Constitutional Review: Supreme Court, 1976-77 Term

By MICHAEL P. LEHMANN* AND MARY C. EKLUND**

Equal Protection

In the following sections, eight cases decided by the United States Supreme Court during its 1976-77 term will be analyzed. These cases represent the more important equal protection decisions disposed of, in whole or in part, on constitutional grounds.[1] Consideration of these rulings will be divided into five parts. The first section analyzes two major gender-based discrimination cases, *Craig v. Boren*[2] and *Califano v. Goldfarb.*[3] The second section considers classifications based on race and reviews two of the Court's more important decisions during the term, *Village of Arlington Heights v. Metropolitan Housing Development Corporation*[4] and *United Jewish Organizations of Williamsburgh v. Carey.*[5] The third and fourth sections examine, respectively, challenges to laws classifying on the basis

* A.B., 1974, University of California, Berkeley; J.D., 1977, University of California, Hastings College of the Law. Member, California Bar.

** Member, third-year class.

1. Other decisions include: Milliken v. Bradley, 433 U.S. 267 (1977) (upheld compensation program and interdistrict remedy to redress the effects of past segregation); Connor v. Finch, 431 U.S. 407 (1977) (legislative reapportionment plan held not to embody equitable discretion necessary to meet the mandates of the Fourteenth Amendment); United States v. Antelope, 430 U.S. 641 (1977) (felony murder provision of federal enclave statute held not to discriminate against Indians); Town of Lockport v. Citizens for Community Action, 430 U.S. 259 (1977) (laws requiring separate majority approval for changes in county government upheld against equal protection challenge); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977) (exclusion of Kansas Delawares from distribution of funds to redress treaty violation upheld against equal protection challenge); Stanton v. Stanton, 429 U.S. 501 (1976) (vacated state judgment finding constitutional a law incorporating a gender-based discrimination in determining the age of majority); Knebel v. Hein, 429 U.S. 288 (1976) (upheld law disallowing deduction for travel expenses in connection with a job training program against an equal protection challenge); Mathews v. De Castro, 429 U.S. 181 (1976) (social security law alleged to discriminate against divorced wives held not to constitute a denial of equal protection).

2. 429 U.S. 190 (1976).

3. 430 U.S. 99 (1977).

4. 429 U.S. 252 (1977).

5. 430 U.S. 144 (1977).

of illegitimacy, *Trimble v. Gordon*[6] and *Fiallo v. Bell*,[7] and alienage, *Nyquist v. Mauclet*.[8] The final section is devoted to a discussion of *Maher v. Roe*,[9] a transitional decision involving an alleged infringement of the fundamental rights of a distinct class of persons. As noted, the Supreme Court has decided other equal protection cases during this term, a few of which will be mentioned and analyzed.[10] But the opinions adverted to are the most important and provide a useful basis on which to analyze the type of review the Court is currently willing to accord equal protection claims in a variety of contexts.

6. 430 U.S. 762 (1977).
7. 430 U.S. 787 (1977).
8. 432 U.S. 1 (1977).
9. 432 U.S. 464 (1977).
10. Most particularly, Poelker v. Doe, 432 U.S. 519 (1977); Beal v. Doe, 432 U.S. 438 (1977); Castaneda v. Partida, 430 U.S. 482 (1977); Califano v. Webster, 430 U.S. 313 (1977).

A. Gender-based Classifications

1. *"Substantial" Relation to "Important" Governmental Interests*

In *Craig v. Boren*,[1] the Supreme Court held that to withstand an equal protection challenge, gender-based classifications must both serve "important" governmental objectives and be "substantially related" to the achievement of those objectives.[2] In doing so, the Court once again refused to subject gender-based discrimination to strict scrutiny, as had been urged by a plurality of the Court in *Frontiero v. Richardson*.[3] The majority of the Court in *Craig* did elect, however, to engage in a more critical examination of a gender-based classification than is normally utilized when fundamental rights and suspect classes are not present. Perhaps the most interesting parts of the opinion are the separate concurrences of Justices Powell and Stevens and the dissent of Justice Rehnquist, which openly discuss the appropriate standard of review in suits alleging gender-based discrimination.

Craig, a male born on September 25, 1953, and Whitener, a licensed beer vendor, alleged that an Oklahoma statute[4] prohibiting the sale of "non-intoxicating" 3.2% beer to males under the age of twenty-one and to females under the age of eighteen constituted discrimination on the basis of

1. 429 U.S. 190 (1976). For some useful discussions of the standard of review in equal protection cases decided by the Burger Court, *see generally Forum: Equal Protection and the Burger Court*, 2 HASTINGS CONST. L.Q. 645 (1975); Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

2. 429 U.S. at 197.

3. 411 U.S. 677 (1973). In *Frontiero*, the Court invalidated 37 U.S.C. § 401 (1970) (amended 1973) and 10 U.S.C. § 1072(2)(C) (1970), which provided that spouses of male members of the uniformed services are dependents for purposes of obtaining increased quarters allowances and medical and dental benefits, but that spouses of female members are not dependents unless they are in fact dependent for over one-half their support. Justices Brennan, Douglas, White and Marshall found that classifications based on sex are inherently suspect. 411 U.S. at 682. Justice Stewart concurred in the judgment, finding an "invidious discrimination" in the statute. *Id.* at 691 (Stewart, J., concurring in the judgment). Justice Rehnquist dissented. *Id.* (Rehnquist, J., dissenting). Finally, Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurred in the judgment, finding a denial of due process, but deeming it unnecessary to decide in that case whether or not sex is a suspect classification. *Id.* at 691-92 (Powell, J., concurring, joined by Burger, C.J. and Blackmun, J.).

4. OKLA. STAT. ANN. tit. 37, §§ 241, 245 (West 1958 & Supp. 1977). Section 241 reads: "It shall be unlawful for any person who holds a license to sell and dispense beer . . . to sell, barter or give to any minor any beverage containing more than one-half of one per cent of alcohol measured by volume and not more than three and two-tenths (3.2) per cent of alcohol measured by weight." Section 245 reads: "A 'minor', for the purposes of [section] . . . 241 . . . is defined as a female under the age of eighteen (18) years, and a male under the age of twenty-one

gender, which resulted in a violation of the rights guaranteed by the equal protection clause of the Fourteenth Amendment to males between eighteen and twenty-one years of age.[5] Recognizing that *Reed v. Reed*[6] and later cases had established the precept that classification by gender must substantially further important governmental interests, the three-judge district court found that the Fourteenth Amendment denied to the states "the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute."[7] Having enunciated this standard, however, the three-judge court concluded that the state had met its burden of proving that the gender-based classification incorporated in the challenged enactment was justified. In doing so, it relied on the state's statistical evidence showing that males between eighteen and twenty-one were more likely to be the subjects of drunk driving arrests and also more likely to suffer traffic injuries.[8] According to Circuit Judge Holloway, who wrote the opinion for the court, these statistics demonstrated that the gender-based discrimination was substantially related to the achievement of the important governmental objective of traffic safety in Oklahoma.[9] Consequently, the three-judge court dismissed

(21) years." Oklahoma, in the statute governing capacity to contract, originally fixed the age of majority for males at 21, whereas for females it was 18. OKLA. STAT. ANN. tit. 15, § 13 (West 1972). It also fixed the age of criminal responsibility for males at 16 and for females at 18. 1970 Okla. Sess. Laws ch. 226, § 2 (repealed 1972). This latter provision was held to be a denial of equal protection. Lamb v. Brown, 456 F.2d 18, 20 (10th Cir. 1972). Consequently, the age of 18 was fixed as marking the commencement of criminal responsibility and civil majority for members of both sexes. *See* OKLA. STAT. ANN. tit. 10, § 1101(a) (West Supp. 1977) (criminal responsibility); OKLA. STAT. ANN. tit. 15, § 13 (West 1972 & Supp. 1977) (civil majority). The 3.2% beer differentiation was codified as an exception to the gender-free classification. *See* OKLA. STAT. ANN. tit. 37, §§ 241, 245 (West Supp. 1977).

5. 429 U.S. at 192.

6. 404 U.S. 71 (1971). *Reed* invalidated a provision of the Idaho probate code that gave preference to men over women when persons of the same entitlement class apply for appointment as administrator of a decendent's estate. The Court found the law arbitrary, in that it bore no rational relationship to any legitimate state objective. *Id.* at 76.

7. Walker v. Hall, 399 F. Supp. 1304, 1308 (W.D. Okla. 1975), *rev'd sub nom.* Craig v. Boren, 429 U.S. 190 (1976).

8. *Id.* at 1311.

9. *Id.* at 1313. The evidence consisted of eight exhibits: (1) an extract of data compiled by the Oklahoma State Bureau of Investigation based on figures culled from 194 local police departments showing that 427 males aged 18-20 were arrested for drunk driving *vis-à-vis* 24 females; (2) statistics from the Oklahoma City Police Department showing that 82% of 18 year olds, 98% of 19 year olds, 94% of 20 year olds and 96% of 21 year olds arrested for driving under the influence were males; (3) a random roadside survey of drivers in Oklahoma City indicating that 84% of males under 20 (*vis-à-vis* 77% of such females) liked beer, that 16.5% of the males (*vis-à-vis* 11.4% of the females) had consumed at least two alcoholic beverages within the past two hours and that 14.6% of the males (*vis-à-vis* 11.5% of the females) had blood alcohol concentrations in excess of .01%; (4) and (5) statistics that the greatest number of traffic fatalities in the state were among the class of males aged 18-20; (6) an FBI report showing a

the action.[10]

The Supreme Court reversed the district court's ruling in a seven-to-two decision.[11] The majority opinion was authored by Justice Brennan and joined by Justices White, Marshall, Powell and Stevens. After first addressing the preliminary issue of standing,[12] the Court initiated its discussion of the merits by noting that "previous cases establish that classifications by gender must serve important governmental objectives and must be substan-

nationwide increase of 96% in drunk driving arrests between 1969 and 1972; (7) a Minnesota survey showing that Oklahoma statistics corresponded to those of other states; (8) a report by the Joint Conference on Alcohol Abuse and Alcoholism detailing the point that traffic accidents involving drivers under 18 increase threefold after such drivers imbibe one or two alcoholic drinks, thus increasing their blood alcohol content to between .01 and .04%. *Id.* at 1309-10.

10. *Id.* at 1314.

11. 429 U.S. at 190.

12. *Id.* at 192-97. The issue was raised because Craig reached the age of 21 after the Court noted probable jurisdiction. Thus, the problem was reduced to one of whether Whitener, the vendor, could rely upon the objections of males between 18 and 21 to establish her claim of unconstitutionality. Justice Brennan characterized the Court's decisional limitations on a litigant's assertion of *jus tertii*, or standing to assert the constitutional claims of those not before the Court, as the result of a "salutary 'rule of self-restraint' designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative." 429 U.S. at 193. Because the lower court had already decided the equal protection challenge and the parties had sought an authoritative constitutional determination, he argued that to forego consideration of the merits at this point would impermissibly foster "repetitive and time-consuming litigation under the guise of caution and prudence." *Id.* at 193-94. The majority found that, in any event, the vendor had suffered sufficient injury in fact from the operation of the statutory provisions to satisfy the constitutional requirements of standing; hence, she had established "independently" her claim to assert *jus tertii* in that the enforcement of the challenged restriction against her would result indirectly in a violation of her own rights. *Id.* at 194.

Chief Justice Burger disagreed with the conclusion that Whitener had alleged facts sufficient to establish *jus tertii* standing; in his view, the majority had simply created a new and undesirable exception to the rule that a litigant may assert only the violation of his own rights. *Id.* at 215-16 (Burger, C.J., dissenting). It is certainly true that the majority opinion did not deal specifically with whether or not the three traditional criteria for *jus tertii* existed in this case, namely, the presence of some substantial relationship between the claimant and the third parties, the impossibility of the rightholders' asserting their own constitutional rights and the need to avoid the dilution of the rights of third parties that would result were the assertion of *jus tertii* precluded. *See* Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 425 (1974). Although Justice Brennan's majority opinion did cite the leading case on this subject, 429 U.S. at 193 (citing Barrows v. Jackson, 346 U.S. 249, 255-59 (1953)), he failed to engage in the detailed analysis undertaken in *Barrows*; to the extent that he was willing to base a finding of *jus tertii* standing on a relatively cursory overview of the facts in question and without considering the relationship between Craig and Whitener, his opinion is innovative. Indeed, the majority elected to place greater emphasis on the thesis that Whitener had *jus tertii* standing because she had suffered an independent injury in fact ensuring "concrete adverseness." 429 U.S. at 194 (citing Baker v. Carr, 369 U.S. 186, 204 (1962)). After *Craig*, the new test for *jus tertii* standing may well be the traditional "injury-in-fact" requirement coupled with no more than an assertion that the rights of third parties would be unjustifiably diluted were standing denied. If this characterization is accurate, *Craig* may well be a significant departure from precedent, as the Chief Justice suggests.

tially related to achievement of those objectives."[13] Justice Brennan briefly reviewed the significant cases since *Reed v. Reed*,[14] emphasizing the inaccuracy of gender as a "proxy for other, more germane bases of classification"[15] and the inadequacy of administrative convenience as a justification for gender-based classifications.[16] On the basis of these prior rulings, he concluded that the difference between males and females with respect to the purchase of 3.2% beer did not warrant the age differential drawn by the statute.[17] Like the opinion of the three-judge district court, the majority opinion in *Craig* deemed *Reed* to be controlling; however, Justice Brennan, unlike Judge Holloway, found that the state of Oklahoma simply had not met its burden of proof. Assuming arguendo that there was a legitimate state interest in traffic safety, the majority found that the statistical evidence offered in support of the discrimination being challenged was far too insubstantial in light of *Reed* to support a connection between gender and drunk driving.[18] Thus, Justice Brennan dismissed the probative value of the statistical disparity between .18% female arrests for drunken driving and 2% male arrests for the same offense (among those between eighteen and twenty-one years of age) on the theory that:

> While such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device. Certainly if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous "fit." Indeed, prior cases have consistently rejected the use of sex as a decision-making factor even though the statutes in question certainly rested on far more predictive empirical relationships than this.[19]

In making such a broad-based assertion, the majority issued a warning that any attempt to justify gender-based differentiations by resort to statistical

13. 429 U.S. at 197.

14. 404 U.S. 71 (1971). *See* note 6 *supra*.

15. 429 U.S. at 198. The Court pointed out that it had rejected archaic and overbroad generalizations concerning the positions of servicewomen, Frontiero v. Richardson, 411 U.S. 677, 689 n.23 (1973), and working women, Weinberger v. Wiesenfeld, 420 U.S. 636, 643 (1975). 429 U.S. at 198. It distinguished cases upholding the use of gender-based classifications, Schlesinger v. Ballard, 419 U.S. 498 (1975) (federal law entitling male naval officers to only nine years' active service before mandatory discharge for lack of promotion, while giving women thirteen years) and Kahn v. Shevin, 416 U.S. 351 (1974) (Florida statute granting $500 tax exemption to widows but not to widowers), by pointing to the laudatory purposes of those laws in that they remedied disadvantages suffered by women. Oklahoma could not and did not make any similar claim. 429 U.S. at 198 n.6. *See generally* Erickson, *Kahn, Ballard, and Wiesenfeld: A New Equal Protection Test in "Reverse" Sex Discrimination Cases?* 42 BROOKLYN L. REV. 1 (1975).

16. 429 U.S. at 198 (citing Frontiero v. Richardson, 411 U.S. 677, 690 (1973); Stanley v. Illinois, 405 U.S. 645, 656 (1972)).

17. 429 U.S. at 200.

18. *Id.* at 204.

19. *Id.* at 201-02.

analysis is a "dubious" business that is in tension with the "normative philosophy that underlies the Equal Protection Clause."[20]

The Court also rejected Oklahoma's assertion that the Twenty-first Amendment could be relied upon to support the constitutionality of the statute. Noting that there is considerable doubt as to the effect of this amendment on constitutional provisions other than the commerce clause,[21] the Court held that it had never recognized sufficient force in the amendment to defeat an otherwise established claim of discrimination in violation of the equal protection clause of the Fourteenth Amendment and that reliance on that amendment could not save invidious gender-based discrimination from invalidation.[22] In a footnote to this portion of the opinion,[23] the Court disapproved the 1948 decision of *Goesaert v. Cleary*,[24] which had dictated the use of the minimum rationality standard in gender-based discrimination cases prior to the *Reed* decision, insofar as the standard was inconsistent with its current holding.

Of the four separate concurrences, three dealt with the issue of equal protection.[25] Justice Stewart found that the disparity created by the statutes, "without even a colorably valid justification or explanation,"[26] amounted to total irrationality and thus constituted an invidious discrimination under the doctrine of *Reed*.[27] Justice Powell, while agreeing with the Court's opinion in general, and particularly with its reliance on *Reed*, expressed concern as

20. *Id.* at 204. The Court also pointed to shortcomings within the statistical samples themselves. Thus, (1) under social stereotypes, males might be more likely to be arrested than females, who would probably be escorted home, *id.* at 202 n.14; (2) the Oklahoma statistics, "gathered under a regime where the age-differential law in question has been in effect, are lacking in controls necessary for appraisal of the actual effectiveness of the male 3.2% beer prohibition," *id.*; (3) the Oklahoma samples failed to measure the dangerousness of 3.2% beer in relation to other types of alcoholic beverages, *id.* at 203; and (4) many of the studies related to traffic fatalities in general and did not deal with the age-sex differentials involved in *Craig*, *id.*

21. 429 U.S. at 206 (citing P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING, CASES AND MATERIALS 258 (1975) ("Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or the use of liquor is concerned."))

22. 429 U.S. at 207.

23. *Id.* at 210 n.23.

24. 335 U.S. 464 (1948). *Goesaert* upheld a Michigan law forbidding females, except the wife or daughter of a male bar owner, to act as bartenders. The Court therein said: "Since the line [the legislators] have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize [their] calling." *Id.* at 467.

25. Justice Blackmun concurred except for the discussion of the Twenty-first Amendment, although he agreed it did not save the statute in question. 429 U.S. at 214 (Blackmun, J., concurring in part).

26. *Id.* at 215 (Stewart, J., concurring in the judgment).

27. *Id.*

to the appropriate standard of review and the majority's treatment of the relevance of the statistical evidence. Finding Justice Brennan's reading of the *Reed* case unnecessarily broad in its implications, he recognized with unusual candor that the "relatively deferential" rationality standard of review "takes on a sharper focus" when the Court is addressing gender-based classifications.[28] While he acknowledged that a more critical examination was being undertaken in such cases, however, he indicated that he would not endorse or welcome the creation of any additional tiers to equal protection analysis, but rather would simply hold that the classification incorporated in the Oklahoma statute, given the rather weak statistical justification advanced for it by the state, did not bear a fair and substantial relation to the asserted governmental objective of traffic safety.[29]

Justice Stevens' concurrence also attempted to grapple with the appropriate level of review. For him, "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."[30] Justice Stevens found the Oklahoma classification objectionable primarily because it was based on an accident of birth, because it was a remnant of the discredited practice of discriminating against adolescent males, and because it ignored the fact that the generally greater weight of males enables them to consume more alcohol without suffering a concomitant loss in driving ability.[31] Reiterating the view that the legislative history failed to indicate the actual purpose or motivation for the classification,[32] he found that in operation it had only a minimal effect on access to, but not consumption of, a "not very intoxicating beverage" and that the empirical data only accentuated the unfairness of "visiting the sins of the 2% on the [other] 98%."[33]

In his dissent, Chief Justice Burger recognized that the majority opinion made gender-based classifications "disfavored" rather than "suspect";[34] it was his contention, however, that no greater scrutiny than the rationality standard could be justified "[w]ithout an independent constitutional basis supporting the right asserted or disfavoring the classification adopted . . . ."[35] He argued that the majority had no right to strike down a law as unconstitutional merely because that law was unwise.[36]

28. *Id.* at 210-11 n.* (Powell, J., concurring).
29. *Id.*
30. *Id.* at 212 (Stevens, J., concurring).
31. *Id.* at 212-13.
32. *Id.* at 213 n.5.
33. *Id.* at 213-14.
34. *Id.* at 217 (Burger, C.J., dissenting).
35. *Id.*
36. *Id.*

Justice Rehnquist also found the majority's opinion objectionable on two grounds. First, he found no precedent justifying an "elevated" level of scrutiny "like that invoked in cases dealing with discrimination against females" when *men* challenge a gender-based statute that treats them less favorably than women, except when the statute impairs an important personal interest protected by the Constitution.[37] "[T]he Court's reliance on . . . previous sex-discrimination cases is ill-founded [because it] treats gender classification as a talisman which—without regard to the rights involved or the persons affected—calls into effect a heavier burden of judicial review."[38] Second, Justice Rehnquist asserted that the majority's thesis that classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives "comes out of thin air," in that no previous cases had adopted such a standard.[39] While Justice Rehnquist regarded this as a laudable retreat from the opinion of the plurality in *Frontiero v. Richardson*,[40] which had argued that gender-based classifications should be subject to strict scrutiny, he advocated application of the rational basis test, which does not demand mathematical precision in the accommodation of interests achieved by the legislature.[41] Under such a test,

> [t]he rationality of a statutory classification for equal protection purposes does not depend upon the statistical "fit" between the class and the trait sought to be singled out. It turns on whether there may be a sufficiently higher incidence of the trait within the included class than in the excluded class to justify different treatment.[42]

Based on the clear differences between the drinking and driving habits of young men and women elucidated in the evidence, Justice Rehnquist would have upheld the challenged statute.[43]

Craig v. Boren is more important for what it portends in equal protec-

37. *Id.* at 217-18 (Rehnquist, J., dissenting). *But cf.* Frontiero v. Richardson, 411 U.S. 677, 688 (1973); Reed v. Reed, 404 U.S. 71, 76 (1971) (both containing broad generalities to the effect that the same equal protection test applies, regardless of the sex being discriminated against).

38. 429 U.S. at 220.

39. *Id.*

40. 411 U.S. 677 (1973). *See* note 3 *supra*.

41. 429 U.S. at 221-22. Under that test, the Constitution:

> is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

42. 429 U.S. at 225-26.

43. *Id.* at 226.

tion analysis than for the relatively minor dispute it resolves. Only a plurality of the Court supports the most recent formulation of the standard of review applicable to gender-based classifications. In terms of the standard of scrutiny to be applied in cases involving gender-based discrimination, the Court's opinion appears superficially to apply *Reed* in an automatic fashion. Justice Brennan argues that *Reed* is controlling and cites that case for the proposition that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[44] Consequently, the majority's disposition of the equal protection claim in *Craig* is premised on the thesis that the evidence introduced by the state of Oklahoma failed "to satisfy *Reed*'s requirement that the gender-based difference be substantially related to achievement of the statutory objective."[45] But, as Justice Rehnquist points out, the exact language of *Reed* does not directly support such a broad conclusion. Chief Justice Burger's opinion in that case cited a 1920 ruling of the Court to the effect that "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "[46] *Reed* never mandated a judicial inquiry into whether or not a discriminatory classification incorporated within a statute in fact substantially furthers the *achievement* of the objective that the statute was enacted to implement. Indeed, the Court in *Reed* never considered whether the challenged enactment in that case, an Idaho law giving preference to men for appointment as the administrator of a decedent's estate, bore a substantial relationship to the achievement of the stated legislative objective, which was to reduce the workload of probate courts by eliminating one type of contest. Rather, it focused upon whether or not the classification in and of itself was so arbitrary as to deny equal protection of the laws.[47] *Craig*'s restatement of *Reed* may add something new; it may impose a requirement not only that the classification itself is rational, but also that the classification is shown to be a device that consistently effectuates the underlying legislative purpose in enacting the statute.

44. *Id.* at 197.

45. *Id.* at 204.

46. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920), *quoted in* Reed v. Reed, 404 U.S. 71, 76 (1971). *Royster Guano* held that a state law which taxes all the income of local corporations derived from business done both within and without the state, while exempting entirely the income derived from outside the state by local corporations which do no local business, violated the Fourteenth Amendment.

47. *See* 404 U.S. at 76-77. The Court noted that "The crucial question, . . . is whether [the statute] advances that objective in a manner consistent with the command of the Equal Protection Clause." The Court found that it did not because "mandatory preference" of either sex merely to eliminate such hearings was an "arbitrary" and thereby "forbidden" legislative choice. *Id.*

An even more interesting problem raised by the majority opinion is the use of statistics to justify, or to attempt to justify, gender-based discriminations. The state of Oklahoma does not maintain records of legislative debates; all the statistics and declarations of legislative purpose introduced in this case were generated by the state attorney general's office for use at trial.[48] Justice Brennan left open the question of whether or not such evidence will suffice to establish legislative purpose. After reviewing the various exhibits introduced by the state, he indicated that

> [i]t is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause.[49]

One interpretation of this statement is that the exhibits introduced by the state's attorney general were simply unpersuasive. The Court could be saying that it will decline to acknowledge the credibility of statistical findings where the samplings are too small, where the structure of the sampling is such that it produces results that are inherently distorted, or where the correlations sought to be demonstrated are themselves illogical. If this characterization is accurate, then *Craig* merely stands for the proposition that defendants in an equal protection case are required to use reliable, unbiased sampling techniques. But another interpretation is possible. Justice Brennan could be saying that the state cannot justify an invidious gender-based classification by reference to statistics alone; resort to such evidence is simply an inadequate means of meeting its burden of proof. Indeed, such a broad-based conclusion might seem to be compelled by the language referring to the "dubious business" of statistical analysis in this context and its conflict with the "normative philosophy" of the Fourteenth Amendment. But the problem inherent in such an expansive interpretation is that it might foreclose the only means a state has for justifying discriminatory treatment. Without recourse to statistical analysis, a state may actually be denied the opportunity to mount any defense to an equal protection challenge, especially if, as in the case of Oklahoma, legislative history is unavailable. Certainly the Court has relied on statistical information in prior equal protection cases;[50] therefore, the second interpretation of the language in *Craig* would yield an anomaly. For these reasons, the first interpretation of Justice Brennan's dictum about statistical analysis would seem to be the preferable one.

Another important aspect of the majority opinion in *Craig* is its

48. 429 U.S. at 199-200 n.7.

49. *Id.* at 204.

50. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636, 643 (1975); Taylor v. Louisiana,

treatment of the Twenty-first Amendment. In a 1936 decision, the Court had said that "[a] classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."[51] In light of such a rationale, legitimate questions could be raised about the extent of the limits the equal protection clause places on the ability of a state to regulate the sale of alcoholic beverages. The Court in *Moose Lodge No. 107 v. Irvis*[52] did establish that state liquor regulatory schemes cannot work invidious discriminations in violation of the Fourteenth Amendment.[53] But in the same term that *Moose Lodge* was decided, the Court also stated in *California v. LaRue*[54] that "wide latitude as to choice of means to accomplish a permissible end must be accorded to the state agency that is itself the repository of the State's power under the Twenty-first Amendment."[55] Accordingly, it ruled that a state could prohibit live sexual entertainment in bars even though some of the acts prohibited would not be obscene as defined by the Supreme Court.[56] Justice Brennan in *Craig*, however, settled all doubts on the subject; following the lead of decisions rendered by lower courts,[57] he

419 U.S. 522, 535 n.17 (1975); Kahn v. Shevin, 416 U.S. 351, 353-54 nn.4&5 (1974); Frontiero v. Richardson, 411 U.S. 677, 689-90 n.23 (1973).

