude the inclusion of plant guards in the same unit with other employees. And, while the Labor Peace Act appears to exclude supervisors from the definition of "employee" (C.R.S. 1973 Section 8-3-104(11)(a)), it does not contain a definition of "supervisors" comparable to that in Section 2(11) of the NLRA, 29 U.S.C. 152(11).


If the Colorado unit included individuals not in the Board unit, it is possible that a union security provision could be rejected as the result of the vote of individuals whom the union, insofar as the NLRA was concerned, did not represent. On the other hand, should a union security provision be approved in such unit, the union would be compelled, insofar as state law was concerned, to represent those individuals in negotiations over union security. Cf. C.R.S. 1973 Section 8-3-108(c).

The first proviso to Section 8(a)(3) of the NLRA, 29 U.S.C. 158(a)(3), permits the discharge of an employee for failure to pay union dues as required by a union security agreement only "if [the union] is the representative of the employees as provided in Section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made ***." Accordingly, an employer would violate Section 8(a)(3), and a union Section 8(b)(2), 29 U.S.C. 158(b)(2), of the NLRA by enforcing a union security agreement covering a bargaining unit other than that approved by the Board under Section 9 of the Act. Such violation is particularly likely to occur when the agreement covers a unit that is clearly inappropriate under the NLRA because it contains individuals, such as supervisors, who are statutorily excluded from Section 9 units. . . . On the other hand, should an employer or union attempt to apply a union security arrangement covering the Board-approved unit, rather than the state-approved union security unit, they would, under the decision below, violate the Labor Peace Act (see C.R.S. 1973 Section 8-3-108(1)(c), (2)(b)).

Id. at 10-11 (footnote omitted).
The Colorado Supreme Court's interpretation of the CLPA was not the court's only alternative. In its conflict of provisions section, the CLPA provides:

Wherever the application of the provisions of other statutes or laws conflict with the application of the provisions of this article, this article shall prevail; except that, in any situation where the provisions of this article cannot be validly enforced, the provisions of such other statutes or laws shall apply.54

If the court had held the question of unit determination was preempted by federal law, this section would have substituted the federal method of unit determination for that provided in the CLPA.57 Most of the conflict between the state and federal statutes concerning the determination of the appropriate bargaining unit would have been avoided. The unit determined by the NLRB would still have been required to comply with the CLPA's referendum before it could negotiate a union-security agreement, which, in any event, is the more important consideration from Colorado's point of view. The court did not, however, choose this interpretation, and its reading of the statute58 is a final interpretation of state law.59

54 COLO. REV. STAT. § 8-3-120 (1973).
57 It is clear that the determination of the collective bargaining [unit] within which the referendum is to be conducted is made by the Division of Labor. If ... election for a collective bargaining unit is preempted and, therefore, falls under the jurisdiction of federal law, the argument is easily answered in those instances where an appropriate bargaining unit has been determined either through certification or voluntary recognition under the provision of the National Labor Relations Act. The director must conduct the referendum within the unit established.

Answer Brief for Appellee Mountain States at 15, Communication Workers v. Western Elec. Co., 551 P.2d 1065 (Colo. 1976). There still may be problems, however, with attempting to conduct a referendum in an NLRB-recognized unit, when that unit cuts across state boundaries:

[T]he bargaining unit established in accordance with federal law may be inconsistent with that required by state regulation. Though the unit for the Michigan strike vote cannot extend beyond the State's borders, the unit for which appellant union is the federally certified bargaining representative includes Chrysler plants in California and Indiana as well as Michigan. . . . Without question, the Michigan provision conflicts with the exercise of federally protected labor rights. A state statute so at war with federal law cannot survive.

58 COLO. REV. STAT. § 8-3-104(4) (1973).
C. The Scope of Section 14(b)

The Colorado Supreme Court was aware of the preemption issues raised by its holding that the state could make a unit determination decision which might not be in accord with that reached by the NLRB. However, in an end run of this question, the court held that the state’s authority to determine units in which union-security referenda could be conducted is “merely an incident of the state’s power to prohibit the application of union-security agreements under the permissive grant of authority contained in § 14(b).” The court offers no authority or justification for this conclusion other than its own interpretation of state powers under section 14(b).