51. State Bd. v. Young's Mkt. Co., 299 U.S. 59, 64 (1936). This case held that under the Twenty-first Amendment a state may exact a license fee for the privilege of importing beer from another state. For a similar holding, see Mahoney v. Joseph Triner Corp., 304 U.S. 401, 404 (1938). Both of these cases involved restrictions on the importation of intoxicants, one regulatory area in which the state's powers under the Twenty-first Amendment are decisive. *See* Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330 (1964). Moreover, economic regulation such as this has traditionally received less strict review. *See* Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 47-48, 50-51 (1966). Thus, the *Young's Market* case is distinguishable on its facts. Moreover, the Court in *Craig* remarked with reference to the quoted language of *Young's Market*: "The Twenty-first Amendment does not recognize, even indirectly, classifications based on gender. And, as the accompanying text demonstrates, that statement has not been relied upon in recent cases that have considered Fourteenth Amendment challenges to state liquor regulation." 429 U.S. at 207 n.21.

52. 407 U.S. 163 (1972).

53. *See id.* at 178-79. In that case, the Court held that a Pennsylvania Liquor Control Board regulation invoked by a private club practicing racial discrimination under its bylaws constituted state action for the purposes of the Fourteenth Amendment.

54. 409 U.S. 109 (1972). *LaRue* held that the Twenty-first Amendment authorizes states to control the manner and circumstances in which liquor is dispensed and thus empowers the California Department of Alcoholic Beverage Control to prohibit live sexual entertainment in bars. In doing so, the Court rejected a First Amendment challenge. *Id.* at 118-19. It also distinguished Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971), which held that the Twenty-first Amendment did not qualify the due process rights of one publicized by the state as an excessive drinker without any prior hearing. *See* 409 U.S. at 115. The *Craig* Court mentioned *LaRue*, but ignored the broad assertions regarding state power made in the latter case. *See* 429 U.S. at 207.

55. 409 U.S. at 116.

56. *See id.* at 117-18.

57. *See* White v. Fleming, 522 F.2d 730, 737 (7th Cir. 1975); Women's Liberation Union v. Israel, 512 F.2d 106, 108 (1st Cir. 1975); Daugherty v. Daley, 370 F. Supp. 338, 340 (N.D. Ill.

concluded that the power delegated to the states under the Twenty-first Amendment is thoroughly circumscribed by the guarantees of the equal protection clause of the Fourteenth Amendment.[58] This is a minor point, but in light of the confusion engendered in this area by prior rulings, it is an illuminating one.

Perhaps the crucial feature of *Craig*, however, is that it upheld the discrimination claim of individuals who are not part of a discrete and insular minority that has historically lacked economic or political power and representation. This may be attributed to the fact that the challenged statute was not defended or perceived as one that was designed to remedy disadvantageous conditions or to compensate for previous deprivations of just such a group.[59] The Court has, in the past, rejected a male's complaint of unconstitutional gender-based discrimination because it perceived a remedial or "benign" purpose behind the legislative classification that favored females in a traditionally hostile setting.[60] In *Weinberger v. Wiesenfeld*,[61] a case involving a challenge to a provision of the Social Security Act denying survivors' benefits to widowers with dependent children, but not to widows, the Court rejected a "benign purpose" rationale and upheld for the first time a claim of gender discrimination by a male claimant. In that case, however, the Court based its finding on the fact that the classification had a negative impact on the claimant's wife. The statute in *Wiesenfeld* "clearly" operated "to deprive women of protection for their families which men receive as a result of their employment."[62] In reaching this result, the Court examined and primarily relied upon the effect of the statute on a female rather than on a male.[63] The *Craig* decision stands alone in upholding a claim of gender-based discrimination by men on no other grounds than the lack of "fit" between the disadvantageous classification and the state's objective rather than the negative impact of that classification on women or their families.

1974); Seidenberg v. McSorley's Old Ale House, Inc., 317 F. Supp. 593, 605-06 (S.D.N.Y. 1970).

58. 429 U.S. at 209-10.

59. *See* note 15 *supra*.

60. *See, e.g.*, Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974). *See* note 15 *supra*.

61. 420 U.S. 636 (1975). The statute involved in *Weinberger* was 42 U.S.C. § 402(g) (1970 & Supp. V 1975) (amended 1977), which grants survivors' benefits under the Social Security Act based on the earnings of a deceased husband and father both to his widow and the couple's minor children, but grants benefits based on the earnings of a deceased wife and mother only to the couple's minor children and not to the widower.

62. 420 U.S. at 645.

63. *See id.* The Court pointed out that a wife "not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she also was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others." *Id.*

As such, it represents a minor but nevertheless intriguing departure in the equal protection analysis normally accorded a subclass of gender-based discrimination claims.

2. Benign Remedial Purposes in Fact

The Court's second significant opinion on gender-based discrimination was also marked by a sharp division among the justices. In *Califano v. Goldfarb*,[64] the Court expressly relied on the doctrine set forth in its prior decision of *Weinberger v. Wiesenfeld*[65] to invalidate an invidious classification created by the Social Security Act.[66]

The Act provided that a widow was entitled to receive survivor's benefits based on the earnings of her deceased husband, regardless of dependency,[67] but under section 402(f)(1)(D), benefits were payable to the widower of a deceased wife only upon proof that he had been receiving at least half of his support from her.[68] Leon Goldfarb filed suit in federal district court, alleging that the rejection of his application for widower's benefits because of his inability to show that he had depended on his deceased spouse for half of his support constituted a denial of equal protection under the due process clause of the Fifth Amendment.[69] The district court declared section 402(f)(1)(D) unconstitutional, relying primarily on the authority of *Wiesenfeld*.[70]

64. 430 U.S. 199 (1977).

65. 420 U.S. 636 (1975).

66. 430 U.S. at 204. The Court stated:

> The gender-based distinction drawn by [42 U.S.C.] § 402(f)(1)(D) [(1970)]—burdening a widower but not a widow with the task of proving dependency upon the deceased spouse—presents an equal protection question indistinguishable from that decided in *Weinberger v. Wiesenfeld*. . . . That decision and the decision of *Frontiero v. Richardson*, 411 U.S. 677 (1973), plainly require affirmance of the judgment of the District Court.

Id.

67. 42 U.S.C. § 402(e)(1) (1970 & Supp. V 1975).

68. *Id.* § 402(f)(1)(D) (1970) (repealed 1977).

69. U.S. CONST. amend. V. This section provides, in pertinent part, that "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." The Court has construed this section to provide a similar guarantee to equal protection of the federal laws as that provided by the Fourteenth Amendment regarding state laws. U.S. CONST. amend. XIV, § 1 provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." For cases construing the Fifth Amendment similarly to the Fourteenth Amendment, *see, e.g.*, Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976); Buckley v. Valeo, 424 U.S. 1, 93 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); Schneider v. Rusk, 377 U.S. 163, 168 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954). *See generally* Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541 (1977).

70. Goldfarb v. Secretary of Health, Educ. & Welfare, 396 F. Supp. 308 (E.D.N.Y. 1975), *aff'd sub nom.* Califano v. Goldfarb, 430 U.S. 199 (1977). In a per curiam opinion, that court stated: "[Mrs. Goldfarb] paid taxes at the same rate as men and there is not the slightest

In a plurality opinion again written by Justice Brennan and joined by Justices White, Marshall and Powell, the Court affirmed the judgment.[71] Finding the equal protection question "indistinguishable" from that decided in *Wiesenfeld*,[72] Justice Brennan said that the statutory classification operated to deprive women wage-earners, who were required to pay social security taxes, of an equivalent scope of protection for their families that similarly situated men received as a result of their employment.[73] Such an inequity was unconstitutional when supported by no more substantial justifications than "old notions," such as "assumptions as to dependency," which were more consistent with traditional social "role-typing" than with contemporary reality.[74]

The plurality rejected any attempt to focus the analysis "upon whether [the] surviving widower was unconstitutionally discriminated against by burdening him but not a surviving widow with proof of dependency."[75] Justice Brennan found *Wiesenfeld* dispositive on this issue, in that the majority in that decision held that benefits must be distributed on classifications that are based on something other than gender. In doing so, he reaffirmed the Court's earlier position that the social security system was designed to protect the *familial unit* (as opposed to a specific widow or widower) from the economic consequences of old age, disability and death.[76] The plurality also rejected arguments based on the need for judicial

scintilla of support for the proposition that working women are less concerned about their spouses' welfare in old age than are men. The government has failed to justify this gender-based discrimination." 396 F. Supp. at 309.

71. 430 U.S. at 202.

72. *Id.* at 204. In response to the dissent's argument that this overstated the relevance of *Wiesenfeld* and *Frontiero*, *see* notes 88 and 97 and accompanying text *supra*, Justice Brennan noted in a footnote to the opinion:

> It is sufficient to answer that the principal propositions argued by appellant and in the dissent—namely, the focus on discrimination between surviving, rather than insured, spouses; the reliance on *Kahn v. Shevin*, 416 U.S. 351 (1974); the argument that the presumption of female dependence is empirically supportable; and the emphasis on the special deference due to classifications in the Social Security Act—were all asserted and rejected in one or both of those cases as justifications for statutes substantially similar in effect to § 402(f)(1)(D).

430 U.S. at 204 n.4.

73. 430 U.S. at 206 (citing Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975)). The Court also noted that similarly to the plaintiff in *Wiesenfeld*, Mrs. Goldfarb was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others. 430 U.S. at 206.

74. *Id.* at 207 (quoting Stanton v. Stanton, 421 U.S. 7, 14 (1975); Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)).

75. 430 U.S. at 207.

76. *Id.* at 208-09. In support of this argument, Justice Brennan quoted from a House report that emphasized that the purpose of the amendments, which for the first time extended the benefits beyond the covered wage-earner himself, was to more adequately protect the

deference to Congressional allocation of noncontractual benefits under a social welfare program,[77] and on a perceived Congressional intent to remedy the arguably greater social welfare needs of widows under a theory of benign discrimination.[78] As to the first argument, Justice Brennan cited *Craig v. Boren*[79] and *Wiesenfeld* for the proposition that benefits which directly relate to years worked and amounts earned must be distributed solely on the basis of those gender-based classifications that serve and substantially relate to the achievement of important governmental objectives.[80] As to the second argument, he noted that inquiry into the actual purposes underlying the differentiation of treatment in section 402(f)(1)(D) proved that dependency, not need, was the criterion for inclusion in that section's named beneficiaries:[81] "Congress chose to award benefits, not to widowers who could prove that they are needy, but to those who could prove that they had been dependent on their wives for more than one-half of their support."[82] Therefore, the arguably greater social welfare needs of

family as a unit. *See* H.R. REP. No. 728, 76th Cong., 1st Sess. 7 (1939), *quoted at* 430 U.S. at 209 n.6.

77. *Id.* at 210-12.

78. *Id.* at 212-17.

79. 429 U.S. 190 (1976). For a discussion of this case, *see* notes 1-63 and accompanying text *supra*.

80. 430 U.S. at 210, 212. Justice Brennan noted that while Congress has wide latitude to create classifications that allocate benefits under a social welfare program, Weinberger v. Salfi, 422 U.S. 749, 776-77 (1975); Flemming v. Nestor, 363 U.S. 603, 609-10 (1960), *Wiesenfeld* had rejected the argument that the non-contractual nature of such interests sanctions differential protection for covered employees which is solely gender-based. *Id.* at 211-12. He also noted that justifications that suffice for non-gender-based classifications in the social welfare area do not necessarily justify gender-based discriminations. Utilizing *Salfi* as an example of discrimination which was *not* based on gender but which was designed merely to weed out collusive marriages, the plurality noted that the rationales of administrative convenience and certainty of result, which were sufficient to sustain the classification in *Salfi*, had been found inadequate justifications for gender-based classifications. *Id.* at 211 n.9 (citing Frontiero v. Richardson, 411 U.S. 677, 690 (1973); Stanley v. Illinois, 405 U.S. 645, 656-57 (1972); Reed v. Reed, 404 U.S. 71, 76 (1971)).

81. 430 U.S. at 212-13.

82. *Id.* at 213. The plurality thus concluded that "[o]n the face of the statute, dependency, not need, is the criterion for inclusion." *Id.* The Court also reviewed the general scheme of the federal Old-Age, Survivors, and Disability Insurance Benefits program (OASDI), 42 U.S.C. §§ 401-431 (1970 & Supp. V 1975) (amended 1976 & 1977), as well as the legislative history of § 402(f)(1)(D), 42 U.S.C. § 402(f)(1)(D) (1970) (repealed 1977). As to the general scheme of OASDI, the Court noted that it is intended to insure covered wage earners and their families against the economic and social impact on the family normally entailed by loss of the wage earner's income due to retirement, disability or death. Benefits were thus paid only to members of the family of the insured wage earner, not to those in the general population who were in need of economic assistance. In this regard, the Court pointed out that need was not a requirement for inclusion in any beneficiary category, *see* 42 U.S.C. § 402 (1970 & Supp. V 1975) (amended 1977), and that need was intended to be irrelevant to the right to receive benefits, although it has been a factor in determining the amounts of those benefits. *See* H.R. REP. No. 615, 74th Cong., 1st Sess. 1 (1935). Finally, the Court observed that dependency is a

widows were not the reason for the legislative distinction; rather, it was "an intention to aid the dependent spouses of deceased wage earners, coupled with a presumption that wives are usually dependent."[83] This presumption of dependency was one of those archaic notions that simply could not be relied upon to justify a gender-based discrimination.[84]

Justice Stevens concurred in the judgment. He found that neither the administrative convenience rationale nor the policy of benign discrimination was an acceptable justification for the differential treatment in this case, primarily because the actual legislative purpose indicated that neither was the intended rationale.[85] Thus, he concluded: "[T]his discrimination . . . is merely the accidental byproduct of a traditional way of thinking about

prerequisite to qualification for benefits for every family member other than a wife or widow. *See* 42 U.S.C. § 402(h)(1)(B) (1970) (parents' benefits); 42 U.S.C. § 402(d)(1)(C) (1970) (children's benefits); 42 U.S.C. § 402(c)(1)(C) (1970) (repealed 1977) (husbands' benefits); 42 U.S.C. § 402(f)(1)(D) (1970) (repealed 1977) (widowers' benefits). The Court concluded: "Thus the overall statutory scheme makes actual dependency the general basis of eligibility for OASDI benefits, and the statute, in omitting that requirement for wives and widows, reflects only a presumption that they are ordinarily dependent." 430 U.S. at 214. As to the legislative history of § 402(f)(1)(D), it too refuted appellant's argument regarding benign discrimination. Wives' and widows' benefits were first provided when coverage was extended to other family members in 1939, in lieu of lump-sum payments to the estate. *See* Social Security Act Amendments of 1939, ch. 666, 53 Stat. 1364-66. The plurality found, however, that there was no "indication whatever in any of the legislative history that Congress gave any attention to the specific case of nondependent widows, and found that they were in need of benefits despite their lack of dependency, in order to compensate them for disadvantages caused by sex discrimination." 430 U.S. at 214-15 & n.16 (citing H.R. REP. No. 728, 76th Cong., 1st Sess. 7 (1939); H.R. DOC. No. 110, 76th Cong., 1st Sess. 7 (1939); 84 CONG. REC. 8827 (1939) (remarks of Sen. Harrison); *Final Report of the Advisory Council on Social Security, Hearings on the Social Security Act Amendments of 1939 Before the House Comm. on Ways and Means*, 76th Cong., 1st Sess. 30 (1939)). Survivors' and old-age benefits were not extended until 1950, *see* Social Security Act Amendments of 1950, ch. 809, § 101, 64 Stat. 485, but the legislative history of this provision also demonstrates that the purpose of the amendment was " *'[t]o equalize the protection given to the dependents of women and men,'* " ADVISORY COUNCIL ON SOCIAL SECURITY, RECOMMENDATIONS FOR SOCIAL SECURITY LEGISLATION, S. DOC. No. 208, 80th Cong., 2d Sess. 38 (1949) (emphasis in original), not to create a differential treatment for the benefit of nondependent wives. 430 U.S. at 216.

83. 430 U.S. at 217. The Court reiterated that this presented "precisely the situation faced in *Frontiero* and *Wiesenfeld*," in that the only "conceivable" justification for writing the presumption of wives' dependency into the statute was the assumption that it "would save the Government time, money, and effort simply to pay benefits to all widows, rather than to require proof of dependency of both sexes." *Id.*

84. *Id.*

85. *Id.* at 219-22 (Stevens, J., concurring in the judgment). Administrative convenience as a rationale was rejected because the cost of additional payments to widows who are not within the described purpose of the statute amounted to $750 million a year, far in excess of any possible administrative savings. Benign discrimination as a rationale was rejected because Justice Stevens was unwilling to presume that Congress would seek to offset prior disfavored treatment by benefitting those widows who were sufficiently successful in the job market to become nondependent on their husbands; such women constituted a class least likely to need the advantage Congress purportedly intended to confer. *Id.*

females. . . . '[D]ue process requires that there be a legitimate basis for presuming that the rule was actually intended to serve [the] interest' put forward by the government as its justification."[86]

Justice Rehnquist dissented in a lengthy opinion in which the Chief Justice and Justices Stewart and Blackmun joined. He argued that social insurance statutes should not automatically be subjected to the heightened levels of scrutiny required by the equal protection clause in other types of cases.[87] Justice Rehnquist distinguished *Wiesenfeld* by pointing out that the statutory provision in that case flatly denied surviving widowers the opportunity to obtain benefits regardless of need and that later decisions had evinced a refusal to extend uncritically "into the field of social security law constitutional proscriptions against distinctions based on illegitimacy and irrebuttable presumptions which had originated in other areas of the law."[88] Because of the amending process, which expands benefits over a period of time, the dissenters said that it is difficult to find a carefully conceived plan for payment of benefits in the mosaic of social security legislation; therefore, administrative convenience was deemed to bear a much more vital relation to the overall legislative design because of Congress' concern for certainty in determination of entitlement to benefits and in promptness of payment.[89] The dissent's review of the legislation amending the Social Security Act yielded two conclusions: first, that persons qualifying for spousal benefits have more substantial needs once their spouse dies, and second, that widows are more likely to be without adequate means of support than widowers.[90] Moreover, the dissent found that the classification contained in section 402(f)(1)(D) made it easier for aged widows to obtain

86. *Id.* at 221.

87. *Id.* at 225 (Rehnquist, J., dissenting, joined by Burger, C.J., and Stewart and Blackmun, JJ.). He argued:

> [C]ases requiring heightened levels of scrutiny for particular classifications under the Equal Protection Clause, which have originated in areas of the law outside of the field of social insurance legislation, [should] not be uncritically carried over into that field [although this does] not mean that the phrase "social insurance" is some sort of magic phrase which automatically mutes the requirements of the equal protection component of the Fifth Amendment.

Id.

88. 430 U.S. at 229 (citing Mathews v. Lucas, 427 U.S. 495 (1976); Weinberger v. Salfi, 422 U.S. 749 (1975)).

89. 430 U.S. at 225. Justice Rehnquist noted that because Congress has continually increased the benefits paid under the Act and expanded the pool of eligible recipients, the resultant statutory scheme evinced certain predictable traits: (1) benefits were extended in a piecemeal fashion so that the classes of beneficiaries under the Act necessarily cannot "mirror the abstract definition of equality of need," *id.* at 230, and (2) there exists "the balance between a desire that payments correlate with degree of need and a recognition that precise correlation is unattainable given the administrative realities of the situation," *id.*

90. *Id.* at 234-35.

benefits, and thus in no way perpetuated or exacerbated the economic disadvantage of women that had led the Court to adopt a test of heightened scrutiny in cases of gender-based discrimination in the first place.[91] In sum, Justice Rehnquist concluded that the classification scarcely constituted "invidious" discrimination but was rather a rationally justified "overinclusion," premised on the concept of administrative convenience.[92]

Goldfarb expressly affirmed the standard of review enunciated in *Craig v. Boren*,[93] albeit by an even smaller plurality. Two of the justices who had agreed with the judgment in *Craig* joined Justice Rehnquist's dissent in *Goldfarb*.[94] The reason for this unexpected *volte-face* would appear to be the fact that this case arose in the context of a constitutional challenge to "social insurance" legislation, a context which may trigger a differing standard of equal protection analysis. To understand this distinct analysis fully, it is necessary to look beyond the plurality opinion of Justice Brennan and scrutinize in detail the views expressed by the other five members of the Court, namely, Justice Stevens, who concurred in the judgment, and Justice Rehnquist and his three fellow dissenters. In examining these opinions, the true significance of the *Goldfarb* case becomes apparent.

Justice Rehnquist alleged that the plurality had placed undue reliance on the decision in *Wiesenfeld*, arguing that the precedential value of that 1975 ruling had been undermined by two later cases, *Weinberger v. Salfi*[95] and *Mathews v. Lucas*.[96] Justice Rehnquist thus asserted that "[w]hile the holding of *Wiesenfeld* is not inconsistent with *Salfi* or *Lucas*, its reasoning is not in complete harmony with the recognition in those cases of the special characteristics of social insurance plans."[97] In order to determine the validity of this proposition, it is necessary to scrutinize these two cases with care.

Salfi involved a challenge to sections 416(c)(5) and (e)(2) of the Social Security Act, which denied insurance benefits to surviving wives and stepchildren who had had their respective relationships to a deceased wage-earner for less than nine months prior to his death.[98] In an opinion written by

91. *Id.* at 242.

92. *Id.*

93. 429 U.S. 190 (1976). *See* notes 13 and 16 and accompanying text *supra*.

94. The two were Justices Blackmun and Stewart.

95. 422 U.S. 749 (1975).

96. 427 U.S. 495 (1976).

97. 430 U.S. at 229 (Rehnquist, J., dissenting, joined by Burger, C.J., and Stewart and Blackmun, JJ.).

98. 42 U.S.C. § 416(c) (Supp. V 1975) provides in full:

(c) Wife.

The term "widow" (except when used in section 402(i) of this title) means the surviving wife of an individual, but only if (1) she is the mother of his son or daughter,

Justice Rehnquist, the Court upheld the constitutionality of these provisions in 1975. Conversely, the three-judge district court below had ruled that because these statutory sections incorporated a conclusive, unchallengeable assumption that a certain class of "widows" and "stepchildren" did not meet the statutory definitions of those terms, they created "irrebuttable presumptions" that violated the due process clause of the Fifth Amendment.[99] The Surpeme Court disagreed. It noted that in 1970, in *Dandridge v. Williams*,[100] it had upheld Maryland welfare legislation against a challenge premised upon the equal protection clause of the Fourteenth Amendment and, in doing so, had said that such laws would be deemed constitutional if it were shown that they were "rationally based and free from invidious discrimination."[101] A year later, in *Richardson v. Belcher*,[102] which involved an attack against certain double recovery offset provisions of the Social Security Act,[103] the test of *Dandridge* was extended to Fifth Amendment claims against the federal government: "If the goals sought are

(2) she legally adopted his son or daughter while she was married to him and while such son or daughter was under the age of eighteen, (3) he legally adopted her son or daughter while she was married to him and while such son or daughter was under the age of eighteen, (4) she was married to him at the time both of them legally adopted a child under the age of eighteen, (5) she was married to him for a period of not less than nine months immediately prior to the day on which he died, or (6) in the month prior to the month of her marriage to him (A) she was entitled to, or on application therefor and attainment of age 62 in such prior month would have been entitled to, benefits under subsection (b), (e), or (h) of section 402 of this title, (B) she had attained age eighteen and was entitled to, or on application therefor would have been entitled to, benefits under subsection (d) of such section (subject, however, to section 402(s) of this title), or (C) she was entitled to, or upon application therefor and attainment of the required age (if any) would have been entitled to, a widow's, child's (after attainment of age 18), or parent's insurance annuity under section 231a of Title 45.

42 U.S.C. § 416(e) (Supp. V 1975) provides in part:

(e) Child.

The term "child" means (1) the child or legally adopted child of an individual, (2) a stepchild who has been such stepchild for not less than one year immediately preceeding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died. . . .

99. Salfi v. Weinberger, 373 F. Supp. 961, 966 (N.D. Cal. 1974), *rev'd*, 422 U.S. 749 (1975).

100. 397 U.S. 471 (1970). The Court here held that 42 U.S.C. § 602(a)(10) (1970) (current version at 42 U.S.C. § 602(a)(10) (Supp. V 1975)), which provided that Social Security funds shall be disbursed through a state Aid to Families with Dependent Children (AFDC) plan, was not infringed by a Maryland law placing a ceiling of $250 per month on all AFDC grants, regardless of the size of the recipient family and its actual need.

101. 397 U.S. at 487.

102. 404 U.S. 78 (1971).

103. The Court here upheld 42 U.S.C. § 424a(a) (1970 & Supp. V 1975) (amended 1977), which required a reduction in social security benefits to reflect workmen's compensation payments.

legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment."[104] Both of these decisions antedated the three later rulings of the Court regarding irrebuttable presumptions, which the three-judge district court had relied upon in *Salfi*.[105] Justice Rehnquist asserted, however, that the district court had incorrectly identified which of the five prior rulings constituted binding precedent in the *Salfi* case.[106] His analysis consisted of several interrelated arguments. First, he noted that while sections 416(c)(5) and (e)(2) created presumptions, these were in no sense irrebuttable: "[A]ppellees are completely free to present evidence that they meet the specified requirements; failing in this effort, their only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test."[107] Second, he argued that under the district court's analysis, judges would be forced to ascertain the purpose underlying the enactment of a challenged classification and then determine whether or not that purpose could best be served by a flat durational cut-off requirement or by individualized determinations. This was said to constitute "a degree of judicial involvement in the legislative function which we have eschewed except in the most unusual circumstances, and which is quite unlike the judicial role mandated by *Dandridge* [and] *Belcher* . . . as well as by a host of cases arising from legislative efforts to regulate private business enterprises."[108] Third, Justice Rehnquist noted that the government had argued that sections 416(c)(5) and (e)(2) were prophylactic in nature because they promulgated classifications similar to those utilized by private insurers to assure that payments were made only upon the occurrence of events the risk of which was covered by the insurance program.[109] In *Salfi*, the legislative history revealed a congressional intent to preclude a certain type of abuse, namely, "[t]he danger of persons entering a marriage relationship not to enjoy its traditional

104. 404 U.S. at 84.

105. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) (school board regulations requiring pregnant teachers to take unpaid maternity leave commencing at least four months before the expected birth held invalid); Vlandis v. Kline, 412 U.S. 441, 452 (1973) (law requiring nonresidents enrolled in state university to pay higher tuition fees and which presumed nonresidency on the basis of one's legal address held invalid); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (law denying a hearing on parental fitness to an unwed father when such a hearing was granted to all other parents whose custody of their children was challenged held invalid), *cited in* Salfi v. Weinberger, 373 F. Supp. 961, 965 (N.D. Cal. 1974), *rev'd*, 422 U.S. 749 (1975).

106. 422 U.S. at 770-72.

107. *Id.* at 772.

108. *Id.* at 773.

109. *Id.* at 776.

benefits, but instead to enable one spouse to claim benefits upon the anticipated early death of the wage earner . . . ."[110] The Court believed that individualized determinations could not effectively deter such abuses because both marital intent and knowledge of life expectancy could not be determined with any reliability and because the very possibility of an individual hearing could encourage such abuses.[111] The Court accordingly concluded that "Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded . . . that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule."[112]

Mathews v. Lucas[113] involved a challenge to 42 U.S.C. § 402(d)(1), which limited survivors' benefits to the "dependent" children of deceased wage-earners.[114] A dependent child was defined as one who was either (a) legitimate, (b) capable of inheriting personal property from the decedent under applicable state intestacy laws or (c) illegitimate, but either the product of a purported marriage entered into in good faith, or acknowledged by the decedent in writing, or established as the child of the decedent by a judicial decree or support order.[115] In an opinion by Justice Blackmun, the Court upheld the constitutionality of this provision in 1976. Relying on prior cases that involved claims of discrimination against illegitimates,[116] Justice Blackmun initially pointed out that the strict scrutiny standard of review was not mandated in this case.[117] He then cited *Salfi* for the conclusion that

110. *Id.* at 777. *See* H.R. REP. No. 2526, 79th Cong., 2d Sess. 25 (1946); S. REP. No. 1862, 79th Cong., 2d Sess. 33 (1946); H.R. REP. No. 544, 90th Cong., 1st Sess. 56 (1967).

111. 422 U.S. at 782-83.

112. *Id.* at 777.

113. 427 U.S. 495 (1976).

114. 42 U.S.C. § 402(d)(1) (1970) provides in part:

> Every child (as defined in section 416(e) of this title) . . . of an individual who dies a fully or currently insured individual, if such child—
>
> (A) has filed application for child's insurance benefits,
>
> (B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22 . . . and
>
> (C) was dependent upon such individual—
>
> . . . .
>
> (ii) if such individual has died, at the time of such death, . . .
>
> . . . .
>
> shall be entitled to a child's insurance benefit for each month, beginning with the first month after August 1950 in which such child becomes so entitled to such insurance benefits . . . .

115. 427 U.S. at 499-500 and nn. 2 & 3 (quoting portions of 42 U.S.C. §§ 402(d)(3), 416(h)(1)(B), 416(h)(2)(A)-(B), 416(h)(3) (1970)).

116. Jimenez v. Weinberger, 417 U.S. 628, 631-34 (1974); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173, 175-76 (1972).

117. 427 U.S. at 506.

section 402(d)(1) incorporated a presumption of dependency which, although inexact, was justified because it effectively precluded the administrative burden and expense that would have been engendered by a system of individualized determinations.[118] Thus, the Court concluded that the appellees must necessarily show that the classification contained in the challenged enactment bore no substantial relationship to the status the enactment sought to define. According to Justice Blackmun, this burden was not met. "[T]he statute does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations. The presumption of dependency is withheld only in the absence of any significant indication of the likelihood of actual dependency."[119] While the Court admitted that it was not necessarily true that the children of a defective marriage live with their parents, or that an order of support issued by a court is in fact being obeyed, or that a dependent relationship exists between an adult and one whom he acknowledges in writing to be his offspring, it nevertheless concluded that its function was to accept the "practical judgment" and "empirical calculation" of Congress in these matters.[120] Justice Blackmun thus found that "[w]e cannot say that these expectations are unfounded, or so indiscriminate as to render the statute's classification baseless."[121]

As noted, Justice Rehnquist in *Goldfarb* claimed not only that *Salfi* and *Lucas* conflicted with *Wiesenfeld*, but also that they mandated a result contrary to that reached by Justice Brennan concerning the validity of section 402(f)(1)(D). These claims are specious because the cases are thoroughly distinguishable.[122] *Salfi* involved a statutory provision that did not contain an invidious gender-based discrimination. While the appellees in *Salfi* were women and stepchildren, the *identical* nine month requirement was imposed on *widowers* pursuant to 42 U.S.C. §§ 402(f) and 416(g).[123] As the Court in *Salfi* noted:

118. *Id.* at 509 (citing Weinberger v. Salfi, 422 U.S. 749, 772 (1975)).

119. 427 U.S. at 513.

120. *Id.* at 515.

121. *Id.* at 516.

122. *Salfi* and *Goldfarb* are, however, similar in one respect. The Court in *Salfi* noted that the presumptions of sections 416(c)(5) and (e)(2) were not irrebuttable because one affected by them could always adduce evidence by which he or she could remove himself or herself from the disabled class. The same is true of the statute involved in *Goldfarb*, in which a widower was given a full opportunity to prove partial dependency upon his deceased spouse. Contrast these cases with *Wiesenfeld*, in which the Court noted that under section 402(g), "Stephen Wiesenfeld was not given the opportunity to show, as may well have been the case, that he was dependent upon his wife for his support, or that, had his wife lived, she would have remained at work while he took over care of the child." Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975). This is a point on which *Goldfarb* may be distinguished from *Wiesenfeld*, but only the dissenters appear to have noticed it.

123. 42 U.S.C. § 402(f) (1970 & Supp. V 1975) (amended 1977); *id.* § 416(g) (Supp. V 1975).

> Large numbers of people are eligible for these [social insurance] programs and are potentially subject to inquiry as to the validity of their relationships to wage earners. These people include not only the classes which appellees represent, but also claimants in other programs for which the Social Security Act imposes duration-of-relationship requirements.[124]

Thus, in *Salfi* the government did not discriminate between men and women, but rather among subclasses of women (*i.e.*, those who were married to a deceased wage-earner for nine months or more and those who were not). In contrast, the statutory provisions in *Wiesenfeld* and *Goldfarb did* discriminate between men and women. In the former case, section 402(g) of the Social Security Act denied benefits to surviving widowers with dependent children, but not to widows; in the latter case, section 402(f)(1)(D) imposed a proof-of-support burden only upon widowers. Thus, the Court's decision in *Salfi* simply did not involve issues arising from gender-based discrimination, which is undoubtedly why the district court in that case applied the "irrebuttable presumption" analysis to the statutory provision in question. Nor is that the only differentiating factor. The government in *Salfi* defended sections 416(c)(5) and (e)(2) on the ground that the classifications therein were prophylactic, designed to curb specified abuses. The Court in that case also focused on this point and emphasized the fact that individualized determinations would not be as efficacious in deterring such abuses. Thus, *Salfi* appears to be limited to situations involving prophylactic laws. The statutes in *Wiesenfeld* and *Goldfarb* do not fit within that rubric; they were not designed *solely* to ensure that the government paid only those benefits arising from the risks it obliged itself to insure. In both those cases, the United States offered in its defense the contention that the classifications in question merely took into account a "well-known" empirical fact: women are more likely than men to have been dependent upon their deceased spouses. This asserted justification is in no sense prophylactic because it is not aimed at curbing any perceived abuse. Arguably, then, the logic of *Salfi* was inapplicable to both the *Wiesenfeld* and *Goldfarb* cases.[125]

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124. 422 U.S. at 781-82.

125. A recent ruling, however, suggests that the logic of *Salfi* may be extended generally. Califano v. Jobst, 98 S. Ct. 95 (1977), involved a challenge to 42 U.S.C. §§ 402(d)(1)(D), (d)(5) (1970 & Supp. V 1975), which provide that marriage will not terminate the disability benefits received by the child of a deceased wage-earner if the child marries a person who is also entited to such benefits. Jobst married a woman who did not fit within that classification, but who was herself permanently disabled; he claimed that the classifications in question violated the Fifth Amendment. An unanimous Court rejected this contention, relying primarily on *Salfi*. Justice Stevens' opinion stated that the statute did no more than link dependency with marital status; presumably, a married person would be less likely to be dependent on his parents for support than one who is unmarried. Thus, the Court relied on *Salfi* for the conclusion that "[t]here is no

Similar difficulties exist with Justice Rehnquist's citation to *Lucas*. That case also did not involve discrimination between discrete classes of persons (*i.e.*, between illegitimate and legitimate children). Some subcategories of illegitimates were benefitted by the challenged enactment, while others were not. This stands in stark contrast to *Wiesenfeld* and *Goldfarb*, where the questioned provisions did provide sharply different treatment for men as a unitary class as opposed to women as a unitary class. But there is an even more crucial difference. *Lucas* involved discrimination on the basis of *legitimacy* rather than *gender*, and this distinction was deemed decisive. Thus, in *Lucas* Justice Blackmun cautioned:

> In cases of strictest scrutiny, such approximations [between a defining classification and the status sought to be defined] must be

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question about the power of Congress to legislate on the basis of such factual assumptions. General rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases." 98 S. Ct. at 99. *Wiesenfeld* was distinguished on the ground that that case involved "an unthinking response to stereotyped generalizations about a traditionally disadvantaged group." *Id. Jobst*, like *Salfi*, involved no gender-based discrimination claim; indeed, Justice Stevens pointed out that the marriage rule applied in many contexts, to disabled beneficiaries as well as parents, children, widows, widowers and divorced wives. *Id.* at 100 n.12. But *Jobst* seemingly involves something other than a prophylactic rule; there was no evidence cited by the Court that Congress drew the challenged classification in order to prevent a perceived abuse; indeed, the district court in *Jobst* made a point of distinguishing other cases where prophylactic provisions of the Social Security Act were at issue. *See* Jobst v. Richardson, 368 F. Supp. 909, 913-14 (W.D. Mo. 1974), *rev'd*, 98 S. Ct. 95 (1977) (citing Stanley v. Secretary of Health, Educ. & Welfare, 356 F. Supp. 793, 802 (W.D. Mo. 1973)). *Jobst* thus suggests that the rule of *Salfi* may extend beyond the specific factual setting of that case. Justice Stevens also stated:

> Even if we were to sustain his attack, and even though we recognize the unusual hardship that the general rule has inflicted upon him, it would not necessarily follow that Mr. Jobst is entitled to benefits. Cf. *Stanton v. Stanton*, 421 U.S. 7, 17-18 [1975] . . .; *Stanton v. Stanton*, 429 U.S. 501 [1977] . . . . For the vice in the statute stems from the exception created by the 1958 Amendment; that vice could be cured either by invalidating the entire exception or by enlarging it. Since the choice involves legislation having a nationwide impact, the equities of Mr. Jobst's case would not control. . . . If we were to enlarge the exception, it would be necessary to fashion some new test of need, dependency or disability. Although the District Court only granted relief for persons marrying a "totally disabled" spouse, its rationale would equally apply to any marriage of a secondary beneficiary to a needy nonbeneficiary.

98 S. Ct. at 100-01 n.14 (citations omitted). This footnote suggests that in social insurance cases where an unjustifiable inequity is proven, the Court may still withhold relief on the grounds that the difficulty inherent in fashioning a suitable remedy is not outweighed by the adverse effects, which are narrowly circumscribed. If this characterization is accurate, *Jobst* has announced a new doctrine. The only authority cited by the Court was *Stanton*, which invalidated a Utah law denying support payments by divorced parties to female children who reached 18 years of age while allowing such payments to male children up to the age of 21. In that litigation, however, the Court remanded the case to the Utah judiciary solely to determine an issue of state law, *i.e.*, whether "any unconstitutional inequality between males and females is to be remedied by treating males as adults at age 18, rather than by withholding the privileges of adulthood from

> supported at least by a showing that the Government's dollar "lost" to overincluded benefit recipients is returned by a dollar "saved" in administrative expense avoided. *Frontiero v. Richardson*, 411 U.S., [677,] 689 [1973] (plurality opinion). Under the standard of review appropriate here, however, the materiality of the relation between the statutory classifications and the likelihood of dependency they assertedly reflect need not be "scientifically substantiated." *James v. Strange*, 407 U.S. 128, 133 (1972), quoting *Roth v. United States*, 354 U.S. 476, 501 (1957) (opinion of Harlan, J.)[126]

Lucas, then, applied a mild standard of review, a standard that was said to be typified by the *James* case. *James* involved a claim of *wealth*-based discrimination against a Kansas recoupment law denying indigent criminal defendants the exemption for personal necessities accorded civil judgment debtors. In contrast, Justice Blackmun also referred in *Lucas* to a "stricter standard" of review and cited as an example the *Frontiero* case, which involved gender-based discrimination and which was relied upon extensively by both the majority opinion in *Wiesenfeld* and Justice Brennan's plurality opinion in *Goldfarb*. Thus, it is specious to assert, as Justice Rehnquist does, that the deferential stance of *Lucas* should be applied in *Goldfarb* when the majority in *Lucas* admitted that it was not implementing the stricter standard of review appropriate in cases, such as *Goldfarb*, that involve sex-based discrimination.[127]

Once one clears away some of the confusion wrought by Justice Rehnquist's ill-advised citations to *Salfi* and *Lucas*, one can then appreciate the gravamen of his dissent. Justice Brennan's plurality opinion in *Goldfarb* found that the only conceivable justification for the classification contained in section 402(f)(1)(D) was the broad, unverified assumption "that it would save the Government time, money, and effort simply to pay benefits to all widows, rather than to require proof of dependency of both sexes."[128] While the plurality rejected this assumption as a means of justifying the unequal treatment accorded widowers, Justice Rehnquist and his three fellow dissenters not only contended that such an assumption was a "rea-

women until they reach 21." 421 U.S. at 17-18. Thus, what occurred in *Stanton* bears little resemblance to what was discussed in note 14 of *Jobst*, and the latter case may well signify the beginning of increased judicial restraint in the context of social insurance legislation, a restraint that is exercised by all nine justices.

126. 427 U.S. at 509-10.

127. A third point should be noted. *Lucas* itself distinguished *Wiesenfeld* by pointing out that section 402(d)(1) did not effect a conclusive denial of benefits to all illegitimates, as the statute involved in the latter case did with respect to all widowers, because an illegitimate could always attempt to adduce evidence that would allow him to qualify as a dependent (*e.g.*, by proving the existence of a support decree or a written acknowledgement). Of course, the statute in *Goldfarb*, like that in *Lucas*, also effected no conclusive denial, *see* note 122 *supra*; one cannot then rely to any great extent on this distinction.

128. 430 U.S. at 217.

sonable surrogate" for proof of actual dependency, but also argued that because the challenged enactment favored women at the expense of men, it constituted an example of "benign" discrimination that had been heretofore permitted in cases like *Kahn v. Shevin*[129] and *Schlesinger v. Ballard*.[130]

Thus, between the plurality opinion and the dissent in *Goldfarb* eight of the justices divided evenly on the reasonableness of the classification. The decisive vote in this case was that of Justice Stevens, who concurred in the judgment of the plurality, but who also agreed with many of the points raised by the dissent. First, he accepted the dissent's view that the constitutional question raised by the appellee required the Court to focus on the appellee's claim for benefits rather than on his deceased wife's tax obligation.[131] In so doing, Justice Stevens explicitly rejected Justice Brennan's argument "that the statutory classification . . . should be regarded from the perspective of the prospective beneficiary and not from that of the covered wage earner,"[132] a thesis that had been borrowed directly from *Wiesenfeld*.[133] Second, Justice Stevens agreed with the dissent that the classification incorporated in section 402(f)(1)(D) was benign rather than invidious.[134] Third, he accepted the dissent's thesis that the classification in question could be justified by reference to the rationales of administrative convenience and the need to cushion the adverse financial impact suffered by widows.[135] Nevertheless, he rejected both rationales on the facts of this case. As to the first, Justice Stevens claimed that administrative convenience rests on the presumption that the cost of providing benefits to nondependent widows is justified by eliminating the burden of requiring those who are dependent to establish that fact.[136] Relevant statistics indicated that ten percent of all women receiving benefits are in fact nondependent and that Congress was thus needlessly expending as much as $750 million dollars per year.[137] Justice Stevens found it inconceivable that the adminis-

129. 416 U.S. 351 (1974). *Kahn* upheld a Florida statute granting a $500 property tax exemption to widows but not to widowers.

130. 419 U.S. 498 (1975). *Ballard* upheld a federal law entitling a male naval officer to only nine years' active service before mandatory discharge for lack of promotion, while allowing women thirteen years.

131. 430 U.S. at 217 (Stevens, J., concurring in the judgment).

132. *Id.* at 207.

133. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 647 (1975).

134. 430 U.S. at 218 (Stevens, J., concurring in the judgment). He pointed out that the classification used herein did not imply that males are inferior to females, did not condemn a large class on the basis of a unrepresentative few and did not add to the burdens of an already disadvantaged, discrete minority. *Id.*

135. 430 U.S. at 219 (Stevens, J., concurring in the judgment).

136. *Id.*

137. *Id.* at 220 & n.5.

trative savings, if any, could match that sum.[138] Nor could he accept the argument that section 402(f)(1)(D) was "the product of a conscious purpose to redress the 'legacy of economic discrimination' against females."[139] The women benefitted by the law were those least affected by that legacy, *i.e.*, widows who were financially self-sufficient. Therefore, he concluded that the challenged enactment was no more than "the accidental byproduct of a traditional way of thinking about females"[140] and was consequently invalid on the basis of the Court's prior holding in *Wiesenfeld*. While Justice Stevens thus purports to accept the dissent's theses, he would require a far more rigorous corroboration of a given justification for unequal treatment under the facts of each case.[141]

138. *Id.*

139. *Id.* at 221.

140. *Id.* at 223.

141. The fragile precedent set by the Court's plurality view in *Goldfarb* was further undermined by Califano v. Webster, 430 U.S. 313 (1977) (per curiam), a subsequent decision rendered during the term. That case also involved a gender-based equal protection challenge to a provision of the Social Security Act. Will Webster sought review of § 215 of the Act, under which old-age insurance benefits are computed on the basis of the wage-earner's "average monthly wage" earned during his "benefit computation years," which are the "elapsed years," reduced by five, during which the covered wages were highest. 42 U.S.C. § 415 (1970 & Supp. V 1975). Until 1972, *see* 42 U.S.C. § 415 (1970), *as amended by* Social Security Act Amendments of 1972, Pub. L. No. 92-603, § 104, 86 Stat. 1340. "Elapsed years" were partially determined by reference to the sex of the wage earner. Section 215(b)(3) prescribed that the number of such years for a male wage-earner would be three higher than the number for an otherwise similarly situated female wage-earner. 42 U.S.C. § 415 (1970) (amended 1972).

> Accordingly, a female wage earner could exclude from the computation of her "average monthly wage" three more lower earning years than a similarly situated male wage earner could exclude. This would result in a slightly higher "average monthly wage" and a correspondingly higher level of monthly old-age benefits for the retired female wage earner.

430 U.S. at 315-16. The lower court accordingly held that the statutory scheme violated the equal protection guarantee of the due process clause of the Fifth Amendment. Webster v. Secretary of Health, Educ. & Welfare, 413 F. Supp. 127, 130 (E.D.N.Y. 1976). The Supreme Court reversed in a per curiam opinion. 430 U.S. 313 (1977). In a very brief discussion, the Court initially cited Craig v. Boren, 429 U.S. 190 (1976), noting that the appropriate standard of review was whether the "classifications by gender [served] important government objectives and [were] substantially related to achievement of those objectives." 430 U.S. at 316-17 (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)). While recognizing that under Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), the "mere recitation" of a benign purpose will not foreclose inquiry into the actual purposes of a statute, 430 U.S. at 317 (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975)), the Court reiterated the point that "[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective." 430 U.S. at 317 (citing Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974)). It also acknowledged that it had previously rejected such a rationale when the classifications in fact penalized women wage-earners or when the "statutory structure and its legislative history revealed that the classification was not enacted as compensation for past discrimination," 430 U.S. at 317 (citing both *Goldfarb* and *Wiesenfeld* as authority for these propositions). *Id.* As to the first assertion, the Court noted those sections of the *Goldfarb* opinion regarding the reduced

Nevertheless, Justice Stevens' statements indicate that five justices have now rejected a significant aspect of the *Wiesenfeld* analysis. In that

protection accorded female wage-earner's families by the operation of the statutory classification. *See* 430 U.S. at 208-09. In this case, however, the Court asserted that the statutory scheme was "more analogous" to those upheld in *Kahn* and *Ballard* than to those struck down in *Wiesenfeld* and *Goldfarb*. 430 U.S. at 317.

> The more favorable treatment . . . here was not a result of "archaic and overbroad generalizations" about women, *Schlesinger v. Ballard* . . . , or of "the role-typing society has long imposed" upon women, *Stanton v. Stanton* . . . , such as casual assumptions that women are "the weaker sex" or are more likely to be child-rearers or dependents. Cf. *Califano v. Goldfarb* . . . ; *Weinberger v. Wiesenfeld* . . . . Rather, "the only discernible purpose of [the more favorable treatment is] the permissible one of redressing our society's longstanding disparate treatment of women." *Califano v. Goldfarb* . . . .

Id. (citations omitted).

The Court based its conclusion on the alleged effect and legislative history of this particular section. It argued that the statute operated to compensate women for past economic discrimination by allowing them to eliminate additional low-earning years from the calculation of their retirement benefits, *id.* at 318 (citing Kahn v. Shevin, 416 U.S. 351, 353-54 & nn. 4-6 (1974)), and that the legislative history reflected a concern for more favorable treatment of female wage-earners. 430 U.S. at 318. Citing Justice Stevens' concurring opinion in *Goldfarb*, the Court concluded that the legislative history was "clear" that the differing treatment was not " 'the accidental byproduct of a traditional way of thinking about females', *Califano v. Goldfarb*, [430 U.S. at 223 (Stevens, J., concurring in the judgment)], but rather was deliberately enacted to compensate for particular economic disabilities suffered by women." 430 U.S. at 320. By basing its conclusion on the alleged effect and legislative history of the challenged section, the *Webster* Court followed Justice Stevens' *Goldfarb* analysis but reached a different conclusion on the facts. Whether the conflicting results are merited, however, is questionable. It should be noted initially that *Webster's* emphasis on the direct operation of the statute is unique. While the Court has, on prior occasions, recognized the remedial effects of a statutory discrimination in favor of women, it has not utilized such an effect to justify the gender-based discrimination. In *Goldfarb*, for example, the statute clearly operated in favor of widows and could be interpreted as effectuating compensation for past limitations on employment opportunities. The Court rejected such a "recitation" of benign purpose, without more. 430 U.S. at 212-17. In contrast, in *Webster* the Court found that the differential treatment was "deliberately" enacted in 1956, in lieu of the statute's previously equal standards, to compensate for past employment discrimination. 430 U.S. at 320. The history cited, however, did not include any direct assertions as to legislative purpose. In an earlier examination of the same section, dissenting Judge McMillen of the northern district of Illinois had observed:

> The majority . . . assumes that the purpose of this differential in benefits is to compensate females for the lower wages which they had previously earned. There is no evidence in the record, however, that these conditions have existed or that they have existed in all levels or types of employment covered by the Social Security Act. Equally importantly, there is no evidence in the record that Congress adopted the distinction in order to compensate for past discrimination.

Polelle v. Secretary of Health, Educ. & Welfare, 386 F. Supp. 443, 448 (N.D. Ill. 1974) (McMillen, J., dissenting).

Another inconsistency surfaces in the *Webster* opinion. In response to Webster's assertion that the 1972 amendment constituted an admission by Congress that its previous policy was invidiously discriminatory, the Court noted, in part, that

> [the] elimination of the more favorable benefit computation for women wage earners, even in the remedial context, is wholly consistent with those reforms, which require equal treatment of men and women in preference to the attitudes of "romantic

case, the Court dismissed a claim that because social security benefits were not compensation for work done, Congress was not obligated to provide such benefits on equal terms to male and female wage-earners.[142] In doing so, the Court declined to extend its 1960 ruling in *Flemming v. Nestor*.[143] That decision, which involved a challenge to a provision of the Social Security Act curtailing benefit payments to resident aliens who underwent deportation,[144] had held that the interest of an employee covered by the Act in future benefits was "noncontractual" in nature.[145] The Court in *Wiesenfeld* had remarked that the noncontractual nature of a specified interest is not a sufficient basis upon which the government "can sanction differential protection for covered employees which is solely gender based."[146] Because the statutory right to benefits under the Act was related to years worked and amount earned, rather than to beneficiaries' needs, the Court held that such benefits must be distributed according to classifications that do not "without sufficient justification" differentiate solely on the basis of sex.[147] In contrast, Justice Rehnquist argued in *Goldfarb* that "social insurance differs

paternalism" that have contributed to the "long and unfortunate history of sex discrimination." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

430 U.S. at 320. Why the Court failed to apply a similar analysis to the pre-1972 statutory formula is unclear. One could at the very least argue that, while the statute was intended to compensate for past discrimination, it also reflected an attitude of "romantic paternalism." Recognition of the confusion engendered by the *Webster* opinion is reflected in the separate opinion of Chief Justice Burger, who concurred in the per curiam judgment and was joined by Justices Stewart, Blackmun and Rehnquist. 430 U.S. at 321 (Burger, C.J., concurring, joined by Stewart, Blackmun and Rehnquist, JJ.). He noted that he found it "somewhat difficult to distinguish the Social Security provision upheld here from that struck down so recently in [*Goldfarb*]." *Id.* While the Chief Justice found some merit in the per curiam opinion, he questioned "whether certainty in the law is promoted by hinging the validity of important statutory schemes on whether five Justices view them to be more akin to the 'offensive' provisions struck down in [*Wiesenfeld* and *Frontiero*] or more like the 'benign' provisions upheld in [*Ballard* and *Kahn*]." *Id.* The Chief Justice thus concurred in the judgment on the basis of the rationale urged by Justice Rehnquist in his dissenting opinion in *Goldfarb*, 430 U.S. at 224-42 (Rehnquist, J., dissenting, joined by Burger, C.J., and Stewart and Blackmun, JJ.), in which he had joined. 430 U.S. at 321. By reasserting the dissenting rationale of *Goldfarb*, the *Webster* concurrence re-emphasizes the Court's growing recognition of the "special characteristics," *see* 430 U.S. at 225 (Rehnquist, J., dissenting, joined by Burger, C.J., and Stewart and Blackmun, JJ.), of social insurance plans, particularly with respect to the sufficiency of benign discrimination as a justification for gender-based classifications within the context of such legislation.

142. 420 U.S. at 646-47.

143. 363 U.S. 603 (1960).

144. 42 U.S.C. § 402(n) (1958) (amended 1960).

145. 363 U.S. at 609-10.

146. 420 U.S. at 646.