The most explicit statement by the United States Supreme Court on the scope of state powers under section 14(b) came in Retail Clerks v. Schermerhorn. In upholding the jurisdiction of a state to enforce its “right-to-work” law, the Court noted that the authority is narrow. For example, picketing to obtain a union-security agreement is within the exclusive jurisdiction of the NLRB even in states which prohibit the execution or application of such agreements. The Court further stated that a state’s regulatory authority “begins only with the actual negotiation and execution of the type of agreement described by § 14(b). Absent such an agreement, conduct arguably an unfair labor practice would be a matter for the National Labor Relations Board under Garmon.” While Schermerhorn II does not directly address the state’s authority to determine the appropriateness of a bargaining unit for union-security clause purposes, it does indicate that sec-

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551 P.2d at 1079.
5 Grodin & Beeson, State Right-to-Work Laws and Federal Labor Policy, 52 Calif. L. Rev. 95, 106-13 (1964). The term “right-to-work” is often used to refer to those states which absolutely prohibit union-security agreements. A “modified right-to-work” state refers to a state, such as Colorado, that prohibits union-security agreements, but only when the required majority approval is not satisfied pursuant to a referendum.
7 375 U.S. at 105 (emphasis in original).
tion 14(b) is a narrow cession of authority back to the states. Under the principle announced in *Schermerhorn II*, since negotiation of a union-security clause in Colorado cannot even properly begin prior to the determination of the appropriate unit or its agent, Colorado’s attempt to regulate unit determination would seem to fall outside the scope of jurisdiction granted to the state under section 14(b).

A final twist to the potential state-federal conflict presented by the Colorado Supreme Court’s decision should be noted. There may be situations when an NLRB-conducted election would satisfy the CLPA’s requirement that the appropriate unit be determined by a secret ballot. The CLPA defines elections as those conducted by the Colorado Division of Labor and “any other tribunal having competent jurisdiction.” Assuming that the NLRB has “competent jurisdiction” within the meaning of the CLPA, units which had been determined in an NLRB election could proceed to the union-security referendum. As noted earlier, however, the NLRB does not always conduct such elections. Those units determined without an election could not proceed to the union-security referendum. Consequently, depending on the NLRB’s method of unit determination, some, but not all, NLRB-determined units would be eligible to conduct the union-security authorization election.

The *Algoma* decision indicated that states may, pursuant to section 14(b), set up union-security referenda. However, it appears that the Colorado Supreme Court may have gone too far in adding an additional requirement that to be eligible to conduct the union-security referenda the appropriate bargaining unit must be determined in a CLPA-authorized election. The Colorado Supreme Court treated the unit determination election and the union-security referendum in the CLPA as an inseparable procedure. Two constitutional challenges to this process may be advanced: equal protection and preemption. It is arguably a denial of equal protection to allow those units determined by an election conducted by the NLRB to proceed with a union-security

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65 See notes 13 and 50 supra.
referendum, while denying the same right to units determined by the Board without an election. 68

Preemption appears, however, to be a stronger argument. By its adoption of section 14(b), Congress clarified the authority of the states to be more restrictive in their regulation of union-security agreements than amended section 8(a)(3) of the same act. Under the Wagner Act, a union-security agreement could be negotiated by any recognized collective bargaining unit. 69 Section 8(a)(3)(ii) of the Taft-Hartley amendments allowed such agreements only after they had been authorized by a simple majority of all employees eligible to vote in a unit determination election. 70 Although the mandatory federal authorization election was abandoned in a 1951 amendment to the act, 71 the 1947 amendments indicate a congressional desire to permit states to be more restric-

68 Since this is an economic issue, the traditional equal protection "rational basis" test would most likely have been applied, considerably reducing the possibility of a successful challenge. City of New Orleans v. Dukes, 96 S. Ct. 2513 (1976); Dandridge v. Williams, 397 U.S. 471 (1970). The application of this test almost insures that an act will be upheld. Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562 (1976); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). Recognizing that this unforeseen and convoluted application of Colorado law could not have been intended by the state legislature, the Court, on the other hand, might have applied a "rational basis plus" test in examining the statute, a more stringent test than the traditional "rational basis" test. See Gunther, The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8-20 (1970). The Burger Court, however, has not used this test in examining economic legislation. City of New Orleans v. Dukes, 96 S. Ct. 2513 (1976). See Canby, The Burger Court and the Validity of Classifications in Social Legislation: Currents of Federalism, 1975 Am. St. L.J. 1, 7-18; Forum: Equal Protection and the Burger Court, 2 Hast. Const. L.Q. 645 (1975); cf. Note, The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court, 75 Colum. L. Rev. 623 (1975).


70 Labor Management Relations Act, 1947, ch. 120, § 8(a)(3)(ii), 61 Stat. 136 (1947) (amending 29 U.S.C. § 158(a)(3) (1940)). Before this section was amended it brought about an unusual result in several instances:

In an election for the approval of a union-shop agreement, a majority of all eligible employees may vote in favor of such agreement, but this may be less than three-fourths of the employees actually voting, in which case the contract would be legal under Taft-Hartley, but illegal under the Colorado Act. In another case, three-fourths of the employees actually voting might vote affirmatively, but might not constitute a majority of all employees eligible to vote, in which case the contract would be legal under Colorado law but not under Taft-Hartley.


tive of union-security agreements than the federal policy, if they so choose. Among the more restrictive state policies in force at the time section 14(b) was debated and of which Congress was aware were those statutes, such as the Colorado and Wisconsin acts, that required something more than the simple majority of the federal referendum provision governing union-security clauses. The more restrictive state policies permitted by section 14(b) might then be interpreted as being limited to the authorizing referendum. While Congress clearly intended to allow states to regulate union-security agreements in this fashion under section 14(b), nowhere in the legislative history does it appear that Congress wished to permit states to regulate unit determinations for union-security purposes. Thus, section 14(b) should not be used to uphold this exception to the Bethlehem Steel holding that unit determinations are preempted from state authority.

In light of the Colorado Supreme Court’s lack of authority for this exception, the United States Supreme Court’s summary dismissal on appeal does little to clarify the extent of state powers under section 14(b). By holding that no substantial federal question was involved in Communication Workers—a somewhat surprising determination in light of the serious constitutional issues raised by the case—the Supreme Court leaves us to speculate on how the conflicts arguably resulting from the enforcement of the CLPA are to be reconciled with the preemption doctrine.

IV. THE POTENTIAL IMPACT OF Communication Workers

Colorado, by basing the referendum on the unit election requirement, may force unions to put pressure on the NLRB, as a tribunal of competent jurisdiction, to conduct unit determination

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18 While Congress was aware of the recent Bethlehem Steel decision, 330 U.S. 767 (1947), preempting unit determination, it made no attempt when considering section 14(b) to include within the section a statutory exception for unit determination for union-security purposes. Sen. Rep. No. 105, 80th Cong., 1st Sess. 6 (1947).

19 A number of attorneys familiar with Communication Workers feel that one explanation for this dismissal was that the Supreme Court accepted the appellee’s contention that, since fragmentation or conflict of bargaining units had not yet actually occurred, the issue was not sufficiently ripe for review. Brief for Appellee Western Elec. Co. at 14-20, Communication Workers v. Western Elec. Co., 45 U.S.L.W. 3501 (U.S. Jan. 25, 1977). Another plausible explanation is the Court’s reluctance to deal with this issue, in light of President Carter’s support for the repeal of section 14(b).
elections so that those Colorado units can then proceed to the union-security election. This could inhibit the Board's discretion in the performance of its duties.\textsuperscript{75}