147. *Id.* at 647. In a subsequent decision this term the Court affirmed another aspect of the *Flemming* decision. In Califano v. Webster, 430 U.S. 313 (1977), the Court specifically held that under *Flemming*, old-age benefit payments are not constitutionally immunized against alterations resulting from statutory amendment. *Id.* at 321. For a discussion of the *Webster* decision, see note 141 *supra*.

from compensation for work done."[148] He relied on *Flemming* for the proposition that because a claim to Social Security benefits is noncontractual in nature, "the contributions of the deceased spouse cannot be regarded as creating any sort of contractual entitlement on the part of either the deceased wife or the surviving husband."[149] Justice Stevens concurred with this view. He noted that the deceased wife "had no contractual right to receive benefits or to control their payment; moreover, the payments are not a form of compensation for her services."[150] Thus, the limitation of *Flemming*, which *Wiesenfeld* had seemingly consigned to oblivion, seems to have reappeared in this area of the law and may well prove to be a severe constraint upon future constitutional challenges to provisions of the Social Security Act.

Moreover, *Goldfarb* suggests that a working majority of the Court will accept either benign discrimination or administrative convenience as a sufficient justification for gender-based classifications, at least within the context of social insurance programs. Only Justice Stevens appears to insist that such a justification be factual rather than hypothetical.[151] While acceptance of benign discrimination is not an innovation, a majority espousal of the rationale of administrative convenience is unique, at least in cases involving sex-based equal protection claims. Thus, in the context of social insurance legislation, a majority of the Court could, in a future case, uphold a gender-based classification if it represented a reasonable empirical judgment or assumption that (in fact) served administrative convenience in the allocation of benefits. Such a realignment may very well dismantle the plurality holding in *Frontiero v. Richardson*,[152] at least insofar as that case has been interpreted to imply that a mere invocation of the slogan "administrative convenience" will not justify invidious sex-based discrimination.[153]

148. 430 U.S. at 241 (Rehnquist, J., dissenting, joined by Burger, C.J., and Stewart and Blackmun, JJ.).

149. *Id.* at 240. Justice Rehnquist argued in this regard that:

> [w]hile there is no basis for assessing the propriety of a given allocation of funds within a social insurance program apart from an identifiable legislative purpose, a compensatory scheme may be evaluated under the principle of equal pay for equal work done. This case is therefore unlike *Frontiero*. . . . [H]ere, . . . the benefit payments to survivors are neither contractual nor compensatory for work done, and . . . there is thus no comparative basis for evaluating the propriety of a given benefit apart from the legislative purpose.

Id. at 241.

150. 430 U.S. at 217 (Stevens, J., concurring in the judgment). For this reason, he added, the case was not controlled by *Frontiero*. *Id.* at n.1. Justice Stevens' rationale was that all workers, male and female, at the same salary level pay the same tax whether married or single, old or young, or the head of a large or small family. "The benefits which may ultimately become payable to them or to a wide variety of beneficiaries . . . vary enormously, but such variations do not convert a uniform tax obligation into an unequal one." *Id.* at 218.

151. *Id.* at 219-24 (Stevens, J., concurring in the judgment).

152. 411 U.S. 677 (1973).

153. *See id.* at 690-91.

This conclusion may, however, be premature. As noted in *Lucas*,[154] *Frontiero* required the government to demonstrate that every dollar lost to an overincluded benefit recipient is returned by a dollar saved in administrative expense avoided. The four dissenters in *Goldfarb* found no need for such a stringent evidentiary burden;[155] but Justice Stevens, while asserting that *Frontiero* did not apply to this case, nevertheless appeared to demand such an exacting showing on the part of the government.[156] If so, then the central principle of *Frontiero* may still be alive and well.

B. Invidious Racial Discrimination: Impact vs. Purpose

1. Housing

In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*,[157] the Court reaffirmed its recent decision in *Washington v. Davis*[158] and clarified some of the questions raised by that opinion. *Davis* had held that disproportionate racial impact alone would not cause an official action to be deemed unconstitutional but that additional proof of racially discriminatory intent or purpose would be necessary to show a violation of equal protection.[159] *Arlington Heights* established that such purpose need not be the "dominant" or "primary" one,[160] but that determining whether it was a "motivating factor" demanded a "sensitive" inquiry into the available circumstantial and direct evidence of motive.[161]

154. Mathews v. Lucas, 427 U.S. 495, 509-10 (1976).

155. 430 U.S. at 238 (Rehnquist, J., dissenting, joined by Burger, C.J., and Stewart and Blackmun, JJ.)

156. 430 U.S. at 219 (Stevens, J., concurring in the judgment).

157. 429 U.S. 252 (1977). For a previous consideration of this case, one which reached somewhat different conclusions than those expressed here, see Note, *The Village of Arlington Heights: Equal Protection in the Suburban Zone*, 4 HASTINGS CONST. L.Q. 361 (1977) [hereinafter cited as *Equal Protection*].

158. 426 U.S. 229 (1976). *Davis* involved a claim that certain testing procedures utilized by the District of Columbia police force violated the due process clause of the Fifth Amendment solely because they had a racially disproportionate impact. *See generally* Comment, *Washington v. Davis: Reassessing the Bars to Employment Discrimination*, 43 BROOKLYN L. REV. 747 (1977).

159. 426 U.S. at 242. The court of appeals in *Davis* applied the doctrine that constitutional claims of racial discrimination could be judged by standards identical to those used in cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1970 & Supp. V 1975) which do not require scrutiny of intent or purpose. Davis v. Washington, 512 F.2d 956, 959 (D.C. Cir. 1975). In the context of employment discrimination, a number of other courts reached similar conclusions. *See* Douglas v. Hampton, 512 F.2d 976, 981 (D.C. Cir. 1975); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1337 (2d Cir. 1973); Castro v. Beecher, 459 F.2d 725, 732-33 (1st Cir. 1972); Chance v. Board of Examiners, 458 F.2d 1167, 1176-77 (2d Cir. 1972); Arnold v. Ballard, 390 F. Supp. 723, 737 (N.D. Ohio 1975); Wade v. Mississippi Coop. Extension Serv., 372 F. Supp. 126, 143 (N.D. Miss. 1974). The Court in *Davis* explicitly disapproved of all these decisions. *See* 426 U.S. at 244 n.12.

160. 429 U.S. at 265.

161. *Id.* at 266.

The Metropolitan Housing Development Corporation, a non-profit developer, sought to build racially-integrated, low- and moderate-income housing within the Village of Arlington Heights, a Chicago suburb. The contract to purchase the land was contingent upon the purchaser having the land rezoned from a single family to multiple family classification. The petition for rezoning, which was accompanied by supporting materials indicating the need for racially-integrated housing developments, was denied by the Village Board on the basis of the recommendation of its Plan Commission. This recommendation was formulated after public hearings during which it was alleged that: (1) the requested rezoning would reduce neighborhood property values and (2) the reclassification sought would usually be issued only to serve as a buffer between single-family developments and commercial/industrial land uses, and no such latter uses existed in the areas contiguous to Arlington Heights.[162] As a result of the Board's denial of a petition, the developer and some potential occupants brought suit for injunctive and declaratory relief, alleging, *inter alia*, that the refusal of the Board was racially discriminatory and thus violated the equal protection clause of the Fourteenth Amendment and the Fair Housing Act of 1968.[163] The district court held that the rezoning denial was not motivated by racial discrimination but rather by a desire to protect property values and to maintain the integrity of the Village's zoning plan.[164] The Seventh Circuit reversed; it accepted the lower court's assessment of motivation but held that the "ultimate effect" of the rezoning denial was racially discriminatory because it would disproportionately affect blacks.[165]

162. For the underlying facts of this case, *see id.* at 255-58.

163. 42 U.S.C. §§ 3601-3619, 3631 (1970 & Supp. V 1975). The Court remanded the case for further consideration of the statutory claim. 429 U.S. at 271. On remand, the Seventh Circuit held that the Village had a *statutory* obligation to refrain from zoning policies that effectively foreclosed construction of any low-cost housing within its boundaries. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1285 (7th Cir. 1977). The court looked solely to the effect of the official action in question. *Id.* at 1294.

164. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 373 F. Supp. 208, 211 (N.D. Ill. 1974).

165. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 414 (7th Cir. 1975). *See also* United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (no discriminatory purpose in zoning case need be shown in order to allege a claim under the Fair Housing Act of 1968; only a prima facie case of discriminatory effect need be demonstrated); United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach, 493 F.2d 799, 811 (5th Cir. 1974) (prima facie case under Title VIII could only be rebutted by showing necessity of promoting a substantial governmental interest); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971) (in case alleging both constitutional and statutory violations arising from municipal interference with construction of low-income housing, held, effect of, not purpose underlying, such interference would be decisive); Dailey v. City of Lawton, 425 F.2d 1037, 1039-40 (10th Cir. 1970) (denial of building permit clearly motivated by racial bias enjoined); Southern Alameda Spanish Speaking Organizations v. City of Union City, 424 F.2d

The United States Supreme Court reversed the ruling of the court of appeals in an opinion by Justice Powell, joined by the Chief Justice and Justices Stewart, Blackmun and Rehnquist. In considering the merits,[166] the Court reiterated the substance of its holding in *Davis* to the effect that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact."[167] The Court then offered a less than exhaustive summary of the proper subjects for its judicial inquiry to determine whether an invidious purpose was a factor motivating an official decision, including the existence of a clear pattern of discriminatory official action preceding the decision, the historical background of the decision, the specific sequence of events leading up to the decision, departures from the normal procedural and substantive sequence of decisionmaking and the legislative or administrative history underlying the challenged decision.[168]

291, 295 (9th Cir. 1970) (if the effect of a referendum abrogating a permit to construct federally-financed low- and moderate-income housing is discriminatory, "a substantial constitutional question" is presented; no Title VIII claim was involved) (dictum); Ybarra v. Town of Los Altos Hills, 370 F. Supp. 742, 751 (N.D. Cal.), *aff'd*, 503 F.2d 250 (9th Cir. 1974) (constitutional challenge to local zoning ordinance could be rebutted by showing that said ordinance "was not arbitrary and unreasonable in purpose or effect"). As these cases demonstrate, the state of the law prior to *Arlington Heights* was somewhat unsettled. But the Seventh Circuit definitely appeared to adopt the statutory standard enunciated in *Black Jack*, although its holding is supported independently by cases like *Lackawanna, Union City* and *Ybarra*.

166. The Court first determined that the plaintiffs had standing by relying on its decision in Warth v. Seldin, 422 U.S. 490 (1975). It held that the developer had standing because he had shown an injury to himself " 'likely to be redressed by a favorable decision.' " 429 U.S. at 262 (quoting Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 38 (1976)). It also concluded that one of the black plaintiffs had standing, basing its conclusion on a similar rationale. 429 U.S. at 264.

167. 429 U.S. at 264-65.

168. *Id.* at 266-68. It could be argued that three of the five varieties of evidence cited by the Court are, for all practical purposes, often indistinguishable from one another. *See Equal Protection, supra* note 157, at 372-73. Thus, one might suggest that because Lane v. Wilson, 307 U.S. 268 (1939), was cited in support of both the "clear pattern" and "historical background" classifications, the same facts may suffice to make out a claim under either category. But the level of inquiry in each is, in fact, crucially different. In the "clear pattern" classification, the Court concerns itself solely with impact, not with purpose. "Historical background," however, was said to be most useful "if it reveals a series of official actions taken for invidious purposes." 429 U.S. at 267. Thus, in the "clear pattern" cases, an ordinance enforced so as to deny 200 of 200 applications filed by Chinese to operate laundries, but only 1 of 80 applications filed by whites, Yick Wo v. Hopkins, 118 U.S. 356, 359 (1886), or a gerrymandering plan restructuring the electoral district of Tuskegee, Alabama, so that a twenty-eight-sided figure that left all but four blacks outside city limits was created, Gomillion v. Lightfoot, 364 U.S. 339 (1960), are examples of situations where the Court focused on effect and inferred a discriminatory purpose from that effect, without any further showing. However, in the "historical background" cases like Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala.), *aff'd per curiam*, 336 U.S. 933 (1949) (invalidated Alabama constitutional provision that required enfranchisement of only those who could explain any article of the United States Constitution, as a result of which only 104 nonwhites in a county that was 36% black were registered as voters; the district court took into account racially discriminatory comments made in state bar journals and campaign

After reviewing the record in this case, the Court concluded that the plaintiffs had failed to carry their burden of proof as to discriminatory

literature of the Democratic party that the amendment was designed to exclude blacks from voting and thus counteract the effect of a recent Supreme Court decision), or Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964) (after desegregation order by a court, county closed all public schools and began granting indirect benefits and tax relief to segregationist private schools), the Court reverses its approach and focuses not on the effect of official action, because that effect is not extreme enough, but rather on the purpose underlying that action. Thus, at least in theory, the two categories are highly distinguishable.

What, then, of the dual citation by the Court in *Arlington Heights* to Lane v. Wilson, 307 U.S. 268, 271 (1939). That case involved an Oklahoma voter registration law. In Guinn v. United States, 238 U.S. 347 (1915), the Court had held that an Oklahoma law imposing a literacy test on all voters except those eligible to cast a ballot on January 1, 1866 (and their lineal descendants) was unconstitutional. A year after *Guinn*, the Oklahoma legislature enacted a statute automatically enfranchising all those who had voted in the 1914 general election and gave all others twelve days (from April 30 to May 11, 1916) to register. 307 U.S. at 371. The Court said "[t]he practical effect of the 1916 legislation was to accord to the members of the negro race who had been discriminated against in the outlawed registration system of 1914, not more than 12 days within which to reassert constitutional rights which this Court found in the *Guinn* case to have been improperly taken from them." *Id.* at 276. Therefore, it was said that "the narrow basis of the supplemental registration, the very brief normal period of relief for the persons and purposes in question, the practical difficulties, of which the record in this case gives glimpses, inevitable in the administration of such strict registration provisions, leave no escape from the conclusion that the means chosen as substitutes for the invalidated 'grandfather clause' were themselves invalid under the Fifteenth Amendment." *Id.* at 277. *Lane* is, like *Schnell*, a "historical background" case; indeed, the fact pattern in both is similar. But it does not really fit within the "clear pattern" classification. Unlike *Yick Wo*, no showing of discriminatory enforcement was made or required; the Court assumed a discriminatory effect because the 1916 law reinstated indirectly the 1914 system, which had previously been deemed invalid. Thus, the Court in *Arlington Heights* appears simply to have misidentified the true nature of *Lane* within the context of its own typology.

It could also be argued that the classification of "historical background" appears to overlap considerably with the category of "specific sequence of events." But in fact there is less overlap than is superficially apparent. The former category seems to refer to events outside the decisionmaking process which cause that process to be initiated (*e.g.*, the Court's desegregation order in *Griffin*, which was based on the ruling in Brown v. Board of Educ., 349 U.S. 294 (1955); the decision of Smith v. Allwright, 321 U.S. 649 (1944), which preceded *Schnell*), whereas the latter category seems to refer to situations where an official decision is inconsistent with previous decisions or prior policy and that inconsistency can only be explained by reference to a discriminatory purpose (*see, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967) (California constitutional amendment granting a person the full discretion to refuse to sell or lease to another, which nullified prior legislation prohibiting discrimination in housing); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971) (town declared moratorium on new subdivisions and rezoned area for park land shortly after learning of plaintiffs' plans to build low-income housing); Progress Dev. Corp. v. Mitchell, 286 F.2d 222 (7th Cir. 1961) (park board allegedly condemned plaintiffs' land for a park upon learning that the homes plaintiffs were building would be sold under a marketing plan designed to assure integration)). Thus the "sequence of events" category differs from the "historical background" classification in that although both require scrutiny of matters extrinsic to the decisionmaking process, the former alone directs judicial focus upon whether or not a given decision comports with past practices. Therefore, there is a significant basis for distinction between the two.

Finally, it might be argued that the Court's citation to Grosjean v. American Press Co., 297

purpose and that this foreclosed further constitutional inquiry, notwithstanding the discriminatory "ultimate effect" found by the court of appeals.[169] However, the claim concerning the Fair Housing Act was remanded to the Seventh Circuit for further consideration.[170]

As noted in an earlier analysis of this case,[171] the Court effectively reformulated the purpose requirement of equal protection analysis, which had originally been derived from the distinction between de facto and de jure segregation. By phrasing it in terms of the consideration of a "motivating factor," the Court would appear to require determination of motive as well as purpose. This reformulation, however, may not be significant; the majority opinion in *Arlington Heights* appears to treat the terms "motive" and "purpose" as alternative ways of expressing one essential concept: *why* a decisionmaker made a particular choice.[172] Thus, whether the subject of

U.S. 233 (1936), in connection with its discussion of "sequence of events" is anomalous because the only sequence specifically mentioned in that case consisted of the eighteenth century Stamp Acts and the adoption of the First Amendment, subjects which should more properly be considered under the rubric of "historical background." As a matter of fact, however, this historical discussion in *Grosjean* had nothing to do with whether the challenged official conduct was invidiously motivated. The Court engaged in its historical exegesis in order to ascertain if the First Amendment permitted a newspaper to seek enjoinment of the collection of a state license tax:

> A determination of the question whether the tax is valid in respect of the point now under review, requires an examination of the history and circumstances which antedated and attended the adoption of the abridgement clause of the First Amendment, since that clause expresses one of those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" . . . and, as such, is embodied in the concept "due process of law" . . . and, therefore, protected against hostile state invasion by the due process clause of the Fourteenth Amendment.

Id. at 245 (citations omitted). In fact, the Court apparently did not intend to refer to this section of *Grosjean* at all in *Arlington Heights*. What it *did* refer to was the statement in that case that "[The tax] is bad, because in the light of *its* history and of *its* present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties." *Id.* at 250 (emphasis added). Thus, this language talks about the unspecified history of the Louisiana act, *not* the history underlying the First Amendment. Viewed in this way, the Court's citation in *Arlington Heights* to *Grosjean* does not seem anomalous at all.

169. *Id.* at 270-71. Concurring and dissenting in part, Justice Marshall, who was joined by Justice Brennan, argued that the entire case should be remanded for reconsideration in light of *Davis*. *Id.* at 271-72 (Marshall, J., concurring in part and dissenting in part, joined by Brennan, J.). Justice White dissented and would also have vacated the judgment below for reconsideration of the statutory issue and, if necessary, the constitutional question in light of *Davis*. *Id.* at 272-73 (White, J., dissenting). He criticized the majority for reassessing the evidence and for the unnecessary listing of evidentiary sources and subjects of proper inquiry. *Id.* at 273.

170. *Id.* at 271. *See* note 163 *supra*.

171. *See Equal Protection, supra* note 157, at 374-75. According to Keyes v. Denver School Dist. No. 1, 413 U.S. 189 (1973), "the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate." *Id.* at 208.

172. This assertion may be corroborated by a glance at *Arlington Heights* and its predecessors. Thus, in Palmer v. Thompson, 403 U.S. 217 (1971), the Court refused to scrutinize the legislative motive underlying the closing of a municipal swimming pool alleged to have been

judicial inquiry is denominated either "purpose" or "motive," the factors appropriate for consideration are the same and they each require examination of extrinsic evidence. Thus, the Court reaffirmed its view, announced as long ago as *Yick Wo v. Hopkins*,[173] that when a "clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face,"[174] such evidence may suffice to show an invidious discriminatory purpose.[175]

caused by sentiments of racial discrimination and, in doing so, it noted that "[i]t is true there is language in some of our cases interpreting the Fourteenth and Fifteenth Amendments which may suggest that the motive or purpose behind a law is relevant to its constitutionality. . . . But the focus in those cases was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did." *Id.* at 225. *Accord*, Wright v. Council of Emporia, 407 U.S. 451, 461-62 (1972). Similarly, in United States v. O'Brien, 391 U.S. 367 (1968), the Court evinced an identical reluctance to scrutinize purpose by saying, "[i]nquiries into congressional motives or purposes are a hazardous matter." *Id.* at 383. In support of this statement, it cited language in McCray v. United States, 195 U.S. 27, 56 (1904): "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." Thus, all these cases referred to "motive" and "purpose" as alternative means of expressing the same idea. This lexicographical imprecision recurs in *Arlington Heights*, where *Palmer, Wright* and *O'Brien* are said to adopt a position contrary to the one that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." 429 U.S. at 265. Similarly, four years earlier, the Court had referred to *Palmer* as dealing with the elusive "search for legislative purpose," even though the case had used the terms of both "purpose" and "motive." McGinnis v. Royster, 410 U.S. 263, 276-77 (1973). Again, all this emphasizes the point that the Court is *not engaging* in an effort to differentiate the meanings of the words "intent," "purpose" and "motive," although at least one justice has elsewhere contended that such a distinction is necessary. *See* Trimble v. Gordon, 430 U.S. 762, 782-83 (1977) (Rehnquist, J., dissenting). This failure to distinguish the meanings of words was also true in Washington v. Davis, 426 U.S. 229 (1976). There, in stating that the judiciary had a duty to scrutinize legislative purpose in equal protection claims, the Court cited in support of this contention Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973) ("[T]he differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate"), 426 U.S. at 240, and distinguished *Palmer* and *Wright*, discrediting the former to "the extent that [they] suggest a generally applicable proposition that legislative purpose is irrelevant in constitutional adjudication . . . ." 426 U.S. at 244 n.11. It did so, even though *Keyes* speaks of "intent" and "purpose," while *Palmer* spoke of "motive" and "purpose." The point of this footnote is not that distinctions cannot be drawn among these three words; it is simply that the Court has chosen *not* to do so for over 70 years. Therefore, when the Court in *Arlington Heights* phrases the issue in terms of whether or not "invidious discriminatory purpose" was a "motivating factor" of an official decision, it is doing nothing unusual. For general discussions of this entire subject, *see* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

173. 118 U.S. 356 (1886). *See* note 168 *supra*.

174. 429 U.S. at 266.

175. In an accompanying footnote, the Court remarked that:

Several of our jury-selection cases fall into this category. Because of the nature of the jury-selection task, however, we have permitted a finding of constitutional violation even when the statistical pattern does not approach the extremes of *Yick Wo [v.*

But where such a clear pattern is not apparent, the majority opinion sanc-

Hopkins, 118 U.S. 356 (1886), involving discriminatory enforcement of building safety codes against Chinese] and *Gomillion [v. Lightfoot*, 364 U.S. 339 (1960), involving municipal gerrymandering designed to disenfranchise blacks].

429 U.S. at 266 n.13 (citations omitted). The accuracy of this statement was borne out later in the term by the case of Castaneda v. Partida, 430 U.S. 482 (1977). That suit involved a challenge to the Texas "key man" system of selecting grand jurors. Under the system, selection was vested in jury commissioners authorized to choose persons from the community at large; all persons so designated were then to be tested for the qualifications required by article 19.08 of the Texas Code of Criminal Procedure, including literacy and good moral character. Partida was indicted by a grand jury in Hidalgo County for committing burglary with intent to rape and was subsequently convicted. He challenged his conviction on the grounds that although the population of Hidalgo County was 79.1% Mexican-American, only 39.0% of the grand jurors serving between 1962 and 1972 had Spanish surnames, only 50.0% of the grand jury that convicted him had such surnames, and Mexican-Americans generally were subject to economic and educational disadvantages. *Id.* at 486-88. The state offered no rebuttal evidence; nevertheless, the Texas Court of Criminal Appeals and a federal district court declined to grant a new trial. *Id.* at 488-92. The Fifth Circuit reversed the latter decision, however, finding that Partida had made a prima facie case of discrimination, which the state had failed to rebut. *Id.* at 492. The Supreme Court affirmed. Justice Blackmun, speaking for a majority of five, said that "in order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs." *Id.* at 494. He also ruled that the plaintiff's burden of proof consisted of showing that (1) there exists a distinct group or class singled out for differential treatment, and (2) underrepresentation is present by comparing the "proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time." 430 U.S. at 494 (quoting Hernandez v. Texas, 347 U.S. 475, 480 (1954)). A selection procedure that is susceptible to abuse or not racially neutral was said to support the presumption raised by such an evidentiary showing. Based on the statistical disparity disclosed by Partida and the inherent subjectivity of a key man selection system, the majority found that the petitioners had made a prima facie case. *Id.* at 495-96. It cautioned, however, that it was "not saying that the statistical disparities proved here could never be explained in another case; we are simply saying that the State did not do so in this case." *Id.* at 499. Nor could any contention that Hispanics constituted a governing majority in Hidalgo county operate as a substitute for the state's introduction of rebuttal evidence. *Id.* at 500. The key dissents were those of Chief Justice Burger and Justice Powell. The former complained that Partida had used gross population figures as a referent for comparison, rather than the figures for the number of Mexican-Americans in Hidalgo County who would be eligible to serve as grand jurors. *Id.* at 504-05 (Burger, C.J., dissenting). There is authority for this view. In Akins v. Texas, 325 U.S. 398 (1945), for example, the Court stated that "[a] purpose to discriminate must be present which may be proven by systematic exclusion of *eligible* jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination." *Id.* at 403-04 (emphasis added). This language was quoted with approval as recently as the Court's decision in Washington v. Davis, 426 U.S. 229, 241 (1976). It ignores, however, the fact that this is a point that the state should have made (and for which evidence should have been introduced) in rebuttal; it was the absence of contradiction in the record that the majority found to be dispositive. Justice Powell went even further than the Chief Justice, however. He said that the majority misapplied equal protection analysis because cases like *Davis* and *Arlington Heights* established the precept that discriminatory intent *and* impact must be proved in order to show a violation of the Fourteenth Amendment. *Id.* at 510-11 (Powell, J., dissenting). Here, the former element was said to be unproven because three of the five jury commissioners were Hispanic and it would be difficult to presume that they discriminated against members of their own race. *Id.* at 514. On the basis of this evidence, Justice

tioned judicial reliance on the four types of evidence listed above.[176] Nevertheless, even such extrinsic proof need not be deemed decisive; the Court went on to note that "[p]roof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation . . . . Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered."[177] As Justice Stevens noted in his concurrence in *Davis*,

> the burden of proving a prima facie case may well involve differing evidentiary considerations. The extent of deference that one pays to the trial court's determination of the factual issue, and indeed, the extent to which one characterizes the intent issue as a question of fact or a question of law, will vary in different contexts.[178]

In the context of housing, the burden of proving a prima facie case of racial discrimination would appear to be quite heavy. Given the segregated housing patterns in many communities, a decision to "preserve the zoning

Powell claimed that the district court's ruling that the judge and jury commissioners had never intentionally discriminated against Mexican-Americans was not clearly erroneous. *Id.* at 517. Again, this analysis slights the fact that the case turned solely on an evidentiary question: was the evidence adduced by the petitioner sufficient to shift the burden of proof to the state of Texas? The majority held that it was. *Id.* at 497-98. The consequent failure of the state to rebut that evidence foreclosed further consideration. Texas could have brought out the points made by Justice Powell. Its failure to do anything, however, was decisive. As the Court has said, "[o]nce a prima facie case of invidious discrimination is established, the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result." Alexander v. Louisiana, 405 U.S. 625, 631-32 (1972). In *Partida*, Texas simply wasted its opportunity to engage in such a rebuttal; because of this unusual procedural characteristic, the case is not necessarily a harbinger of future developments in this area of constitutional law.