An additional problem is that the Colorado Division of Labor, which has the primary responsibility under the CLPA for conducting unit elections and referenda, does not have the capability to supervise the potential overload of elections which enforcement of \textit{Communication Workers} might impose on it.\textsuperscript{76} In 1975 the Division conducted only seven or eight unit determination elections, and only 27 union-security referenda.\textsuperscript{77} Since 1943 there have been only 375 union shop referenda.\textsuperscript{78} There are approximately 4,750 to 5,700 collective bargaining units in Colorado,\textsuperscript{79} 95\% of which have already been recognized or certified by the NLRB.\textsuperscript{80} Many, if not most, of these units have not been determined by a CLPA unit election.\textsuperscript{81} Thus, a unit election would be required before a referendum could be held. And with the possibility of unit fragmentation as a result of the CLPA unit severance provisions, an even greater number of referenda might be necessary.

Since the Division is not currently capable of meeting such a dramatic increase in the demand for unit determination and union-security elections, the practical effect of this decision may be to frustrate employees and unions in their attempts to seek

\textsuperscript{75} "As the political winds change and new members are appointed [to the Board] the unit decisions may show drastic turnabouts." J. Aboodeely, \textit{The NLRB and the Appropriate Bargaining Unit} 13 (1971). By exercising its discretion as to whether or not to hold a unit election, the Board can, either directly or indirectly, affect which unit shall prevail. This, in turn, may determine the issue of union representation. \textit{Id.} at 225, \textit{citing} Liberty Coach Co., 181 N.L.R.B. 182 (1970), where the bargaining unit found appropriate by the Board was determinative of the representative question. The Board's decision on unit appropriateness, and thus on unit elections, will determine whether a union representing that unit can ever obtain a legal union-security agreement.

\textsuperscript{76} The Division of Labor has estimated that it might need between 20 and 50 more employees and between one and three million more dollars to conduct these elections. Carey, \textit{Union 'security agreements' in jeopardy}, Rocky Mountain News (Denver), Feb. 7, 1977, at 6, col. 1.

\textsuperscript{77} Second Frey Interview, \textit{supra} note 17.

\textsuperscript{78} Motion for stay of mandate by the defendant State of Colorado with attached affidavit at 1, 3-4, \textit{Communication Workers v. Western Elec. Co.}, 551 P.2d 1065 (Colo. 1976) [hereinafter cited as \textit{Motion for stay}].

\textsuperscript{79} Second Frey Interview, \textit{supra} note 17.

\textsuperscript{80} Motion for stay, \textit{supra} note 78.

\textsuperscript{81} Second Frey Interview, \textit{supra} note 17.
unit and union-security elections. These elections have usually been conducted by the Colorado Division of Labor within two weeks of the request.\(^2\) A significant increase in the number of requests for these elections may create long delays during which time an employer might seek to discourage employees from voting for a union-security agreement\(^3\) or to persuade employees to vote against the formation of a CLPA bargaining unit; or, in hopes of dividing union solidarity, the employer might seek to encourage craft fragmentation of the bargaining unit. The problems created by having a single NLRB unit for general collective bargaining purposes that encompasses several CLPA units for the specific purpose of the authorization referendum can only lead to confusion for employers, employees, and unions.

During the potential delays before elections, union funds derived from initiation fees and dues could drop significantly, since union-security provisions requiring such payments would not yet have been validated. Even though the union, which has been recognized as the exclusive bargaining agent by the NLRB, might be crippled financially, it will still be required under federal law to fairly represent all the employees in grievance, arbitration, and collective bargaining matters, regardless of whether the employees have tendered dues to that union.\(^4\) Employees who are paying

\(^2\) First Frey Interview, supra note 46.

\(^3\) Even if the director of the Division of Labor should find that the employer has committed an unfair labor practice by interfering with the employees' free choice in the referendum, there is some question as to whether an adequate remedy is available. If the referendum is still required to authorize a union-security clause, there appears to be little discouragement of employers from interfering with this right. COLO. REV. STAT. §§ 8-3-108(4) and 8-3-110(7) (1973).

\(^4\) In Wallace Corp. v. NLRB, 323 U.S. 248 (1944), the Court stated:

The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially.