176. *See* note 168 and accompanying text *supra*. For an example of how this procedure will be applied, *see* Harkless v. Sweeny Independent School Dist., 554 F.2d 1353 (5th Cir. 1977). In that case the court confronted a challenge to an administrative decision not to renew the contracts of black school teachers after the integration of a dual school system. The Fifth Circuit appeared to find what could be classified as a "clear pattern" similar to that found in *Yick Wo*. Thus, of the black teachers, 70% did not receive contract renewals, although all white teachers requesting such renewals were granted them; moreover, of 17 newly-hired teachers, all were white. *Id.* at 1356. This is seemingly a stark enough pattern to make the evidence of impact decisive. Yet the Fifth Circuit went on to consider the other types of evidence adverted to in *Arlington Heights*. The court noted that the school district had historically maintained dual facilities; although the district desegregated voluntarily, the court surmised that no "overnight change" in racial attitudes had occurred. *Id.* As to the other evidentiary factors listed by the Supreme Court, the court of appeals lumped these under the rubric "sequence of events." It focused particularly on the compilation and content of "anecdotal evaluations" made by the curriculum director of the school district with regard to the black teachers not rehired. *Id.* at 1357. On this basis, the Fifth Circuit found racially discriminatory purpose. *Id.* at 1358. Its procedure suggests that the neat categories supplied by the Court in *Arlington Heights* will, as a practical matter, be rather loosely applied.

177. 429 U.S. at 270-71 n.21.

178. Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring).

plan" and to maintain "housing values" may well be tantamount to such discrimination in fact, notwithstanding the procedural or official propriety of that decision. Faced with the requirement of corroborating his claim by an extensive body of extrinsic evidence, the plaintiff will face an extremely difficult task in attempting to prove an ulterior racial motivation on the part of the lawmakers.[179] For example, in *Arlington Heights*, the Court indicated that lack of consistency in the Village's application of the policy of creating a buffer zone between residential and commercial land users and the fact that the Village Planner was never asked for his oral or written opinion on the rezoning request at issue would not be sufficient to make the threshold showing of discriminatory purpose.[180]

The Court's methodology in this respect is instructive. Despite the inconsistent use of the buffer policy by the Village on previous occasions, Justice Powell accepted the conclusions of the district court and the Seventh Circuit that this evidence did not necessitate a finding of discriminatory administration[181] and this assertion curtailed further inquiry into the subject.[182] On all other matters, however, the Court engaged in an independent review of the record, although it could have rested on the findings of the intermediate courts. Why it chose to accord a different level of inquiry to the

179. This may not always be the case, however, even after *Arlington Heights*. In Kirksey v. Board of Supervisors, 554 F.2d 139 (5th Cir. 1977), the court confronted a challenge to the implementation of a plan to restructure the voting districts for the election of county officers in Hinds County, Mississippi. The plan was devised in 1975 in order to remedy the incorrect apportionment effected by a prior 1969 redistricting. The Fifth Circuit said that the evidentiary criteria of *Arlington Heights* apply only where official action creates a discriminatory situation; they do not pertain where admittedly neutral official action perpetuates already existent purposeful discrimination. *Id.* at 147. This case raises an important qualification to *Arlington Heights*, but proof of *prior* purpose would still be required. This could be accomplished by relatively easy means, however, *e.g.*, admission of findings of fact made in previous lawsuits or stipulations.

180. 429 U.S. at 269-70 n.19.

181. *Id.* at 270. The plaintiffs in this case alleged fifteen violations of the Village's buffer policy. The Seventh Circuit found among these only four "clear" violations and two "questionable" violations. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 412 (7th Cir. 1975), *rev'd*, 429 U.S. 252 (1977). But this inconsistency was weighed against the defendants' evidence on the zoning change refusals: "[T]here were two proposed changes rejected at least in part on the basis of the buffer zone policy and another four rejections which might have been on this basis though this was not stated. There were also two proposals that were withdrawn after the Plan Commission had recommended their rejection at least partly on the basis of the apartment policy. A third withdrawal after a rejection recommendation might have been for the same reason." 517 F.2d at 412. Thus, of fifteen discrepancies, the Seventh Circuit firmly concluded that the buffer policy played a partial role in four, an unknown role in five, and was possibly violated in six. This was the basis for the finding upon which the Supreme Court relied; but the Court neglected to note that even the Seventh Circuit admitted "more detailed factual findings concerning these zoning changes would have been helpful. . . ." *Id.*

182. 429 U.S. at 271.

subject of administrative enforcement of the buffer policy was never explained.

On the failure to ask the advice of the Village Planner, the Court admitted that this omission was "curious," but claimed that the "respondents failed to prove at trial what role the Planner customarily played in rezoning decisions, or whether his opinion would be relevant to respondents' claims."[183] This suggests an interesting possibility: a plaintiff might show a wide variety of procedural irregularities in a zoning decision, but if the defendant administrator claims that the decision would have been the same, even had there been no irregularities, the Court would apparently be willing to regard such procedural lapses as *de minimis*. Thus, a great burden is placed on the plaintiff: he must not only show procedural or substantive departures, but must also engage in the unenviable task of demonstrating a causal nexus between those departures and an official decision, *i.e.*, that *but for* those departures, the decision that might have been reached would, in all probability, be contrary to the one that was reached. The obvious consequence of such an exacting standard is to foreclose success in all but the most blatant cases of discrimination.

Nor was that the only limit imposed. The decision by the Village Board occurred on September 28, 1971. Yet the plaintiffs were not allowed to question Board members about their motives at the time those members cast their decisions; they could only do so at the discovery phase of trial, when memories might have been dim. The Court did not find this objectionable, because it reasoned that since the theory of the case pressed by the plaintiffs had been based on effect, not purpose, they had no legitimate grievance about restrictions on the acquisition of evidence concerning purpose and, presumably, could not change the thrust of their case at this late stage.[184] But, as a matter of fact, the Court changed the thrust of their case for them. The Seventh Circuit, which handed down a ruling in 1975, had assumed that an equal protection claim could be based on evidence of effect.[185] That assumption was undermined by *Washington v. Davis*,[186] decided in 1976, in which the Court expressly rejected judicial overreliance on impact only and disapproved of many cases utilizing such a technique, including the Seventh Circuit's decision in *Arlington Heights*.[187] Thus, one can see the logic in the views of Justices Marshall, Brennan and White, who argued that the case should have been remanded for further proceedings in light of

183. *Id.* at 269-70 n.19.
184. *Id.* at 270 n.20.
185. *See* note 165 and accompanying text *supra*.
186. 426 U.S. 229 (1976). *See* notes 158-59 and accompanying text *supra*.
187. *Id.* at 244-45 n.12.

Davis.[188] As Justice Marshall said, "[t]he Court of Appeals is better situated than this Court both to reassess the significance of the evidence developed below in light of the standards we have set forth and to determine whether the interests of justice require further District Court proceedings directed toward those standards."[189] *Arlington Heights* is thus an anomaly. The district court and the court of appeals admitted evidence primarily relating to one theory of the case, proof of impact. The Supreme Court reviewed *that evidence* in light of its retrospective application of an entirely new theory of the case, proof of purpose, without allowing the plaintiffs to adduce new evidence to meet the additional burdens imposed by this new theory.

Apart from this anomaly, however, one may well ask the larger question: was the significant evidentiary burden imposed on the plaintiffs in this case misplaced? Arguably, no. Indeed, they may have mischaracterized the true impact of the Village's decision. The economic reality of such a decision may well have had a greater impact on the poor in general than on members of any race in particular. Although the particular plaintiffs in the lawsuit consisted of one nonprofit corporation and three nonwhite individuals (two blacks and one chicano) and although the individual plaintiffs failed to win certification of the action as a class action, the district court said that they merely had a wealth-based, not a racial, discrimination claim. It then rejected the wealth-based claim.[190] Coupling claims of discrimination against the poor and against nonwhites as the plaintiffs did raises an even more difficult threshold question. As Justice Powell noted in his opinion for the Court in *San Antonio Independent School District v. Rodriguez*,[191] a disadvantaged class consisting of the poor "cannot be identified or defined in customary equal protection terms . . . ."[192] While "the most probative evidence of intent [may be] objective evidence of what actually happened [*i.e.*, the impact of official action] rather than evidence describing the

188. *Id.* at 271-72 (Marshall, J., concurring in part and dissenting in part, joined by Brennan, J.); *id.* at 272-73 (White, J., dissenting); *see* note 169 *supra*.

189. *Id.* at 271-72 (Marshall, J., concurring in part and dissenting in part, joined by Brennan, J.).

190. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 373 F. Supp. 208, 209-10 (N.D. Ill. 1974), *rev'd*, 517 F.2d 409 (7th Cir. 1975), *rev'd*, 429 U.S. 252 (1977).

191. 411 U.S. 1 (1973). In this case, the Court held that a Texas school financing scheme based in part on revenues raised by local property taxes did not violate the equal protection clause of the Fourteenth Amendment, to the extent that it created disparities between the kind of education given students in low-wealth school districts and that given students in high-wealth school districts. For general discussions of the extent to which the Constitution protects the poor as a class, *see* Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41.

192. 411 U.S. at 19.

subjective state of mind of the actor,"[193] the impact in *Arlington Heights* was upon a class composed of individuals earning a low or moderate income. Although nonwhites generally constituted a higher percentage of this class than whites, the Village's actions with respect to those minorities did not lack an explanation on grounds "other than race." Thus, it could be argued that, in the context of this case, the burden of proof imposed on the plaintiffs may not have been unduly rigorous at all, because they may have been attempting to characterize an economically-motivated decision as a racial one, and thus avail themselves of the opportunity to claim the benefits of the strict scrutiny accorded claims of racial discrimination rather than the mere rationality standard used to analyze wealth-based equal protection claims.[194] Indeed, the district court in this case appeared to recognize as much when it stated: "Plaintiffs have failed to carry their burden of proving discrimination by defendants against racial minorities as distinguished from the under-privileged generally."[195] Thus, that court concluded that the individual plaintiffs in this case simply did not represent "a definable or manageable class"[196] such as a racial minority.

2. *Reapportionment*

The Supreme Court's major reapportionment decision of this term unfortunately raises more questions than it answers, largely as a result of the fact that the justices were divided and expressed their varying views in five different opinions. In *United Jewish Organizations of Williamsburgh, Inc. v. Carey*,[197] the Court held that a state legislature's use of racial criteria in drawing legislative district lines in an effort to comply with the Voting Rights Act[198] did not violate the Fourteenth or Fifteenth Amendments,

193. Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring).

194. *Compare* Loving v. Virginia, 388 U.S. 1, 9-11 (1967) (detailing the consequences of finding a discriminatory racial classification) *with* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 19-25 (1973) (explaining why the poor do not constitute a disadvantaged class under traditional equal protection analysis). *See also* Note, *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065 (1969).

195. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 373 F. Supp. 208, 210 (N.D. Ill. 1974), *rev'd*, 517 F.2d 409 (7th Cir. 1975), *rev'd*, 429 U.S. 252 (1977).

196. 373 F. Supp. at 209.

197. 430 U.S. 144 (1977). For a general discussion of this subject and of the opinion of the intermediate appellate court in this case in particular, see Walker, *One Man-One Vote: In Pursuit of an Elusive Ideal*, 3 HASTINGS CONST. L.Q. 453 (1976).

198. 42 U.S.C. §§ 1973-1973p (1970 & Supp. V 1975). The pertinent provision of this Act, 42 U.S.C. § 1973c (1970) (amended 1975), read in part as follows:

> [W]henever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, such

absent a clear showing that the resultant reapportionment was unfairly prejudicial to white or nonwhite voters. There was, however, no majority opinion on the substantive issues in this case; Justice White's opinion for the Court was accepted in its entirety only by Justice Stevens. Justices Blackmun and Brennan joined in all but one section, namely, the one in which Justice Rehnquist did join. Justices Stewart and Powell concurred in the judgment only, and the Chief Justice dissented.

The facts of the case are complex. The United States Attorney General concluded that Kings County, Bronx County and Manhattan County, New York, had imposed literacy tests upon voters during the 1968 Presidential election, and were therefore subject to the remedial provisions of the Voting Rights Act.[199] His approval was subsequently sought for the state's proposed 1972 reapportionment of congressional, state assembly and state

State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

199. *See* 35 Fed. Reg. 12354 (1970) (determination that New York maintained a literacy test on November 1, 1968); 36 Fed. Reg. 5809 (1971) (determination that the three counties in question were subject to the remedial provisions of the Voting Rights Act). New York sought a declaratory judgment that the three counties were exempt under 42 U.S.C. § 1973b(a) (1970) (permitting a federal court in the District of Columbia to determine that no such test had been used with the intent to abridge the right to vote on the basis of race during or preceding filing of the request for a declaratory judgment); the Justice Department consented to the judgment and it was subsequently granted. New York v. United States, No. 2419-71 (D.D.C. April 13, 1972) (unreported). Denied the right to intervene in the declaratory judgment proceedings, the NAACP appealed to the United States Supreme Court, which upheld the denial on the ground that the request for intervention was untimely. NAACP v. New York, 413 U.S. 345, 369 (1973). On a subsequent remand, however, the motion was granted. Thereafter, a New York district court ruled that failure to provide a Spanish translation for ballots used in the November 6 election constituted a violation of the Voting Rights Act. Torres v. Sachs, 381 F. Supp. 309, 313 (S.D.N.Y. 1973). In light of this precedent, the NAACP obtained an order that re-opened the 1972 District of Columbia judgment and required New York, on behalf of the three counties in question, to comply with § 5 of the Act. These orders were affirmed summarily. New York v. United States, 419 U.S. 888 (1974).

senate seats.[200] The Attorney General concluded that the state had not met its burden under the Voting Rights Act of demonstrating that the contemplated redistricting scheme had neither the purpose nor the effect of abridging the right to vote by reason of race or color.[201] The state then revised its reapportionment plan in 1974 to create two state assembly and two state senate districts with larger nonwhite majorities.[202] One affected white community was Williamsburgh, the home of 30,000 Hasidic Jews. Under the first plan, the Hasidic community was located entirely in one assembly (sixty-one percent nonwhite) and one senate (thirty-seven percent nonwhite) district.[203] The revised version divided the community into two assembly and two senate districts in order to create substantial nonwhite majorities approaching an idealized proportion of sixty-five percent in those districts.[204] To implement this goal, a portion of the white population of the original single districts was reassigned to adjoining districts; thus, for example, in Kings County as a whole under the 1974 plan, nonwhite majorities were created in two state senate districts that were majority white in the 1972 proposal, while white majorities were established in two districts that were majority nonwhite under the earlier plan.[205] The United Jewish Organizations sued on behalf of the Hasidic Jewish community for an injunction and declaratory relief, alleging that the revised plan would dilute the value of each plaintiff's franchise solely for the purpose of achieving a racial quota, and that members of the community were assigned to electoral districts solely on the basis of race, in violation of the Fourteenth and Fifteenth Amendments. The district court dismissed the complaint[206] and a divided United States Court of Appeals for the Second Circuit affirmed.[207]

200. *See* 1972 N.Y. Laws ch. 11. As a result of the 1974 orders by the District of Columbia court, *see* note 199 *supra*, New York sought the Attorney General's approval of the 1972 redistricting in Bronx, Kings and Manhattan counties; the 1972 reapportionment constituted a change of "standard, practice, or procedure with respect of voting" and such a change requires approval by the Attorney General under 42 U.S.C. § 1973c (1970) (amended 1975). *See* Georgia v. United States, 411 U.S. 526, 535 & n.7 (1973).

201. *See* United Jewish Organizations of Williamsburgh, Inc. v. Wilson, 510 F.2d 512, 517 (2d Cir. 1974), *aff'd sub nom.* United Jewish Organizations of Williamsburgh, Inc., v. Carey, 430 U.S. 144 (1977).

202. 1974 N.Y. Laws chs. 588-91, 599.

203. United Jewish Organizations of Williamsburgh, Inc. v. Wilson, 510 F.2d 512, 517 (2d Cir. 1974).

204. Redrawn state senate districts 23 and 25 were 71.1% and 34.7% nonwhite, respectively; redrawn assembly districts 56 and 57 were 88.1% and 65% nonwhite, respectively. *Id.* at 518.

205. *See* 430 U.S. at 152.

206. United Jewish Organizations of Williamsburgh, Inc. v. Wilson, 377 F. Supp. 1164, 1166 (E.D.N.Y.), *aff'd*, 510 F.2d 512 (2d Cir. 1974), *aff'd sub nom.* United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977).

207. United Jewish Organizations of Williamsburgh, Inc. v. Wilson, 510 F.2d at 512, 525 (2d Cir. 1974).

In rejecting the petitioners' claims, Justice White discussed four propositions: (1) whether the use of racial criteria in districting and apportionment was in fact permissible; (2) whether, even if racial considerations could be used to remedy the effects of past discrimination, there was, in fact, a finding of prior discrimination here; (3) whether the use of a racial quota is ever acceptable in redistricting; and (4) whether the racial criteria New York used in this case were constitutionally infirm. As to the first three issues, prior cases construing the Voting Rights Act were deemed controlling.[208]

As to the fourth question, Justice White held on two grounds that New York did not utilize constitutionally infirm criteria. First, he contended that the state did no more than that which the United States Attorney General had been authorized to require under the Court's previous construction of section 5 of the Voting Rights Act.[209] Justices Brennan and Blackmun joined this section of the opinion.[210] The second independent ground was that New York was free deliberately to draw district lines in such a way that the

208. 430 U.S. at 155-62. Relying primarily on Beer v. United States, 425 U.S. 130 (1976) and City of Richmond v. United States, 422 U.S. 358 (1975), the Court found that the Constitution did not prevent a state subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts, and that the use of racial criteria was not limited to eliminating the effects of past discriminatory districting or apportionment. In the *Beer* case, New Orleans had created, pursuant to § 5 of the Voting Rights Act, one council district with a black majority where none had previously existed. Eight justices approved such an approach. 425 U.S. at 141-42 (Stewart, J., for the Court, joined by Burger, C.J., and Blackmun, Powell and Rehnquist, JJ.); *id.* at 144 (White, J., dissenting); *id.* at 158-61 (Marshall, J., dissenting). In *City of Richmond*, the Court approved an annexation that reduced the proportion of blacks within the city from 52% to 42%; the new system resulting from the annexation created four wards (out of nine) with 64% nonwhite majorities. The Court held that "annexation in this context [did] not have the effect of denying or abridging the right to vote within the meaning of § 5." 422 U.S. at 372. Consequently, in the *United Jewish Organizations* case, it was said that "neither the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting and apportionment," 430 U.S. at 161, and that the state may decide how substantial black majorities must be in order to satisfy the requirements of the Voting Rights Act. The Court further stated that unless it had "adopted an unconstitutional construction of § 5 in *Beer* and *City of Richmond*, a reapportionment [could not] violate the Fourteenth or Fifteenth Amendment merely because a State [used] specific numerical quotas in establishing a certain number of black majority districts." *Id.* at 162. For a more complete discussion of the problems raised by the majority's analysis of the Voting Rights Act in *United Jewish Organizations*, see Note, *Judicial Deference in the Representation Controversy: A Further Erosion of the Justiciability Doctrine*, 44 BROOKLYN L. REV. 143 (1977).

209. In this respect, the Court cited the non-retrogression principle of Beer v. United States, 425 U.S. 130 (1976), *see* note 208 *supra*; that is, "a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5." 425 U.S. at 141. In *United Jewish Organizations*, the Court reasoned that New York had merely acceded to the recommendations of the Justice Department and thereby effectuated such an enhancement. *See* 430 U.S. at 164.

210. 430 U.S. at 147.

percentage of districts with a nonwhite majority approximated the percentage of nonwhites in the county, as long as it did not violate the Fourteenth and Fifteenth Amendments of the Constitution.[211] Justice Rehnquist agreed with respect to this argument only.[212] Justice White found neither a racial slur or stigma nor any abridgement of the right to vote on account of race: "[T]here was no fencing out of the white population from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength."[213] He emphasized that under the 1974 plan, seventy percent of the assembly and senate districts in Kings County, for example, retained white majorities.[214] He said that "as long as whites in Kings County, as a group, were provided with fair representation, we cannot conclude that there was a cognizable discrimination against whites or an abridgement of their right to vote on the grounds of race."[215] Thus, the Court concluded that the state has the power to alleviate the consequences of racial restrictions on the exercise of the franchise and to achieve a fair allocation of political power between white and nonwhite voters.[216]

Justice Brennan explained his position in a separate concurrence. He noted that the "one starkly clear fact" was that an overt racial number was employed.[217] He found, however, that the racial classification used was not suspect because it was not motivated by any racial animus, and because it did not downgrade minority participation in the franchise.[118] As for the problem of so-called benign discrimination, he was willing to defer consideration of this sensitive question for another day because, in his opinion, the existence of the Voting Rights Act alone supported affirmance of the judgment.[219]

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211. *Id.* at 165.

212. *Id.* at 147.

213. *Id.* at 165.

214. *Id.* at 166. *See* United Jewish Organizations of Williamsburgh, Inc. v. Wilson, 510 F.2d 512, 523 n.21 (2d Cir. 1974).

215. 430 U.S. at 166.

> We also note that the white voter who as a result of the 1974 plan is in a district more likely to return a nonwhite representative will be represented, to the extent that voting continues to follow racial lines, by legislators elected from majority white districts. The effect of the reapportionment on whites in districts where nonwhite majorities have been increased is thus mitigated by the preservation of white majority districts in the rest of the county. . . . Of course, if voting does not follow racial lines, the white voter has little reason to complain that the percentage of nonwhites in his district has been increased.

Id. at n.24.

216. *Id.* at 167-68.

217. *Id.* at 169 (Brennan, J., concurring in part).

218. *See id.* at 170.

219. *See id.* at 171.

Justice Stewart, joined by Justice Powell, wrote a short opinion concurring in the judgment. He emphasized the petitioners' failure to show that the legislative plan had either the purpose or effect of discriminating against them on the basis of their race.[220] In short, an awareness of race was not the equivalent of discriminatory intent. The Chief Justice dissented, finding that the state's attempt to gerrymander voting districts in order to achieve sixty-five percent nonwhite majorities in some of those districts violated the precept established by prior rulings that the "drawing of political boundary lines with the sole, explicit objective of reaching a predetermined racial result cannot ordinarily be squared with the Constitution."[221] Nor was the utilization of such a quota necessary to fulfill New York's obligation under the Voting Rights Act, at least on the basis of the Chief Justice's view of the evidentiary record.[222].

More than any other factor, the Voting Rights Act, which necessarily deals with remedying the effects of discrimination based on race or color, allowed the Court in this case to avoid a number of "sensitive" political and constitutional questions, the most important of which is whether gerrymandering that is deliberately based on race may be used affirmatively to offset previous racial discrimination. This issue was shunted aside when the Court chose to rely on the holdings in *Gaffney v. Cummings*[223] and *White v. Regester*[224] to assess the constitutionality of New York's redistricting scheme. *Gaffney* offers a succinct formulation of the standard to be utilized:

> State legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment. A districting statute otherwise acceptable, may be invalid because it fences out a racial group so as to deprive them of their pre-existing municipal vote. *Gomillion v. Lightfoot*, 364 U.S. 339

220. *See id.* at 179-80 (Stewart, J., concurring, joined by Powell, J.).

221. *Id.* at 181 (Burger, C.J., dissenting).

222. *See id.* at 183-85. Chief Justice Burger objected on grounds that there was no evidence showing that the 1974 plan was designed to comply with the provisions of the Voting Rights Act, as construed by Beer v. United States, 425 U.S. 130 (1976); *see* note 208 *supra*. 430 U.S. at 144. He also failed to find any evidence showing that the 65% figure was "a reasoned response" to the problem of past discrimination. *Id.* at 184.

223. 412 U.S. 735 (1973). The case upheld an apportionment plan devised by the Connecticut legislature. The House districts deviated on the average by 1.9% from mathematical equality with a maximum deviation of 7.83%. No prima facie case of invidious discrimination was said to be made out by such a showing. *Id.* at 751.

224. 412 U.S. 755 (1973). This case involved a Texas reapportionment plan where the total maximum deviation between Texas House of Representatives districts was 9.9%, but the average deviation from mathematical equality was only 1.82%. The Court cited *Gaffney* to the effect that "state reapportionment statutes are not subject to the same strict standards applicable to reapportionment of congressional seats," *id.* at 763, and accordingly found the deviation involved in *White* de minimis, *id.* at 764.

> (1960). A districting plan may create multimember districts perfectly acceptable under equal population standards but invidiously discriminatory because they are employed "to minimize or cancel out the voting strength of racial or political elements of the voting population." *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965).[225]

White added the insight that

> [t]he plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice.[226]

Justice White had little difficulty in resolving the problem after characterizing it in this fashion. Concentrating not only on the intent of the New York legislature (*i.e.*, its good faith compliance with the Act), but also on the effect of its redistricting, he found no evidence that whites were "fenc[ed] out" from the political process or that their votes were "unfairly" minimized or cancelled out.[227] The incidence of nonwhite voters was merely diffused among the state assembly and senate districts in proportion to their incidence in the population. In fact, whites retained majorities in seventy percent of all electoral districts.[228] As long as whites as a group were accorded fair representation, whites within an individual district who might be disadvantaged simply did not have a cognizable discrimination claim or a colorable argument about the abridgement of their right to vote on grounds of race.[229]

The case is perhaps most important then for what was implied rather than for what was stated. The Court concluded by remarking that the use of "sound districting principles" to redress prior racial inequities is permissible. This raises several interesting questions: (1) is fairness to a racial group a sufficient surrogate for fairness to the individual and (2) if so, is this meant

225. 412 U.S. at 751 (citations omitted). In *Gomillion*, the city of Tuskegee, Alabama was gerrymandered into the shape of a 28-sided figure such that all but four or five of four hundred black voters, but not one white voter, no longer resided within city limits. The Court vacated a summary judgment in favor of the city. Gomillion v. Lightfoot, 364 U.S. 339, 348 (1960). *Fortson* involved a Georgia reapportionment plan that divided the state into substantially equal senatorial districts; except for the seven most populous counties, one to eight counties comprised a district and the voters therein elected the senator for that district on a district-wide basis. The seven most populous counties were divided into several districts and the voters therein elected, on a county-wide basis, as many senators as there were districts within the county. The Court held that the equal protection clause does not mandate the formation of all single-member districts. Fortson v. Dorsey, 379 U.S. 433, 439 (1965).

226. 412 U.S. at 766.

227. *See* 430 U.S. at 165.

228. *See* United Jewish Organizations of Williamsburgh, Inc. v. Wilson, 510 F.2d 512, 523 n.21 (2d Cir. 1974).