\textit{Id.} at 255. \textit{See also} Weyand, \textit{Majority Rule in Collective Bargaining}, 45 COLUM. L. REV. 556, 565-67 (1945). For a critique of this principle see Schatzki, \textit{Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?}, 123 U. PA. L. REV. 897 (1975). It is this principle of exclusivity, with its concomitant requirement of fair representation of all employees in the unit, to which many point when supporting the concept of union security:

Congress recognized that in the absence of a union-security provision "many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost."
for the union's services might be expected to put pressure on their fellow employees who are not. This pressure would probably be most pronounced in the many small units that predominate on the Colorado labor scene, since most employees would know each other, and therefore would know who was not contributing his or her fair share.

Unions, to insure their success in these elections which now become so vital to their financial strength, can be expected to expand their campaign activity among the employees. Rather than attempting to foster greater cooperation between labor and management, union activists may emphasize their conflicts with management in these campaigns in order to gain greater support from other employees. It takes little imagination to see both that

S. REP. No. 105, 80th Cong., 1st Sess. 6 (1947).
Section 8(a)(3) gives employers and employees who feel that union-security agreements promote stability by eliminating "free riders" the right to continue such arrangements.

Id. at 7.


In criticizing the original Taft-Hartley majority referendum requirement to authorize union-security clauses, Archibald Cox pointed out the negative factors resulting from a referendum election requirement:

One disadvantage is the delay which will result in the negotiation of collective bargaining agreements. The election will have to be held before negotiations for the contract can be commenced and, even if the Board is able to expedite its processes, the election proceedings are likely to take a considerable period of time. A second disadvantage is the election campaign which will inevitably precede each ballot. Union leaders will be under heavy pressure to arouse the employees' enthusiasm for strengthening their organization against the employer; and any competing union in the plant, if not the employer himself, will be tempted to campaign against the union. Such a period builds up intense emotions; friction develops and production is slowed. Nor is it easy to resume normal relationships. In newly organized plants the problem will be especially difficult for, instead of the period of readjustment which should follow the selection of a collective bargaining representative, there will come renewed conflict over the union shop.

Moreover, the execution of the initial union shop contract may not always mark the end of the struggle. Section 9(e)(2), by providing for votes as often as once a year upon petition of 30% of the employees, holds out the constant hope that the union's authority may be subsequently curtailed. Thus, each annual bargaining conference will be conducted under the threat of being suddenly interrupted by the filing of a petition and the subsequent turmoil of an election campaign.
this situation could produce the very industrial confusion and strife which the National Labor Relations Act was designed to minimize and that the United States Supreme Court should have more closely considered these issues.

CONCLUSION

*Algoma* supports Colorado's regulation of union-security clauses by the referendum vehicle. *Bethlehem Steel* holds that Colorado's power to determine appropriate units for general purposes of collective bargaining has been preempted by federal legislation. Determination of the representative agent is also within the sole responsibility of the NLRB. *Schermerhorn II* and the legislative history of section 14(b) indicate that the scope of authority granted to the states by this section should be narrowly construed and should not be extended to encompass unit determination for the specific purpose of conducting union-security referenda. The United States Supreme Court's handling of the case, in effect affirming *Communication Workers*, requires speculation as to why the Court found no substantial federal question. If, and when, actual conflict does occur between federal and state policy on unit determination, a closer scrutiny by the Court of these issues seems justified.

The Colorado Supreme Court, by interpreting the CLPA as mandating a unit election as a necessary prerequisite to a union-security referendum, may have so entangled these two requirements that the entire unit and referendum procedure might have fallen had the United States Supreme Court struck down the unit election provision. Had this occurred, employers and employees could have freely negotiated union-security agreements absent an authorizing referendum under section 8(a)(3) of the National Labor Relations Act. The Colorado Legislature, however, could have reinstituted the authorization referendum requirement by simply amending the CLPA, so that such a referendum could be


*See note 37 supra.*

*Another alternative is that had the United States Supreme Court struck down the CLPA unit election requirement a remand to the state court of *Communication Workers* could have been ordered for a determination of the severability of the unit and referendum requirements.*

conducted in that portion of any NLRB-recognized unit contained within Colorado, whether determined by an election or otherwise.