229. *See* note 215 and accompanying text *supra*.

to advance *sub silentio* a theory of benign discrimination that will now be applicable in reapportionment cases? In his dissent from the majority opinion of the Second Circuit, Judge Frankel raised a number of apposite points. He argued that the means used by the state did not really accomplish nor were they necessary to achieve the compelling objective of remedying the effects of past discrimination.[230] The majority of the judges in the Second Circuit and Justice White accepted the assumption that the 1974 plan was an effort by New York to implement a guideline set forth by the Attorney General, calling for nonwhite majorities in any one district to be limited to sixty-five percent of that district's voting population.[231] As Judge Frankel pointed out, however, New York did not believe its 1972 proposal, which failed to meet such a standard, produced a racially discriminatory effect, and the Attorney General's office itself disclaimed approval of and authority for the sixty-five percent quota.[232] The Justice Department had merely ruled that the state had not met its burden of proof that the 1972 plan did not abridge the right to vote; the sixty-five percent figure was arrived at because the executive director of the state's Joint Committee on Reapportionment "got the feeling . . . that 65 percent would probably be an approved figure" after several ex parte conversations with lower echelon Justice Department officials.[233] Thus, Judge Frankel concluded that not only was the idea of racial quotas "at war with our bedrock concepts of individual worth and integrity,"[234] but also the one utilized in this case was never found to be necessary by the legislature itself as a means of remedying the alleged wrongs in question and there was "no ground in logic or law for translating the percentage relationship of a minority to the whole county population into a *percentage of districts* over which that minority should have majority control."[235]

Similarly, in his *United Jewish Organizations* concurrence, Justice Brennan expressed doubts as to whether "cognizable discrimination" cannot be found in any situation so long as whites " 'as a group [are] provided with fair representation . . . .' "[236] He went on to identify three

230. United Jewish Organizations of Williamsburgh, Inc. v. Wilson, 510 U.S. 512, 530-34 (2d Cir. 1974) (Frankel, J., dissenting).

231. *See* 430 U.S. at 152 (citing United Jewish Organizations of Williamsburgh, Inc. v. Wilson, 510 F.2d 512, 517 (2d Cir. 1974)).

232. United Jewish Organizations of Williamsburgh, Inc. v. Wilson, 510 F.2d 512, 527 (2d Cir. 1974) (Frankel, J., dissenting). Judge Frankel cited the language of the Attorney General's response of July 1, 1974 to New York regarding the state's 1974 plan.

233. 430 U.S. at 152.

234. United Jewish Organizations of Williamsburgh, Inc. v. Wilson, 510 F.2d 512, 529 (2d Cir. 1974) (Frankel, J., dissenting).

235. *Id.* at 533 (emphasis in original).

236. 430 U.S. at 171 n.1 (Brennan, J., concurring in part) (quoting the plurality opinion, *id.* at 166).

contentions that the Court would have to grapple with were it to confront directly the issue of preferential treatment for minorities: (1) whether the "purportedly preferential race assignment may in fact disguise a policy that perpetuates disadvantageous treatment of the plans supposed beneficiaries";[237] (2) whether such treatment stimulates societal race-consciousness by suggesting "the propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs";[238] and (3) whether, in light of the commands of the Fourteenth Amendment, even a "benign" racial policy might not at least appear unjust.[239] These are crucial issues that Justice White glossed over by relying on *Gaffney* and *White*. But even Justice Brennan, after having identified these problems, resolved the issue by expressing his desire to defer to the judgment of the Attorney General about whether a particular plan complied with the remedial requirements of the Voting Rights Act;[240] he did so without even considering Judge Frankel's point that, in this case, the Attorney General had expressed no judgment at all on the use of quotas in the 1974 plan.[241] Moreover, neither Justice Brennan nor Justice White took the occasion to consider some of the stark problems suggested by the facts of this case and by the way the beneficiaries of the New York plan were labelled.

Kings County, New York, for example, is 64.9% white, 24.7% black and 10.4% Puerto Rican.[242] Neither the state nor the Justice Department considered the claims of the Puerto Ricans who bitterly objected to being subsumed in black majorities in order to create "nonwhite" voter proportions of sixty-five percent. They claimed, quite rightly, that the 1974 proposal fragmented the Puerto Rican community, which desired its own congressional district in Bronx County.[243] Yet, both the opinion for the Court and the concurrence by Justice Brennan refer blithely to "nonwhites" as if that label described one homogeneous class of persons. Similarly, no one on the Court reached the issue of whether the 1972 or 1974 plans remedied the adverse effects caused by New York's use of a literacy test.

237. *Id.* at 172.

238. *Id.* at 173.

239. *Id.* at 174.

240. *Id.* at 175. He pointed out that the Voting Rights Act applies to localities where there is a past history of discrimination, thus enhancing the Attorney General's power, that the remedial nature of the Act belies any contention that a slur on whites was intended by creating nonwhite majorities, and that the petitioners had never been deprived of the franchise. All these factors were said to reinforce the legitimacy of the remedy selected by the Justice Department. *Id.* at 177-78.

241. United Jewish Organizations of Williamsburgh, Inc. v. Wilson, 510 F.2d 512, 527-28 (2d Cir. 1974) (Frankel, J., dissenting).

242. *Id.* at 523 n.21.

243. *Id.* at 529 n.4 (Frankel, J., dissenting). *See also* 430 U.S. at 185 (Burger, C.J., dissenting).

Such a test would appear to discriminate against those with insufficient education, and that classification cuts across all races. Yet, the New York plan rather crudely fashioned a remedy that was based solely on color, not education. It was apparently never questioned whether this remedy truly offered redress to all those persons adversely affected by the state's prior practices. Nor did the authorities take into account the problem implicit in the fact that the nonwhites in Kings County were unevenly distributed throughout all the regions of that county, or that they came from different communal settings, from varying socioeconomic backgrounds and undoubtedly possessed different views about what they expected from the political process.[244] The authors of the state plan apparently assumed that by drawing districts with sixty-five percent nonwhite majorities they would thus assure that all nonwhites would vote for nonwhite candidates for office and thus regain a sense of solidarity, a meaningful sense of participation in the political process. But when one gerrymanders in order to create an artificial majority composed of pluralistic factions that have few things in common except the fact that they are "nonwhites," one has arguably increased the chances of intraracial divisiveness that will further fragment minority voters. New York had other options, including uniformly reducing the size of electoral districts so as to maintain community cohesiveness or changing single-member districts to multi-member districts. Instead, it adopted a scheme of gerrymandering without ever really considering whether that scheme actually hindered, rather than helped, its putative beneficiaries. By relying on *Gaffney* and *White* and not undertaking a more sophisticated analysis, the Court merely compounded the omission of the state and the Justice Department. Thus, in light of the simplistic approach used by Justice White, it is arguable that minority members should view *United Jewish Organizations* as, at best, a decidedly mixed victory.

But perhaps the most significant question raised by this case involves the standard of review that may be applied in evaluating future claims of "purposeful" racial discrimination. The section of the main opinion that discussed this point was joined by only two justices in addition to Justice White; it indicated, however, that although New York utilized racial criteria in a "purposeful manner," its action was permissible in that it represented "no racial slur or stigma" with respect to any race.[245] This statement raises a question: did the Court merely intend that this language would serve as an alternative expression of the meaning of the adjective "invidious," or did it intend to restrict the definition of legislative purpose in reapportionment

244. *See* 430 U.S. at 185 (Burger, C.J., dissenting) ("The assumption that 'whites' and 'nonwhites' in the county form homogeneous entities for voting purposes is entirely without foundation.")

245. 430 U.S. at 165.

cases involving claims of racial discrimination to a more narrow concept of a purpose to stigmatize? As Justice Brennan noted, such a definition imposes formidable fact-finding responsibilities on the courts regarding questions of voter polarization and legislative motive.[246] But the question may, in fact, be partially answered by the concurrence of Justices Stewart and Powell. After citing *Washington v. Davis*,[247] they indicated that where the clear purpose of the state is to attempt to comply in good faith with the Voting Rights Act, a finding of invidious purpose to discriminate is foreclosed because an awareness of race is not the equivalent of "discriminatory intent."[248] Explicit in this concurrence and perhaps implicit in Justice White's opinion is the thesis that the test of *Davis* has been incorporated in reapportionment cases. Discriminatory intent (or purpose) and impact will now have to be shown before an instance of gerrymandering will be declared unconstitutional. The emphasis on the *Davis* type of intent, however, was not apparent in either *Gaffney* or *White*.

Gaffney, in fact, appeared to subordinate the issue of intent to that of effect. The Court therein admitted that district lines are rarely neutral phenomena and that a "politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results . . . ."[249] It went on to note that once a "neutral" plan is known, its political effect is also known, so when such a plan is passed, that effect must therefore be "intended," in the sense that a decisionmaker intends the consequences that flow from a decision which he has made.[250] Similarly, *Gomillion v. Lightfoot*,[251] the key case which *Gaffney* relied upon, has been rightly characterized as a decision where the focus "was on the actual effect of the

246. *Id.* at 171 n.1 (Brennan, J., concurring in part).

247. 426 U.S. 229, 248 (1976). The petitioners in that case claimed that the District of Columbia's written personnel test for applicants for police officerships was racially discriminatory. The District of Columbia Circuit reversed a motion for summary judgment for the district on the ground that under Griggs v. Duke Power Co., 401 U.S. 424 (1971) (construing Title VII of the Civil Rights Act of 1964), an employer could not use tests to exclude members of minority groups, unless the employer demonstrated that the screening procedures were substantially related to job performance. Davis v. Washington, 512 F.2d 956, 959 (D.C. Cir. 1975), *rev'd*, 426 U.S. 229 (1976). It did so even though the case involved the Fifth Amendment's guarantee of due process, not Title VII. The United States Supreme Court concluded that such an extension of Title VII doctrines is a legislative, not a judicial choice. 426 U.S. at 248. Accordingly, it held that where a test is neutral on its face, the mere fact that it has a racially disproportionate impact does not warrant an inference of discrimination. *Id.* at 245-46. *See generally* Comment, *Washington v. Davis: Reassessing the Bars to Employment Discrimination*, 43 BROOKLYN L. REV. 747 (1977).

248. 430 U.S. at 179-80 (Stewart, J., concurring in the judgment, joined by Powell, J.).

249. Gaffney v. Cummings, 412 U.S. 735, 753 (1973).

250. *Id. See also* United Jewish Organizations of Williamsburgh, Inc. v. Wilson, 510 F.2d 512, 524 n.23 (2d Cir. 1974).

251. 364 U.S. 339 (1960). *See* note 225 *supra*.

[challenged] enactments, not upon the motivation which led the States to behave as they did."[252] Thus, the concept of intent utilized in *Gaffney* (and *White*, which relied on *Gaffney*) was the tort concept referred to by Justice Stevens in his concurrence in *Davis*: "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds."[253] But the majority in *Davis* did not follow this approach; instead, it chose to define intent or purpose by reference to the subjective state of mind of the decisionmaker. As a consequence, it rejected the more mechanistic definition utilized implicitly in *Gaffney* and *White*. The result of eschewing reliance on such a mechanistic definition is to compel the plaintiff in reapportionment cases to actually prove that the decisionmakers in question harbored discriminatory motives, rather than allowing him to assume that a court will infer such motives for him from its scrutiny of the effect of official conduct. Thus it may well be that the Court in *United Jewish Organizations*, in the course of applying the doctrines announced in *Gaffney* and *White*, actually reformulated those doctrines in order to give state legislatures greater discretion in electoral redistricting. Whether or not this reformulation will apply to cases where there is no context of an effort by a state to remedy past discrimination against nonwhites is an open question. If, however, the Court is truly using the definition of intent or purpose set forth in *Davis*, which rejected the claim that the use of a written test by the District of Columbia in the course of its selection procedure for police officers denied blacks equal protection of the laws,[254] the answer would appear to be affirmative. If so, then from the perspective of racial minorities, the decision in *United Jewish Organizations* may well be a two-edged sword.

C. Illegitimacy Classifications

1. The Search for the Appropriate Standard of Review

In two cases decided this term, the Court reviewed the status of illegitimacy in the context of equal protection, but reached two different results with opinions written by two substantially different majorities. In

252. Palmer v. Thompson, 403 U.S. 217, 225 (1971). *Palmer* upheld the decision of a city to close all public swimming pools following the issuance of a court order that those pools be desegregated. The Court declined to examine the motive underlying that official action, saying that "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it." *Id.* at 224. But in *Davis*, the Court indicated that the precedential validity of *Palmer* had been undermined by subsequent decisions. 426 U.S. at 244 n.11.

253. Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring).

254. *See* note 247 *supra*.

Trimble v. Gordon,[255] the Court adhered to a position developed last term in *Mathews v. Lucas*,[256] and engaged in a "less than strict" but more than "toothless" scrutiny of a law that discriminated invidiously against children born out of wedlock.[257] Contrary to the result in *Lucas*, however, the Court invalidated as unconstitutional an illegitimacy classification in an Illinois law governing intestate succession. The decision was by a narrow margin of five to four, with Justice Powell writing for the majority, which included Justices Brennan, White, Marshall and Stevens.

The challenged Illinois statutory scheme allowed illegitimate children to inherit by intestate succession only from their mothers, while legitimate children could inherit by intestate succession from both parents.[258] Pursuant to that scheme, Trimble, an illegitimate daughter, was not permitted to inherit from her father, who had died intestate, even though he had openly acknowledged her as his child and had made support payments for her in accordance with a judicial paternity order.[259] The Illinois Supreme Court rejected the equal protection challenge to the state's discrimination against illegitimate children[260] by relying explicitly on the authority of *Labine v. Vincent*.[261]

255. 430 U.S. 762 (1977).

256. 427 U.S. 495 (1976). For a previous description and discussion of *Lucas, see* notes 113-121 and accompanying text *supra*.

257. 427 U.S. at 510.

258. *See* ILL. REV. STAT. ch. 3, § 12 (1973). This provision was replaced by a 1976 enactment, ILL. REV. STAT. ch. 3, § 2-2 (1976), which recodifies without change the particular language challenged by the petitioner in this case.

259. 430 U.S. at 763-64.

260. *In re* Estate of Karas, 61 Ill. 2d 40, 50-53, 329 N.E.2d 234, 240-41 (1975), *rev'd sub nom.* Trimble v. Gordon, 430 U.S. 762 (1977). The state supreme court also rejected a gender-based equal protection challenge. 61 Ill. 2d at 50-51, 329 N.E.2d at 238-39. The Supreme Court never reached this issue. *See* 430 U.S. at 765-66.

261. 401 U.S. 532 (1971). In *Labine*, the Court upheld Louisiana laws that bar an illegitimate child from sharing equally with legitimates in the estate of their father. In the present case the father had publicly acknowledged the child, but had died without a will. LA. CIV. CODE ANN. arts. 240, 919 (West 1952). It said that the policy choice represented by such laws was one best suited to determination by a legislature and that Louisiana had created no "insurmountable barrier" to illegitimates because the statutory disability could always be removed by the simple formality of executing a will. 401 U.S. at 539. The Court in *Labine* thus was able to distinguish that case from its prior rulings in Levy v. Louisiana, 391 U.S. 68 (1968) and Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968).

Levy invalidated a Louisiana law specifying that an illegitimate child could not recover for the wrongful death of his or her mother, but a legitimate child could. The Court said that while states have great discretion to enact classifications in the economic area, this is not true in situations where basic civil rights are at stake; here, the right involved was "the intimate, familial relationship between a child and his own mother." 391 U.S. at 71. Because an illegitimate child is subject to all the responsibilities of a citizen, the Court held that he could not be denied rights which other citizens enjoy. *Id.*

Glona involved the converse situation. The parent was being denied the right to seek damages for the alleged wrongful death of her child under Louisiana law. The Court found "no

The Supreme Court reversed and invalidated the statute. Justice Powell's majority opinion refused to emulate the extremely deferential stance of *Labine*, insisting instead that when such classifications encroached upon "sensitive and fundamental personal rights,"[262] the Court's many other illegitimacy decisions required at a minimum some rational relationship to a legitimate state purpose, and sometimes more. The Court then explored the asserted state purposes and found each of them inadequate to justify the statute in question. The argument that the law promoted the stability of family life was rejected because the Court found that it furthered no legitimate aim; a state could not attempt to influence the actions of the parents by imposing sanctions on the children born of their illegitimate relationships.[263] Similarly, the difficulties of proving paternity and the related danger of spurious claims in some situations were deemed insufficient to justify a total statutory disinheritance of illegitimate children whose fathers died intestate.[264] At this juncture, the Court emphasized the lack of "fit" between means and ends. It chastised the Illinois Supreme Court for failing

> to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws. Because it excludes those categories of illegitimate children unnecessarily, [the challenged enactment] is constitutionally flawed.[265]

Similarly, the Court rejected the contention that the Illinois law was valid because it imposed no "insurmountable barrier" in that Trimble's deceased father could have left a will, married her mother or stated in his acknowledgement of paternity a desire to legitimate her. This argument was dismissed because Justice Powell claimed it "loses sight of the essential question: the constitutionality of discrimination against illegitimates in a state intestate succession law."[266] The final rationale advanced was that the

possible rational basis . . . for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served." 391 U.S. at 75. It therefore held that the equal protection clause of the Fourteenth Amendment limits the power of the state to draw such "legal" lines as it chooses. *Id.* at 76.

The Court in *Labine* noted that in that case, unlike *Glona*, Louisiana had a rational basis for classification in that it wished to promote family life and control the disposition of property left within the state. 401 U.S. at 536 n.6. Moreover, it classified *Levy* as the type of case where the state had, in fact, created an "insurmountable barrier." *Id.* at 539.

262. 430 U.S. at 767 (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172 (1972)).

263. *Id.* at 769-70.

264. *Id.* at 770-71.

265. *Id.*

266. *Id.* at 774.

statute mirrored the assumed intent of Illinois decedents; presumably, they knew of the law in question, so if they took no steps to legitimate their children born out of wedlock, they must have intended to disinherit them. Justice Powell rejected this thesis, noting both that the Illinois court had made no such finding and that he could locate no such legislative intent either in the statute or in the circumstances underlying its enactment.[267] Instead, he claimed that the intent of the state legislature was to provide a more just system of intestate succession than that available under prior law, tempered by the state's interest in precluding spurious paternity claims.[268]

The Chief Justice, joined by Justices Stewart, Blackmun and Rehnquist dissented, relying on *Labine v. Vincent*,[269] which the majority had claimed was not controlling.[270] Justice Rehnquist filed a separate dissenting opinion in which he reiterated his familiar view that the Court, under the guise of equal protection, was engaged in "endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principle."[271]

Despite adherence to *Lucas*' rejection of "strict scrutiny" in illegitimacy cases,[272] the Court again recognized that "illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis of statutory differentiations."[273] The result in *Trimble*, however, appears more consistent with this recognition than the result in *Lucas*. In the latter case, the Court upheld provisions of the Social Security Act that required certain categories of illegitimate children to actually prove, rather than enjoy the benefits of a presumption that, they were in fact dependents of a deceased wage-earner.[274] But in *Trimble* the

267. *Id.* at 776.

268. *Id.*

269. 401 U.S. 532 (1971).

270. *See* 430 U.S. at 776-77 (Burger, C.J., dissenting, joined by Stewart, Blackmun and Rehnquist, JJ.).

271. *Id.* at 777 (Rehnquist, J., dissenting). He claimed that the Court had encountered so many difficulties in the equal protection area because it had read too much into the Fourteenth Amendment. *Id.* at 782. As a result, the Court allegedly (1) was compelled to scrutinize legislative motive under the guise of considering legislative purpose, although motive is extremely difficult to ascertain, and (2) was required to engage in "a conscious second-guessing of legislative judgment in an area where [it] has no special expertise whatever." *Id.* at 783-84. Because Illinois' distinction was not "mindless and patently irrational," Justice Rehnquist would have voted to affirm the ruling of the state supreme court. *Id.* at 786.

272. In *Lucas*, the Court cited *Labine* for the proposition that "discrimination between individuals on the basis of their legitimacy does not 'command extraordinary protection from the majoritarian political process,' San Antonio Independent School Dist. v. Rodriguez [411 U.S. 1, 28 (1973)], which our most exacting scrutiny would entail." Mathews v. Lucas, 427 U.S. 495, 506 (1976).

273. 430 U.S. at 767.

274. 42 U.S.C. § 402(d)(1) (1970 & Supp. V 1975). The Court in *Lucas* noted that the

Court once again failed to articulate a single standard of review and, in fact, appeared to utilize a number of prior cases, each of which used widely varying decision-making standards.[275] The Court did, however, clear away some of the confusion that had existed in this area of the law, both because of *Lucas* and its reliance on *Labine*, the only other previous decision in which it had upheld a classification based on illegitimacy, and because of an existing "anomaly" in its equal protection analysis in illegitimacy cases that stemmed from certain language in the *Labine* decision.

The Court did rely on *Lucas* in analyzing Illinois' interest in assuring accuracy and efficiency in the disposition of property at death, noting that the prior case provided "especially helpful guidance," although it admittedly arose in a different context.[276] Justice Powell argued that the central finding in *Lucas* was that the provisions of the Social Securtiy Act were "carefully tuned to alternative considerations" and did not "broadly discriminate between legitimates and illegitimates without more."[277] While recognizing that federal courts must accord substantial deference to a state's statutory scheme of inheritance, the Court argued that the challenged Illinois law did exclude broad categories of illegitimate children "unnecessari-

Secretary of Health, Education and Welfare explained "the design of the statutory scheme assailed here as a program to provide for all children of deceased insureds who can demonstrate their 'need' in terms of dependency at the times of the insureds' deaths." 427 U.S. at 507. It concluded that the statutory classifications were in fact reasonably related to the likelihood of dependency at death and served administrative convenience by avoiding the burden imposed by case-by-case determination in the many instances where such dependency is objectively probable. *Id.* at 509.

275. Besides *Lucas*, the Court in particular discussed Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), Labine v. Vincent, 401 U.S. 532 (1971), and Levy v. Louisiana, 391 U.S. 68 (1968). For a discussion of *Levy* and *Labine*, and the Court's purported distinction between the two cases, see note 261 *supra*. In *Weber,* the problem was a Louisiana workers' compensation law which discriminated against dependent, unacknowledged illegitimate children seeking to recover for the death of their father. The Court cited *Levy* with approval, saying that that prior ruling could not be ignored on the basis of "finely carved distinctions." 406 U.S. at 169. It distinguished *Labine* by pointing out that (1) the latter case involved "the traditional deference to a State's prerogative to regulate the disposition at death of property within its borders," *id.* at 170, and that (2) the intestate in *Labine* could have modified his illegitimate child's disfavored position, whereas the decendent in *Weber* could not, *id.* at 170-71. Since no legitimate state interest was otherwise present, the Court struck down the Louisiana law as a violation of the equal protection clause of the Fourteenth Amendment. *Id.* at 175-76. Thus, the relevant precedent was decidedly disparate.

276. 430 U.S. at 771-72.

277. *Id.* at 772 (quoting Mathews v. Lucas, 427 U.S. 495, 513 (1976)). The law in *Lucas* precluded the need for an illegitimate to establish that he was the dependent child of a deceased wage-earner if he could show that he was that wage-earner's legitimate offspring. *See* note 115 and accompanying text *supra*. Thus, the Court in *Lucas* could say that it could not conclude "that the factors that give rise to a presumption of dependency lack any substantial relation to the likelihood of actual dependency." 427 U.S. at 513.

ly."[278] It criticized the state court for failing to consider less burdensome alternatives or less overinclusive options that would not preclude valid as well as spurious claims in connection with the settlement of intestate estates. In short, the statute failed to meet the standard announced in *Lucas* in that it extended "well beyond [its] asserted purposes."[279]

The key to the *Lucas* and *Trimble* decisions thus appears to be both whether there is a conclusive and blanket exclusion of illegitimates "as such" from the statutory definition of a potential class of beneficiaries and whether the asserted legitimate state purpose could reasonably be served by a more narrowly tailored classificatory definition. In *Lucas*, the asserted statutory purpose of accommodating the needs of the dependent children of a deceased wage-earner was clearly a permissible one and the statutory classifications implementing it were justified because they were "reasonably related to the likelihood of dependency at death"[280] and reflected reasonable empirical judgments. Conversely, in *Trimble*, the state court had concluded that the statute was actually enacted for the purpose of ameliorating in part the common law rule under which an illegitimate child was incapable of inheriting from anyone.[281] While the difficulty inherent in proving paternity and hence avoiding spurious claims might well be frustrated were a system of case-by-case determinations implemented, achievement of these goals did not justify a policy of complete exclusion. Thus the Court balanced the state's interests against the constitutional rights of illegitimates and found that the former may not be served by methodologies that gratuitously infringe the latter. In effect, the majority in *Trimble* evinced a clear willingness to employ in equal protection cases involving discrimination against illegitimates a variant of the less burdensome alternatives analysis heretofore utilized primarily in cases involving impingements upon First Amendment rights or attempts by states to burden the free flow of interstate commerce.[282]

278. 430 U.S. at 771. Thus, Justice Powell was careful to note that "we would have a different case if the state statute were carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity." 430 U.S. at 772 n.14.

279. *Id.* at 772-73.

280. Mathews v. Lucas, 427 U.S. 495, 509 (1976).

281. *In re* Estate of Karas, 61 Ill. 2d 40, 44-45, 329 N.E. 2d 234, 236-37 (1975), *rev'd sub nom.* Trimble v. Gordon, 430 U.S. 762 (1977). In light of this asserted purpose, the Court could note: "Penalizing children as a means of influencing their parents seems inconsistent with the desire of the Illinois Legislature to make the intestate succession law more just to illegitimate children." 430 U.S. at 768 n.13.

282. In the area of economic legislation, *see, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); Dean Milk Co. v. Madison, 340 U.S. 349, 354-55 (1951). In the First Amendment context, *see, e.g.*, United States v. Robel, 389 U.S. 258, 268 (1967); Lamont v. Postmaster Gen., 381 U.S. 301, 310 (1965); Shelton v. Tucker, 364 U.S. 479, 488 (1960). *See generally* Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process,* 80 HARV. L.

Justice Powell also undermined the precedential validity of *Labine* by rejecting any application of the "insurmountable barrier" analysis utilized in that case.[283] The Illinois Supreme Court had relied on that prior ruling in support of its holding that the existence of alternative methods of inheritance from the father (*e.g.*, by will or by intermarriage with the mother coupled with a declaration of legitimacy) supported the total statutory disinheritance of those illegitimate children whose male parents die intestate.[284] The United States Supreme Court found, however, that such alternatives were without constitutional significance because if the statutory differentation could not be justified by the promotion of recognized state objectives, it was not clear how it could be "saved by the absence of an insurmountable barrier to inheritance under other and hypothetical circumstances."[285] Indeed, the Court invoked *Reed v. Reed*,[286] a case involving gender-based discrimination, in support of the proposition that constitutional issues cannot be resolved by resorting to a "hypothetical reshuffling of the facts."[287] Thus, the Court in *Trimble* eviscerated its prior holding in *Labine*. While it agreed with *Labine* that the promotion of legitimate family relationships and the establishment of a system of property disposition may well be valid state interests,[288] its reference to the "insurmountable barrier" discussion in *Labine* and in the later case of *Weber v. Aetna Casualty & Surety Co.*[289] as an "analytical anomaly" undercuts the one distinctive feature about *Labine*, the feature that caused the majority in that case to depart from the rather exacting scrutiny used by the Court in its 1968 decisions invalidating laws disfavoring illegitimates.[290] Moreover, even in regard to *Labine*'s

REV. 1463 (1967); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

283. 401 U.S. 532, 539 (1971); *see* note 261 *supra*.

284. *In re* Estate of Karas, 61 Ill. 2d 40, 47, 52, 329 N.E.2d 234, 238, 240 (1975), *rev'd sub nom.* Trimble v. Gordon, 430 U.S. 762 (1977). Much the same analysis had been utilized in the *Weber* case, *see* note 275 *supra*, where the Court distinguished *Labine* by pointing out the absence of alternative means to remove an illegitimate child from the disfavored classification. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 170-71 (1972).

285. 430 U.S. at 774.

286. 404 U.S. 71 (1971).

287. 430 U.S. at 774. *Reed* invalidated a provision of the Idaho probate code that gave preference to men over women when persons of the same entitlement class apply for appointment as administrator of a decedent's estate. The Court in *Trimble* pointed out that *Reed* gave no consideration to the fact that if a decedent left a will naming an executor, there would be no problem of alleged discrimination. But *Reed* is a gender-based discrimination case while *Trimble* is an illegitimacy-based discrimination case; nowhere does the Court attempt to say why the existence-of-alternatives analysis used in *Weber*, *see* note 284 *supra*, cannot be used in *Trimble*.

288. 430 U.S. at 768-70.

289. 406 U.S. 164 (1972). *See* note 275 *supra*.

290. *See* note 261 *supra* and cases cited therein.

acceptance of the state's interest in deterring unsanctioned family relationships, the Court reiterated the view that the sins of the parents should not be an excuse for the state to punish their children; consequently, it characterized the Louisiana law involved in *Labine*, which disinherited all "bastard children," as "a measured, if misguided, attempt to deter illegitimate relationships."[291] Thus, *Trimble* confirms the view that *Labine* was a digression by five members of the Court, two of whom, Justices Black and Harlan, are no longer alive. Such a digression is unlikely to have much enduring value as precedent.[292]

Moreover, *Trimble* may be easily reconciled with the Court's prior holding in *Lucas*. While the Court clearly deferred to the statutory purposes asserted in both *Lucas* and *Trimble*, the nature and scope of that objective in fact dictated the result in both cases. In *Lucas*, the asserted purpose was quite narrow and consequently the Court could find that the statutory classification did promote the underlying legislative objective. In *Trimble*, however, the Court could not justify a similar finding because the "motivating purpose" was broad enough to include some illegitimates who were conclusively but unnecessarily excluded. While the result in the latter case may be laudable in light of historical discrimination against illegitimates, the Court's emphasis on the asserted legislative objective and the degree to which the means used further that objective by incorporating only necessary invidious classifications injects a continuing note of uncertainty into its analysis of equal protection claims by illegitimates. The outcome of such claims may thus be determined by whether or not the plaintiffs pressing them make a sufficiently strong showing of a legislative purpose (based on either statutory interpretation or legislative history) that need not be furthered by a law effecting the absolute exclusion of illegitimates as a class.

2. *A More Limited Scrutiny in Federal Immigration Legislation*

In a case decided the same day as *Trimble*, the Court replaced the more critical scrutiny it found appropriate for illegitimacy classifications in state statutes with an extremely deferential standard of review because the classifications in question occurred in the context of federal immigration laws. In *Fiallo v. Bell*,[293] Justice Powell again wrote for the majority. On this

291. 430 U.S. at 769 n.13.

292. The majority admitted as much in stating that "it is apparent that we have examined the Illinois statute more critically than the Court examined the Louisiana statute in *Labine*. To the extent that our analysis in this case differs from that in *Labine* the more recent analysis controls." 430 U.S. at 776 n.17. The Court also stated: "*Labine v. Vincent* . . . is difficult to place in the pattern of this Court's equal protection decisions, and subsequent cases have limited its force as precedent." *Id.* at 767 n.12.

293. 430 U.S. 787 (1977).

occasion, however, he was joined by Chief Justice Burger as well as Justices Stewart, Blackmun, Rehnquist and Stevens, all of whom, except Justice Stevens, had dissented in *Trimble*. *Fiallo* dramatically illustrated a point not touched upon in *Trimble*, namely, the significance of the particular context in which an illegitimacy claim is raised; thus, the majority in *Fiallo* noted that "legislative distinctions in the immigration area need not be as ' "carefully tuned to alternative considerations," ' . . . as those in the domestic area."[294]

The *Fiallo* case involved a challenge to sections 101(b)(1)(D) and 101(b)(2) of the Immigration and Nationality Act of 1952.[295] The Act grants preferential immigration status to aliens who qualify as the "children" or "parents" of United States citizens or lawful permanent residents. The statute's definitions exclude from that status, however, the relationship between an illegitimate child and the natural father while they include the relationship between an illegitimate child and the natural mother. Three sets of fathers and their illegitimate offspring who sought and were denied, either as an alien father or as an alien child, the special immigration preference, challenged the constitutionality of the relevant sections of the Act under the First, Fifth and Ninth Amendments.[296] A three-judge district court dismissed the suit after finding that the statutory provisions at issue were neither "wholly devoid of any conceivable rational purpose" nor

294. *Id.* at 799 n.8 (citing Trimble v. Gordon, 430 U.S. 762, 772 (quoting Mathews v. Lucas, 427 U.S. 495, 513 (1976))).

295. 8 U.S.C. §§ 1101(b)(2)(D), 1101(b)(2) (1970). Under § 1101(b)(2), a person qualifies as a "parent" for purposes of the Act solely on the basis of the person's relationship with a "child." Pursuant to § 1101(b)(1)(D), one definition of a child is an unmarried person under 21 years of age who is also illegitimate and "by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother . . . ." Other definitions of the term "child" include (1) a legitimate child, (2) a stepchild, born out of wedlock or not, who is under 18 at the time the marriage creating his status occurs, (3) a legitimated child if legitimation occurs before that child reaches 18, (4) a child adopted before the age of 14 who has resided with the adopting parent for two years or more, or (5) a child under the age of 14 at the time a petition is filed in his behalf to accord him classification as an "immediate relative" pursuant to the provisions of the Act. In all cases, the child must be under 21 and unmarried. 8 U.S.C. §§ 1101(b)(1)(A),(B),(C),(D),(E),(F) (1970).

296. 430 U.S. at 790-91. Ramon Fiallo, a United States citizen by birth, resided in the Dominican Republic with his natural father, Ramon Fiallo-Sone. The latter sought an immigration visa as the "parent" of an illegitimate child, but was told no such request could be granted unless he "legitimated" his son. Cleophus Warner, a naturalized American citizen, was the unwed father of Serge Warner, born in the French West Indies in 1960. The Immigration and Naturalization Service declined to classify Serge as a "child" for the purposes of procuring a visa, absent proof of legitimation. Trevor and Earl Wilson, permanent resident aliens, were the illegitimate children of Arthur Wilson, a Jamaican citizen. They sought an immigration visa for Arthur, but were told denial was certain in light of the fact that they were neither legitimate nor legitimated. *Id.* at 790-91 n.3.

"fundamentally aimed at achieving a goal unrelated to the regulation of immigration."[297]

In affirming the district court's rejection of the equal protection challenge, the Supreme Court relied almost entirely on "the limited scope of judicial inquiry into immigration legislation"[298] in defining the permissible extent of its assessment of the invidious statutory classification being challenged. Although Justice Powell rejected the government's extreme claim that the statute expressed a nonjusticiable political judgment,[299] he insisted that the legislative power of Congress over aliens was complete. Such a power was said to be a sovereign attribute largely immune from judicial control and the Court rejected all assertions that special factors in the present case warranted greater scrutiny than that applied generally in immigration cases, which consisted of a "limited judicial review."[300]

The Court found that Congress was concerned with clarifying prior law in enacting the challenged legislation, so that an illegitimate child would have the same status as a legitimate child with reference to his or her mother and that the legislative history reflected an intentional choice not to accord an applicant a preferential status by virtue of the relationship of illegitimate child and natural father.[301] This decision was deemed to be clearly a policy question within the exclusive province of Congress. Moreover, Justice Powell said that there were "legitimate governmental interests" arguably

297. Fiallo v. Levi, 406 F. Supp. 162, 166 (E.D.N.Y. 1975), *aff'd sub nom.* Fiallo v. Bell, 430 U.S. 787 (1977).

298. 430 U.S. at 792.

299. *Id.* at 793 n.5:

> Our cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens, and there is no occasion to consider in this case whether there may be actions of the Congress with respect to aliens that are so essentially political in character as to be nonjusticiable.

300. *Id.* at 792. *See, e.g.*, Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976); Mathews v. Diaz, 426 U.S. 67, 81-82 (1976); Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893). In particular, the Court cited the case of Kliendienst v. Mandel, 408 U.S. 753 (1972). There, United States citizens challenged the power of the Attorney General to deny a visa to a proponent of communism. The visa was refused pursuant to 8 U.S.C. § 1182(a)(28)(D) (1970), which makes such individuals ineligible for a visa absent a waiver by the Attorney General. The Court rejected the challenge, saying, "when the Executive exercises this [delegated] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the appellant." 408 U.S. at 770. The Court in *Fiallo* concluded that "[w]e can see no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in *Kliendienst* . . . ." 430 U.S. at 795.

301. *Id.* at 797 & n.7 (citing S. REP. No. 1057, 85th Cong., 1st Sess. 4 (1957) (the amendment was designed "to clarify the law so that the illegitimate child would in relation to his mother enjoy the same status under the immigration laws as a legitimate child"); H.R. REP. No.

furthered here.[302] According to him, it was not the task of the courts to probe and test the justifications of the legislative decision, regardless of whether that decision is based on a perceived absence of close family ties or, as in *Trimble*, a concern with the serious problems of proof that are usually attendant to determinations of paternity.[303]

Justice Marshall was joined by Justice Brennan in dissent.[304] The thrust of his opinion was that the rights granted by Congress are accorded to citizens, not to aliens, and that such rights must comport with the Fifth Amendment guarantees of due process and equal protection.[305] Consequently, Justice Marshall declared:

> When Congress grants a fundamental right to all but an invidiously selected class of citizens, and it is abundantly clear that such discrimination would be intolerable in any context but immigration, it is our duty to strike the legislation down. Because the Court condones the invidious discrimination in this case simply because it is embedded in the immigration laws, I must dissent.[306]

Thus, Justices Marshall and Brennan viewed the case as one of "discrimination among citizens" and found the majority's scrutiny so completely deferential as to constitute an "abdication" of judicial review.[307] This minimal level of scrutiny was said to be even more objectionable because the definitions incorporated in the challenged federal law rested on "two traditionally disfavored classifications—gender and legitimacy,"[308] and because the statute interfered with "the fundamental 'freedom of personal

1199, 85th Cong., 1st Sess. 7 (1957) (the amendment was designed "to alleviate hardship and provide for a fair and humanitarian adjudication of immigration cases involving children born out of wedlock and the mothers of such children"); 103 CONG. REC. 14659 (1957) (remarks of Sen. Kennedy) (the amendment "would clarify the law so that an illegitimate child would, in relation to his mother, enjoy the same status under immigration laws as a legitimate child")).

302. 430 U.S. at 798.

303. *Id.* at 799.

304. *Id.* at 800 (Marshall, J., dissenting, joined by Brennan, J.). Justice White also dissented for "substantially the same reasons." *Id.* at 816 (White, J., dissenting).

305. *Id.* at 800 (Marshall, J., dissenting, joined by Brennan, J.). In support of this claim, Justice Marshall cited 8 U.S.C. § 1154(a) (1970), which provides that "[a]ny citizen of the United States claiming that an alien is entitled to . . . an immediate relative status under section 1151(b) of this title . . . *may* file a petition with the Attorney General for such classification." *Id.* at 806 & n.7 (emphasis by the Court). The majority acknowledged this argument, but said Congress' exercise of sovereign power in this area, subject to limited judicial review, would justify any immigration preference it chose. *Id.* at 795-96 n.6. Justice Marshall distinguished *Fiallo* from the *Kliendienst* case, *see* note 300 *supra*, where the rights of citizens were also implicated, by pointing out that (1) the focus of that case was on the governmental interest in keeping out undesirables, a fact which only tangentially involved the rights of citizens, and that (2) the appellees in the *Kliendienst* case *conceded* the power of Congress to exclude communists from entry into the country. *Id.* at 808.

306. *Id.* at 816 (Marshall, J., dissenting, joined by Brennan, J.).

307. *Id.* at 805-06.

308. *Id.* at 809.

choice in matters of marriage and family life.'"[309] Finally, Justice Marshall said the hypothesized rationale of administrative convenience offered by the majority was an inadequate justification for infringing the rights of illegitimate children, citing *Trimble* in support of this conclusion.[310]

Justice Powell's deference to congressional judgment in this case appears to be premised upon an analogous technique employed by the Court in recent cases involving challenges to other types of alienage classifications incorporated in federal laws.[311] The basis for such deference is, of course, the language in article one, section eight of the Constitution empowering Congress to establish "an uniform Rule of Naturalization."[312] The question of the propriety of classifying on the basis of illegitimacy, however, was virtually ignored in *Fiallo* and few of the prior cases on the subject were utilized in the Court's analysis. On the surface, the federal law in *Fiallo* would seem to be an extreme example of invidious discrimination; the Act's classifications utilized both illegitimacy and gender as the bases for difference in treatment and denial of benefits. Notwithstanding these factors, any one of which has in the past evoked greater scrutiny, the majority hypothesized of its own accord a number of rationales for the distinctions enacted by Congress. Recognizing that the legislative history of the provision established that it was designed to reunite families whenever possible, the Court held that it was appropriate for Congress to consider not only the nature of the relationship, but also problems of identification, administration and the potential for fraud.[313] It was obvious to the Court that Congress had determined that preferential status was not warranted for illegitimate children and their natural fathers, "perhaps because of a perceived absence in most cases of close family ties as well as a concern with the serious problems of proof that usually lurk in paternity determinations."[314] Thus, in contrast with *Trimble*, the context in which *Fiallo* arose caused the Court to assume justifications not even presented in the record. The congressional judgment in this case was deemed to be an example of "policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress."[315]

The matter of judicial assumptions regarding legislative purpose merits extended analysis. As noted, Justice Powell simply assumed that the justifi-

309. *Id.* at 810 (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974)).
310. *Id.* at 813 (citing Trimble v. Gordon, 430 U.S. 762, 771-72 (1977)).
311. *See* note 300 *supra*.
312. U.S. CONST. art. I, § 8, cl.4.
313. 430 U.S. at 799 n.8.
314. *Id.* at 799.
315. *Id.* at 798.

cations for the challenged enactment included administrative efficiency and the need to preclude spurious claims of paternity. On reflection, this was a remarkable assumption. As Judge Weinstein pointed out in his dissent to the majority opinion of the three-judge district court:

> The legislative history and the statutory scheme leave no doubt that the exclusive purpose of Congress was to maintain or reunite family units which include United States citizens or permanent resident members. Not a shred of evidence has been produced to support the government's claim that the statutory purpose was to prevent spurious paternity claims by unwed natural fathers. As one of the provision's co-sponsors put it: "This bill is praiseworthy in its fundamental purpose—to reunite families."[316]

This same conclusion had been arrived at in 1966 in *Immigration and Naturalization Service v. Errico*,[317] wherein the Court held that:

> The intent of the [1957] Act is plainly to grant exceptions to the rigorous provisions of the 1952 Act for the purpose of keeping family units together. Congress felt that, in many circumstances, it was more important to unite families and preserve family ties than it was to enforce strictly the quota limitations or even the many restrictive sections that are designed to keep undesirable or harmful aliens out of the country.[318]

How, then, could Justice Powell suddenly hypothesize a new and hitherto unsuspected purpose underlying the challenged laws? The answer may be found in the case of *Hampton v. Mow Sun Wong*.[319] That decision invalidated a Civil Service Commission regulation barring noncitizens, including resident aliens, from employment in the federal competitive civil service. The government in that case contended that there were many reasons to justify such a regulation, including the President's need for a bargaining chip in treaty negotiations, the incentive provided for aliens to become citizens, the consistency of international law on this subject and the need for civil servants to have undivided loyalties.[320] The Court said its role was to analyze whether the justifications offered by the government were "interests on which [the Commission] may properly rely in making a

316. Fiallo v. Levi, 406 F. Supp. 162, 171 (E.D.N.Y. 1975) (Weinstein, J., dissenting), *aff'd sub nom.* Fiallo v. Bell, 430 U.S. 787 (1977) (citing 103 CONG. REC. 15497 (1957) (remarks of Sen. Pastore)). The dissent also cited H.R. REP. NO. 1199, 85th Cong., 1st Sess. 7-8 (1957) *reprinted in* 1957 U.S. CODE CONG. & AD. NEWS 2020-21; H.R. REP. NO. 1365, 82nd Cong., 2d Sess. 29 (1952); 103 CONG. REC. 16719 (1957) (remarks of Sen. Kennedy); 103 CONG. REC. 16307 (1957) (remarks of Rep. Rodino). 406 F. Supp. at 171.

317. 385 U.S. 214 (1966).

318. *Id.* at 220. This language is dictum. *Errico* involved the construction of 8 U.S.C. § 1251(f) (1970), which creates an exception to the general rule that one who procures an immigration visa by fraud is deportable in the case of an "alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen . . . ."

319. 426 U.S. 88 (1976).

320. *Id.* at 103-04.

decision implicating the constitutional and social values at stake in this litigation."[321] This question was answered in the negative. Unlike *Fiallo*, in *Hampton* the government had to *plead* justifications which were then rigorously scrutinized. What, then, accounts for the different technique used in the former case? A possible answer emerges from the following passage in *Hampton*:

> When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest. If the agency which promulgates the rule has direct responsibility for fostering or protecting that interest, it may reasonably be presumed that the asserted interest was the actual predicate for the rule. That presumption would, of course, be fortified by an appropriate statement of reasons identifying the relevant interest. Alternatively, if the rule were expressly mandated by the Congress or the President, we might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption.[322]

Fiallo illustrates the absurdity of this approach. The majority not only presumed the existence of some interest that would be rationally served by Congress' express rule in sections 101(b)(1)(D) and 101(b)(2), it did so by ignoring the statements of purpose made by various members of Congress, the very body to which the Court is proclaiming its great deference. Thus, it would seem that the rule of reliance on congressional history as the final determinant of legislative purpose will no longer govern in the context of equal protection claims concerning naturalization or immigration laws. Instead, it will be replaced by a rule allowing the Court great creativity in selecting a purpose that will cause a challenged congressional enactment in this area to withstand minimal scrutiny.

The significance of context in this field of the law is underscored by the Court's acceptance not only of a hypothetical justification, but also of several rationales asserted by the state but rejected by Justice Powell in *Trimble*, such as the problems associated with proof of paternity and the potential for fraudulent claims that might result from "a more generous drawing of the line."[323] Further comparison with *Trimble* demonstrates the Court's willingness in *Fiallo* to ignore the vital issue of whether or not the objectives for which the federal immigration statute was passed necessitated complete exclusion as opposed to a case-by-case determination, regardless of the fact that some significant categories of illegitimate children and their natural fathers might be recognized without any excessive administrative

321. *Id.* at 113-14.
322. *Id.* at 103.
323. 430 U.S. at 799 n.8.

burden. Thus, the logic of *Fiallo* is inherently anomalous. On the one hand, Justice Powell rejected the government's contention that the case presented a nonjusticiable controversy. On the other hand, the conclusion that he derived from the "toothless" brand of judicial review which he did apply was that the proper forum in which the petitioners should seek redress was Congress rather than the courts, because the challenged enactment expressed a nonreviewable judgment of policy.[324] Nevertheless, *Fiallo* is easily distinguishable from *Trimble* and other cases simply because the suit did arise in the context of federal immigration legislation.[325] At least there is as yet no indication that the Court is willing to apply the deferential technique of *Fiallo* to federal legislation involving matters other than naturalization policy.

D. Classifications Based on Alienage

Contrary to its analyses in some of the illegitimacy cases, the Court held in *Nyquist v. Mauclet*[326] that when a law is directed "at aliens and . . . only aliens . . . [t]he fact that the statute is not an absolute bar does not mean that it does not discriminate against the class."[327] A bare majority of the Court consequently ruled in favor of alien plaintiffs who challenged New York's refusal to provide them with financial assistance for higher education. In an opinion authored by Justice Blackmun, and joined by Justices Brennan, White, Marshall and Stevens, the Court applied the standard of strict scrutiny first utilized in this context in *Graham v. Richardson*[328] and found the asserted interests offered by the state in order to justify its refusal to provide financial assistance insufficient in light of the exclusive federal control over immigration and naturalization.

The New York statute restricted the receipt of scholarships, tuition assistance awards and student loans to citizens, to those applying for citizenship or to those who submitted a statement affirming their intent to so

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324. Indeed, Justice Powell said as much:

> [W]e simply note that this argument [that the statute is based upon an outdated, stereotypical view of the relationship between unwed fathers and their offspring] should be addressed to the Congress rather than the courts. Indeed, in that regard it is worth noting that a bill introduced in the 94th Congress would have eliminated the challenged distinction. H.R. 10993, 94th Cong., 1st Sess. (1975).

430 U.S. at 799 n.9.

325. This distinction is borne out by the majority's assertion that "our cases clearly indicate that legislative distinctions in the immigration area need not be as ' "carefully tuned to alternative considerations," ' *Trimble* v. *Gordon* [430 U.S. 762, 772 (1977)] (quoting *Mathews* v. *Lucas*, 427 U.S. 495, 513 (1976)), as those in the domestic area." 430 U.S. at 799 n.8.

326. 432 U.S. 1 (1977).

327. *Id.* at 9.

328. 403 U.S. 365 (1971).

apply as soon as they became eligible.[329] This law was challenged by two aliens residing in New York;[330] a three-judge district court held that the statute violated the equal protection clause of the Fourteenth Amendment.[331]

The Supreme Court affirmed. The Court reiterated its holding in *Graham v. Richardson*[332] that state classifications based on alienage are inherently suspect and are thus subject to close judicial scrutiny.[333] It rejected the argument that the state law did not distinguish between citizens and aliens *vel non* by remarking that "[t]he important points are that [the law] is directed at aliens and that only aliens are harmed by it."[334] Applying strict scrutiny to this case, Justice Blackmun declined to accept New York's two proffered justifications. First, he found that the alleged interest in providing the incentive for aliens to become citizens was not a state function but rather a federal one.[335] Second, he rejected the argument that the restrictions on educational benefits ensured an informed electorate because he claimed that this alleged goal would not be frustrated by extending such benefits to aliens, who also pay their full share of taxes.[336]

The Chief Justice dissented, pointing out that prior cases involving aliens had concerned economic benefits, either occupational, professional or

329. N.Y. EDUC. LAW § 661(3) (McKinney Supp. 1977-78):

> 3. Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible for citizenship, or (d) must be an individual of a class of refugees paroled by the attorney general of the United States
>
> . . . .

For the general provisions of the New York law authorizing disbursements, see *id.* at §§ 605(1), 670 (Regents college scholarships); *id.* at §§ 604(1), 667(1) (tuition assistance awards); *id.* at §§ 680-684 (student loans).

330. Appellee Jean-Marie Mauclet is a French national married to an American citizen; he began residing in New York in April of 1969. In an affidavit he indicated his intention not to relinquish French citizenship. Appellee Alan Rabinovitch is a Canadian citizen who was admitted to this country as a permanent alien resident in 1964 and has been living in New York since his admission. He also stated that he had no intention of becoming a naturalized American citizen, but did intend to continue to reside in New York. 432 U.S. at 4-5.

331. Mauclet v. Nyquist, 406 F. Supp. 1233, 1236 (W.D.N.Y. 1976), *aff'd*, 432 U.S. 1 (1977). Other lower federal courts have also held that discrimination against resident aliens in the distribution of educational assistance is unconstitutional. *See, e.g.*, Chapman v. Gerard, 456 F.2d 577, 579 (3d Cir. 1972) (provision of the Virgin Islands Code barring resident aliens from participation in the Territorial Scholarship Fund); Jagnandan v. Giles, 379 F. Supp. 1178, 1187 (N.D. Miss. 1974), *aff'd*, 538 F.2d 1166 (5th Cir. 1976) (challenge by aliens to the declaration of their ineligibility for resident status for tuition purposes at Mississippi State University).

332. 403 U.S. 365, 382-83 (1971).

333. 432 U.S. at 8-9.

334. *Id.* at 9.

335. *Id.* at 10.

336. *Id.* at 11-12.

welfare-related.[337] In the present case, he found no fundamental personal interest at stake and he therefore believed that while the line drawn by the state was not perfect, it did provide a rational means for New York to further its stated goals.[338] Moreover, he declared that "[b]eyond the specific case, I am concerned that we not obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship."[339]

Both the Chief Justice and Justice Stewart joined in Justice Powell's dissent. He found that the New York law did not discriminate against aliens in general, but rather between aliens who preferred to remain foreign citizens and all others.[340] On that basis, Justice Powell argued that no precedent necessitated the ruling handed down by the majority.[341] Justice Rehnquist, whose dissent was also joined by the Chief Justice, was troubled by the mechanical application of the Court's equal protection jurisprudence to this case. He could find no basis for heightened scrutiny. He found that under the rational basis test, the New York statute could be justified either in terms of the future benefits that it assured to the state or in economic terms, since repayment and easier collection of loans were assertedly more likely if such loans were limited to citizens.[342]

If one believes Justice Rehnquist, *Nyquist* would seem to extend significantly the Court's prior decisions in the area of discrimination against aliens, both in terms of the analysis employed and the result reached. The Court's formal finding on the suspectness of alienage as a statutory classification had occurred as recently as *Graham*,[343] decided in 1971. In that case, however, Justice Rehnquist pointed out that the Court based its conclusion on the rationale of footnote four of the *Carolene Products*[344] case, namely,

337. *Id.* at 12-13 (Burger, C.J., dissenting) (citing Examiners Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572 (1976) (Puerto Rican statute permitted only United States citizens to practice as civil engineers); *In re* Griffiths, 413 U.S. 717 (1973) (membership in state bar limited to citizens); Graham v. Richardson, 403 U.S. 365 (1971) (denial of welfare benefits to aliens); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (state statute denied fishing license to persons ineligible for citizenship); Truax v. Raich, 239 U.S. 33 (1915) (state constitution required employers to hire "not less than eighty per cent qualified electors or native-born citizens of the United States"); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (city ordinance discriminatorily enforced against aliens so as to prevent Chinese subjects, but not United States citizens, from operating laundries in wooden buildings within the city)).