In light of the low number of state referenda conducted in the past, and the high rate of approval for union-shop agreements in these elections, elimination of the referendum is the most logical, economical, and administratively manageable alternative. Employee input into the union-security issue would be preserved. The employees can seek to influence the type, if any, of union-security clauses negotiated through their normal union channels. More importantly, employees can force the federal Board, by petition of 30% of the employees, to conduct a deauthorizing referendum which would rescind a union-security clause. While the authorizing referendum conducted by Colorado, which

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Footnotes:

8 From 1945 to 1960 the Industrial Commission (which supervised Colorado labor election procedures before this responsibility was transferred to the Division of Labor) conducted only 347 all-union referenda, of which the union won 314. H. SELIGSON & G. BARDWELL, LABOR-MANAGEMENT RELATIONS IN COLORADO 147 (1969). This high rate of approval involves union-shop agreements—the most stringent form of union-security clause now permitted. Even higher rates of approval might be expected in referenda conducted for lesser or modified union-security agreements, such as a maintenance-of-membership clause. Seligson and Bardwell also point out that the Industrial Commission "conduct[ed] all-union elections in collective bargaining units which have been certified in representative elections conducted by the National Labor Relations Board." Id. at 146. The Division of Labor has followed this procedure. Second Frey Interview, supra note 17.

9 Wisconsin, which also has a referendum requirement, has had similar experiences. The unions there have won all-union referenda about 87% of the time. G. HAFERBECKER, WISCONSIN LABOR LAWS 168 (1958). This probably understates the number of union-security clauses agreed to in Wisconsin, since "[i]t is obvious that a large number of all-union agreements have been executed in defiance of the statutory provisions." Id. at 168, quoting [1941-1942] WISCONSIN EMPLOYMENT RELATIONS Bd. ANN. REP. 8. This defiance is interesting in light of the Wisconsin Employment Relations Board's opinion in Mathie-Ruder Brewing Co., Dec. No. 1506 (1948), cited in Comment, A Study of the Wisconsin Employment Peace Act—Part II—Union Security, 1956 Wis. L. REV. 481, 487-88. This comment points out that "the mere inclusion in a collective bargaining agreement of an unauthorized 'all-union' clause is a violation of the Act."

10 Since over 90% of the unions in Colorado have negotiated some form of union-security clauses, and few referenda have been held, First Frey Interview, supra note 46, it appears that Colorado employers, as well as Wisconsin employers, have been willing to agree to all-union contracts without referenda. The federal referendum requirement was dropped in 1951 because of the high cost of holding these elections, as well as the high rate of union-security clause approvals. H.R. REP. No. 1082, 82d Cong., 1st Sess. (1951); 1949 NLRB ANN. REP. 6.


usually results in approval of the union-security clause anyway, would not then be mandated by the state, the deauthorizing referendum conducted by the NLRB would still be available upon petition to provide similar protection of employee rights. The additional and unnecessary time and expense to the State of Colorado would be avoided, along with all the potential confusion accompanying these elections.

Legislative elimination of Colorado's union-security authorization referendum, either by the state or by congressional repeal of section 14(b), would merely legitimize the traditional practice in Colorado of negotiating and executing such agreements absent a referendum, and thereby reinstate the status quo prior to Communication Workers.

August Randall Vehar

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83 In the one instance where the people of Colorado were able to render a direct opinion on this issue, they overwhelmingly rejected a proposal to make Colorado a “right-to-work” state and prohibit all union-security agreements by a vote of 318,480 to 200,319. Proposed Constitutional Amendment No. 5, An Act to Amend Article II of the State Constitution Providing that Membership in Any Labor Union or Organization Shall Not Be Required as a Condition to Obtain or Retain Employment, Nov. 4, 1958. On file with the Colorado Legislative Council, Colorado State Capitol, Denver, Colorado.

84 See note 89 supra.
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