338. 432 U.S. at 14.

339. *Id.*

340. *Id.* at 15 (Powell, J., dissenting, joined by Burger, C.J., and Stewart, J.).

341. *Id.* Justice Powell also asserted that the line drawn by the state was a reasonable one, because New York has a "substantial interest in encouraging allegiance to the United States on the part of all persons, including resident aliens, who have come to live within [its] borders." *Id.* at 16.

342. *Id.* at 21-22 (Rehnquist, J., dissenting, joined by Burger, C.J.).

343. Graham v. Richardson, 403 U.S. 365 (1971).

344. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

that aliens ought to be protected because they constituted a "discrete and insular" minority, identifiable by a status, albeit temporary, that the individual members of the minority were powerless to change.[345] Justice Rehnquist argued that prior equal protection cases invalidating state legislation discriminating against noncitizens involved situations where aliens as a class were being accorded treatment different from that accorded citizens as a class.[346] Thus, *Graham* struck down an Arizona law imposing a durational residency requirement on welfare benefits for certain aliens, but not for citizens. Similarly, in *In re Griffiths*[347] and *Sugarman v. Dougall*,[348] the Court invalidated, respectively, a Connecticut statute excluding aliens as a class from the practice of law and a New York statute permitting only United States citizens to hold permanent positions in the competitive class of the state's civil service. In *Nyquist*, however, Justice Rehnquist contended that the New York law did not impose an inevitable disability based on status; "a resident alien has, at all times, the power to remove himself from one classification and to place himself in the other, for, at all times, he may become entitled to benefits either by becoming a citizen *or* by declaring his decision to become a citizen as soon as possible."[349] For this reason, he said

345. 432 U.S. at 17-18 (Rehnquist, J., dissenting, joined by Burger, C.J.). Under federal law, aliens are, indeed, at least temporarily powerless to change their status. They can file a petition for naturalization only after residing in this country for five years, 8 U.S.C. § 1427(a) (1970), or three years, if the alien is married to an American citizen, 8 U.S.C. § 1430(a) (1970). The naturalization laws have created certain exceptions to this durational requirement where the alien is (1) married to a citizen employed abroad by the government, by a United States institution of research, or as a missionary; is present in the country at the time of naturalization and declares an intention to reside in the country as soon as his or her spouse terminates such foreign employment; (2) employed for at least five years by a nonprofit corporation recognized by the United States Attorney General as one that promotes United States interests abroad; or (3) is the surviving spouse of a citizen killed during a period of honorable service in the armed forces and who was living in "marital union" with the citizen spouse at the time of death. 8 U.S.C. §§ 1430(b)-(d) (1970). As Justice Rehnquist pointed out, these exceptions are *de minimis*. 432 U.S. at 18 n.1. Consequently, he went on to observe:

> If a classification, therefore, places aliens in one category, and citizens in another, then, thereafter, every entering resident alien must pass through a period of time in this country during which he falls into the one category and not the other. Nothing except time can remove him from his identified status as an "alien" and from whatever associated disabilities the statute might place on one occupying that status. In this sense, it is possible to view aliens as a discrete and insular minority, since they are categorized by a factor beyond their control.

432 U.S. at 18-19 (Rehnquist, J., dissenting, joined by Burger, C.J.).

346. *See* 432 U.S. at 19. Justice Rehnquist noted that "[t]he line drawn by the legislature [in these cases] was drawn on the basis of a status, albeit temporary, that the included members were powerless to change." *Id.*

347. 413 U.S. 717 (1973).

348. 413 U.S. 634 (1973).

349. 432 U.S. at 20. As a result, even though an alien would still have to wait the prescribed period before he could become naturalized, *see* note 345 *supra*, this fact did not make him a

that the class affected by the New York law in *Nyquist* was not a discrete and insular minority as required by *Graham*. Moreover, he argued that in this case, unlike *Graham, Griffiths* and *Sugarman*, there existed no period of disability from which an alien could not escape: "There is no temporal disability since the resident alien may declare an intent, thereby at once removing himself from the disabled class, even if the intent cannot come to fruition for some period of time."[350]

The majority disputed these characterizations of precedent. Justice Blackmun pointed out that *Graham* involved a law denying welfare benefits to noncitizens or aliens who had not resided within the United States for fifteen years;[351] it thus differentiated between *subcategories* of the general class of aliens, much as the New York law in *Nyquist* did.[352] On the issue of voluntariness, the majority pointed out that the plaintiffs in *Griffiths* and *Sugarman* could have applied for citizenship and thus removed themselves from the disabled class created by the Connecticut and New York statutes involved in those cases. They did not do so, but their omission in this respect had not caused the Court's refusal to apply the strict scrutiny standard of review.[353] Indeed, Justice Blackmun pointed out that Justice

member of a discrete and insular minority for the purposes of the state's classification; educational benefits would be disbursed to any alien filing an affidavit declaring his intention to become a citizen, even though the period satisfying the federal residency requirement had not yet elapsed.

350. *Id.*

351. ARIZ. REV. STAT. ANN. § 46-233(A) (Supp. 1970-71) (amended 1972):

> A. No person shall be entitled to general assistance . . . who does not meet and maintain the following requirements:
>
> 1. Is a citizen of the United States, or has resided in the United States a total of fifteen years.

It should be noted that Justice Rehnquist's characterization of *Graham* is not totally inaccurate. The second case in that consolidated lawsuit involved a challenge to a Pennsylvania law, PA. STAT. ANN. tit. 62, § 432(1)-(2) (Purdon 1968) (amended 1976), which provided welfare payments to "(1) needy persons who qualify under the federally supported categorical assistance programs and (2) those other needy persons who are citizens of the United States." Graham v. Richardson, 403 U.S. 365, 368-71 (1971). The Pennsylvania statute thus did discriminate between aliens as a unitary class and citizens as a unitary class.

352. 432 U.S. at 8, 9 & n.11.

353. *Id.* at 9 n.11. In *Griffiths*, the Court pointed out that the appellant, who was the spouse of a citizen, had resided in the United States for a period longer than the federal durational requirement of three years, *see* 8 U.S.C. § 1430(a) (1970), and thus was eligible for naturalization; she simply refused to renounce her Netherlands citizenship. *In re* Griffiths, 413 U.S. 717, 718 n.1 (1973). The four appellees in *Sugarman* were discharged from the state's civil service on December 28, 1970. One of them had been residing in New York since 1963, another since 1964; the other two dated their residence from 1967. Thus, two appellees were eligible for naturalization in 1970 and all of them were eligible by the time the Court decided the case. *See* note 345 *supra*. The Court observed, however, that "[t]he record does not disclose that any of the four appellees ever took any step to attain United States citizenship." Sugarman v. Dougall, 413 U.S. 634, 638 (1973).

Rehnquist had reiterated the very same theme of his *Nyquist* dissent in the course of his dissenting opinion in *Sugarman*.[354]

Moreover, the rationale expressed by Justice Rehnquist had already been undermined by other rulings of the Court during this term. In *Trimble v. Gordon*,[355] for example, the Court had struck down an Illinois law preventing illegitimates from inheriting from their fathers who died intestate and, in so doing, it rejected the contention that the law was permissible because the affected parent could always voluntarily take alternative measures to remove his child from the disabled class, such as drawing up a will. Moreover, the majority in *Trimble* also emphasized that the law was directed at illegitimates and that only they were harmed by it.[356] As a result, the fact that the statute was not an absolute bar did not mean that it did not discriminate against illegitimates as a class;[357] in support of this proposition the Court cited several illegitimacy cases, including *Mathews v. Lucas*,[358] which the majority in *Trimble* relied on extensively.

At first sight, this analysis would appear to be inconsistent with that utilized in the *Fiallo*[359] case, in which the Court rejected a discrimination claim involving a statute containing a classification based on alienage and illegitimacy and also refused to probe in detail the legislative purpose underlying the enactment of that statute. This inconsistency is minimized, however, by the Court's recognition in both *Nyquist* and *Fiallo* of the federal government's exclusive control over immigration and naturalization.[360] Because New York lacked any colorable claim to a similar sovereign power, the Court premised its ruling in *Nyquist* on the assumption that the states were not entitled to the deferential judicial review appropriate to congressional acts in this somewhat unique area. To support this distinction,

354. *See* Sugarman v. Dougall, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting). There, Justice Rehnquist said:

> But there is a marked difference between a status or condition such as illegitimacy, national origin, or race, which cannot be altered by an individual and the "status" of the appellant . . . . There is nothing in the record indicating that their status as aliens cannot be changed by their affirmative acts.

Id. This quotation is somewhat inconsistent with Justice Rehnquist's assertion that *Sugarman* and *Nyquist* are distinguishable. In *Sugarman*, the appellees had met the federal residency requirement; the same was true in *Nyquist*, however, because Nyquist and Rabinovitch had been residents in this country for eight and thirteen years, respectively, and thus could have sought naturalization had they so wished. *See* note 330 *supra*.

355. 430 U.S. 762 (1977); *see* notes 255-92 and accompanying text *supra*.

356. *Id.* at 774.

357. *See id.* at 771-72.

358. 427 U.S. 495 (1976).

359. Fiallo v. Bell, 430 U.S. 787 (1977). *See* notes 293-325 and accompanying text *supra*.

360. *See* Nyquist v. Mauclet, 432 U.S. 1, 7 n.8 (1977); Fiallo v. Bell, 430 U.S. 787, 792-96 (1977).

the Court cited its own ruling in *Mathews v. Diaz*,[361] which accorded less than strict scrutiny to a federal statute limiting the eligibility of aliens, but not citizens, to participate in a federal medical insurance program upon the satisfaction of a durational residency requirement, wherein it was "at pains to emphasize that Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States."[362] Therefore, *Nyquist* is consistent not only with the Court's prior cases involving discrimination by states based on alienage, but with contemporaneous decisions involving analogous problems in the context of discrimination against illegitimates.

E. Limited Review of a Fundamental Right

The last significant equal protection case of the term was *Maher v. Roe*.[363] In that decision, the Court held by a six-to-three margin that a state's refusal to provide financial assistance for nontherapeutic abortions (*i.e.*, those abortions not deemed medically necessary) under a welfare program that generally subsidized all medical expenses associated with pregnancy and childbirth did not constitute an undue burden on a woman's fundamental right to terminate her pregnancy.

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361. 426 U.S. 67 (1976).

362. 432 U.S. at 7 n.8 (citing Mathews v. Diaz, 426 U.S. 67, 84-87 (1976)). *Accord*, Hampton v. Mow Sun Wong, 426 U.S. 88, 100-01 (1976); De Canas v. Bica, 424 U.S. 351, 358 n.6 (1976). The New York student loan program, *see* statutes cited in note 329 *supra*, is largely subsidized by the federal government. *See* 20 U.S.C. §§ 1071-1087-2 (1970 & Supp. V 1975). Under federal regulations, an alien student is eligible for assistance if he is in this country for other than a temporary purpose and intends to become a permanent resident. 45 C.F.R. § 177.2(a) (1976). Presumably, the Court in *Nyquist* would find such a discrimination legitimate because it constituted an exercise of federal power.

363. 432 U.S. 464 (1977), *rev'g* Roe v. Norton, 408 F. Supp. 660 (D. Conn. 1975). For earlier proceedings in this case, see Roe v. Norton, 380 F. Supp. 726 (D. Conn. 1974), *rev'd*, 522 F.2d 726 (2d Cir. 1975). For a prior discussion of this case in the context of the Court's other decisions this term relating to the funding of abortions under federal statutes, see Comment, *Beal v. Doe, Maher v. Roe, and Non-Therapeutic Abortions: The State Does Not Have to Pay the Bill*, 9 LOY. CHI. L.J. 288 (1977). A few comments should be offered at this juncture about *Maher's* companion decisions, Beal v. Doe, 432 U.S. 438 (1977) and Poelker v. Doe, 432 U.S. 519 (1977). *Beal* dealt with a Pennsylvania plan denying financial assistance for nontherapeutic abortions. The issue presented was whether Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396i (1970 & Supp. V 1975) (amended 1976 & 1977), which establishes a Medical Assistance Program under which participating states may provide federally funded medical assistance (Medicaid) to needy persons, required the subsidization of such abortions. Lower federal courts prior to *Beal* had divided equally on this issue. *Compare* Doe v. Beal, 523 F.2d 611, 621-22 (3d Cir. 1975), *rev'd*, 432 U.S. 438 (1977); Doe v. Westby, 402 F. Supp. 140, 143-44 (W.D.S.D. 1975), *vacated*, 433 U.S. 901 (1977); Roe v. Norton, 380 F. Supp. 726, 730 (D. Conn. 1974), *rev'd*, 522 F.2d 928 (2d Cir. 1975); Klein v. Nassau County Medical Center, 347 F. Supp. 496, 500-01 (E.D.N.Y. 1972), *vacated on other grounds*, 412 U.S. 925 (1973) (all the above

In his opinion for the Court, Justice Powell relied primarily on his own opinion for the majority in *San Antonio Independent School District v. Rodriguez*[364] and that of Justice Stewart in *Dandridge v. Williams*[365] to support the proposition that the challenged Connecticut regulation,[366] to the extent that it burdened female indigents, did not operate against a suspect

finding that a state's refusal to fund all types of nontherapeutic abortions violated Title XIX) *with* Roe v. Norton, 522 F.2d 928, 935 (2d Cir. 1975); Roe v. Ferguson, 515 F.2d 279, 283 (6th Cir. 1975); Doe v. Rose, 499 F.2d 1112, 1115 (10th Cir. 1974); Lady Jane v. Maher, 420 F. Supp. 318, 320 (D. Conn. 1976); Doe v. Wohlgemuth, 376 F. Supp. 173, 182-86 (W.D. Pa. 1974), *modified sub nom.* Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), *rev'd*, 432 U.S. 438 (1977) (all deeming such a refusal to be not inconsistent with Title XIX). The Third Circuit in *Beal* had argued that in light of the Court's decision in Roe v. Wade, 410 U.S. 113 (1973), fixing a woman's decision to abort as within the ambit of the constitutional right of privacy, a state could not, consistently with Title XIX, decline to fund nontherapeutic abortions sought within the first or second trimester. Doe v. Beal, 523 F.2d 611, 621-22 (3d Cir. 1975), *rev'd*, 432 U.S. 438 (1977). The Supreme Court disagreed, saying that nothing in Title XIX prevented the state from furthering its "unquestionably strong and legitimate interest in encouraging normal childbirth." 432 U.S. at 446 (footnote omitted). Moreover, it noted that Congress in 1976 had legislated that no federal Medicaid funds authorized for fiscal year 1977 could be used to subsidize nontherapeutic abortions. *Id.* at 447 n.14 (citing Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976)). This law had been held unconstitutional by at least one lower federal court prior to *Beal* and *Maher*. *See* McRae v. Mathews, 421 F. Supp. 533, 542 (E.D.N.Y. 1976), *vacated sub nom.* Califano v. McRae, 433 U.S. 916 (1977). The Court therefore held that while Title XIX permitted states to subsidize such abortions, it did not require them to do so. 432 U.S. at 447.

In Poelker v. Doe, 432 U.S. 519 (1977), the appellee had alleged that the refusal by the city of St. Louis, Missouri, to provide her with publicly-financed hospital services for nontherapeutic abortions infringed her Fourteenth Amendment rights. In a per curiam opinion, the Court dismissed this claim by citing the rationale of *Maher*. 432 U.S. at 521. In a similar fashion, a federal court of appeals relied on *Maher* to reject a contention that a state may not exclude from coverage under its medical insurance program for public employees payment for elective abortions while simultaneously providing benefits for pregnancies resulting in childbirth. Lehocky v. Curators of the Univ. of Mo., 558 F.2d 887, 889 (8th Cir. 1977). So the *Maher* doctrine will apply in a variety of contexts. For general discussions of the entire problem, see Butler, *The Right to Medicaid Payment for Abortion*, 28 HASTINGS L.J. 931 (1977); Note, *Medicaid and the Abortion Right*, 44 GEO. WASH. L. REV. 404 (1976).

364. 411 U.S. 1 (1973). For a summary of this case, see note 377 *infra*.

365. 397 U.S. 471 (1970). For a summary of this case, see note 378 *infra*.

366. *See* CONN. WELFARE DEP'T, PUBLIC ASSISTANCE PROGRAM MANUAL, vol. 3, ch. III, § 275 (1975). Under § 275, funds authorized by Title XIX of the Social Security Act could be disbursed only for the payment of "medically necessary," rather than elective, abortions. The term "medically necessary" was defined to encompass cases of psychiatric necessity. The final judgment was to be that of the attending physician and of the Chief of Gynecology and Obstetrics at an accredited hospital. The two appellees, Mary Poe, a sixteen year-old high school student and Susan Roe, an unwed mother with three children, both had to pay for their own abortions because they were unable to obtain certificates of medical necessity. 432 U.S. at 467 n.3.

The district court in *Maher* found that in order to construe the act to avoid constitutional doubts and to implement the policy of non-interference in doctor-patient relationships, it had to

class for purposes of equal protection analysis.[367] Similarly, the majority[368]

be interpreted so as to bar a state from refusing to fund nontherapeutic abortions. Roe v. Norton, 380 F. Supp. 726, 730 (D. Conn. 1974), *rev'd and remanded*, 522 F.2d 928 (2d Cir. 1975), *enforced*, 408 F. Supp. 660 (D. Conn. 1975), *rev'd sub nom.* Maher v. Roe, 432 U.S. 464 (1977). The Second Circuit disagreed. It pointed out that the language of Title XIX never mentions abortions and no intention to limit the powers of the state in this respect could be derived from the relevant legislative history. 522 F. 2d 928, 935 (2d Cir. 1975). The Supreme Court dismissed the statutory claim by relying on its decision in the companion case of Beal v. Doe, 432 U.S. 438 (1977). *See* note 363 *supra*. *See* Maher v. Roe, 432 U.S. at 480.

The Court's decision in this respect is too cursory. Under Title XIX, the state is empowered to set reasonable standards governing the eligibility of medical assistance. 42 U.S.C. § 1396(a)(17) (Supp. V 1975). But, Connecticut having set a standard of "medical necessity" (including psychic necessity), one may well ask whether the state was not defining that term unreasonably. As one earlier decision pointed out, a nontherapeutic abortion "may prevent specific and direct harm which is medically diagnosable (*e.g.*, psychological harm), may protect the woman's future mental and physical health, and may prevent the distress associated with the unwanted pregnancy and child." Doe v. Wohlgemuth, 376 F. Supp. 173, 190 (W.D. Pa. 1974), *modified sub nom.* Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), *rev'd*, 432 U.S. 438 (1977). *Accord*, Klein v. Nassau County Medical Center, 347 F. Supp. 496, 500 (E.D.N.Y. 1972), *vacated on other grounds*, 412 U.S. 925 (1973). If one accepts such a conclusion, then Connecticut was perhaps acting inconsistently in using a standard of necessity while leaving the judgment of whether or not that standard was met to persons other than the woman herself. Indeed, on January 26, 1976, ten days after the district court's order in this case, Connecticut revised § 275 of its *Manual* to permit reimbursement for elective abortions without authorization by a physician and a member of the hospital staff. Whether it did so solely in compliance with the district court order or in recognition of the inherent inconsistency in its own policy is conjectural. *See* 432 U.S. at 468-69 n.4.

367. Justice Powell said:

> An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases. Nor does the fact that the impact of the regulation falls upon those who cannot pay lead to a different conclusion. In a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services. But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.

432 U.S. at 470-71. Prior to *Maher*, a number of courts had concluded that similar state legislation did create disadvantaged classes for the purpose of equal protection analysis. *See, e.g.*, Doe v. Rose, 380 F. Supp. 779, 781-82 (D. Utah 1973), *aff'd*, 499 F.2d 1112, 1117 (10th Cir. 1974) (improper discrimination between the class of women seeking therapeutic abortions and the class of women seeking nontherapeutic abortions found; strict scrutiny test applied); Doe v. Wohlgemuth, 376 F. Supp. 173, 191 (W.D. Pa. 1974), *modified sub nom.* Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), *rev'd*, 432 U.S. 438 (1977) (unconstitutional discrimination between indigent women who choose to carry their pregnancies to term and those who choose to terminate their pregnancies by abortion found; strict scrutiny test applied); Klein v. Nassau County Medical Center, 347 F. Supp. 496, 500 (E.D.N.Y. 1972), *vacated on other grounds*, 412 U.S. 925 (1973), *on remand*, 409 F. Supp. 731 (E.D.N.Y. 1976) (per curiam), *vacated sub nom.* Toia v. Klein, 433 U.S. 902 (1977) (classification of pregnant women eligible for Medicaid into two groups, those who choose to carry their pregnancies to term and those who choose to abort found unconstitutional; rational basis test applied). Thus, Justice Powell may have misstated the classification problem. It was not a matter of differentiating between indigents and nonindigents, but rather between subcategories of indigent women. In light of his ultimate analysis, however, this error may have been unimportant.

368. The majority consisted of Justice Powell, joined by Justices Stewart, White, Rehn-

found that the law in question did not impinge upon the fundamental right of a woman to be protected against undue governmental interference in her decision whether to terminate her pregnancy,[369] a right that had been recognized by the Court in *Roe v. Wade*.[370] Justice Powell concluded that Medicaid subsidies for the costs attendant to childbirth placed

> no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the services she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.[371]

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quist and Stevens. Chief Justice Burger concurred separately, agreeing that Connecticut's policy did not place a barrier upon a woman's choice to abort. 432 U.S. at 481 (Burger, C.J., concurring). Justice Brennan, joined by Justices Marshall and Blackmun, dissented, essentially finding that the state law infringed the privacy right created by Roe v. Wade, 410 U.S. 113 (1973). 432 U.S. at 482-90 (Brennan, J., dissenting, joined by Marshall & Blackmun, JJ.).

369. 432 U.S. at 474. The district court in this case held:

> When Connecticut refuses to fund elective abortions while funding therapeutic abortions and prenatal and postnatal care, it weights the choice of the pregnant mother against choosing to exercise her constitutionally protected right to an elective abortion . . . . Her choice is affected not simply by the absence of payment for the abortion, but by the availability of public funds for childbirth if she chooses not to have an abortion. When the state thus infringes upon a fundamental interest, it must assert a compelling state interest that justifies the incursion.

Roe v. Norton, 408 F. Supp. 660, 663-64 (D. Conn. 1975), *rev'd sub nom.* Maher v. Roe, 432 U.S. 464 (1977).

370. 410 U.S. 113 (1973). *Wade* invalidated a Texas criminal law prohibiting all abortions except those necessary to save the mother's life. The Court ruled that (a) prior to the end of the first trimester, the choice to abort is left to the woman and her attending physician; (b) during the second trimester, the state may "regulate the abortion procedure in ways that are reasonably related to maternal health"; (c) during the final trimester, the state may not only prescribe procedure but also proscribe nontherapeutic abortions. *Id.* at 164-65. The Court found "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." *Id.* at 154. *See generally* Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807 (1973); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade and its Critics*, 82 YALE L.J. 920 (1973); Heymann & Barzelay, *The Forest and the Trees: A Comment on Roe v. Wade*, 53 B.U.L. REV. 765 (1973).

371. 432 U.S. at 474. Justice Powell distinguished *Wade* by pointing out that it involved a criminal ordinance placing a bar on the procurement of nontherapeutic abortions. *Id.* at 472. But later cases upheld the right of privacy created in *Wade* against incursions by noncriminal state laws. Thus, in Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976), the Court invalidated a civil law requiring the consent of the husband in addition to that of the physician before a woman could procure an abortion during the first trimester. *Id.* at 67-72. Justice Powell in *Maher* contended that such a provision had the same vetoing effect as the criminal law in *Wade*. 432 U.S. at 472-73. Similarly, he pointed to language in Belloti v. Baird,

Moreover, the state's power to encourage an alternative activity consonant with legislative policy was said to be necessarily different from and broader than its power to interfere directly with a protected activity.[372] Justice Powell therefore claimed that Connecticut was not required to demonstrate a compelling interest in order to justify the legislative policy favoring normal childbirth.[373] From this assertion, the Court derived the conclusion that, for equal protection purposes, the challenged enactment need only be subjected to the rational basis standard of review.[374] Applying *Dandridge v. Williams*,[375] the majority accordingly deferred to the value judgment of the Connecticut legislature implicit in its enactment of the provision being challenged; that value judgment was said to be the encouragement of childbirth and the statute in question was deemed to be a "rational means" of implementing such a policy.[376]

The equal protection analysis engaged in by the majority in *Maher* was

428 U.S. 132, 147 (1976) (parental consent requirement for minors seeking abortions; the Court chose not to rule on the merits until the state clarified the consent procedure), saying "that a requirement for a lawful abortion 'is not unconstitutional unless it unduly burdens the right to seek an abortion.' " 432 U.S. at 473.

372. 432 U.S. at 475-76. The Court at this juncture failed to give meaningful consideration to problems raised by Doe v. Bolton, 410 U.S. 179 (1973). That case invalidated a Georgia abortion law, which required, *inter alia*, that abortions be performed at hospitals certified by the state Joint Commission on Accreditation, that each abortion be approved by a duly constituted committee of staff members of the relevant hospital, and that the decision to abort be concurred in by at least two other doctors in addition to the woman's attending physician. *Id.* at 184. The Court in *Bolton* deemed the first prerequisite not reasonably related to the purposes of the statute, *id.* at 194; the second was found to possess "no constitutionally justifiable pertinence," *id.* at 197; the third was said to unduly interfere with the doctor-patient relationship, *id.* at 199-200. Yet the regulation in *Maher* not only required that the abortion take place in an accredited institution, but also that it be approved by the Chief of Obstetrics and Gynecology at that hospital and by the Chief of Medical Services for the state's Department of Social Services, 432 U.S. at 466 n.2; Roe v. Norton, 380 F. Supp. 726, 727 n.1 (D. Conn. 1974), and this portion of the regulation was not changed by the 1976 revision thereof. *See* note 366 *supra*. The Court said approval of the Chief of Medical Services was permissible. "It is not unreasonable for a State to insist upon a prior showing of medical necessity to insure that its money is being spent only for authorized purposes." 432 U.S. at 480. It never considered the accreditation and chief gynecologist-approval provisions. In omitting to analyze these factors, the majority in *Maher* suggests implicitly that the means-ends analysis utilized in *Bolton* may apply only in the context of criminal laws such as the Georgia statute involved in that case.

373. 432 U.S. at 476-77. Justice Powell distinguished Meyer v. Nebraska, 262 U.S. 390, 399 (1923), which defined "liberty" as including the right to "establish a home and bring up children," by pointing out that that case involved a penal law prohibiting the teaching of German in public schools and that it did not deny states the right to encourage a preferred course of action. 432 U.S. at 477.

374. 432 U.S. at 478. Application of this test requires only that a regulation be rationally related to a constitutionally permissible purpose. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976); Lindsey v. Normet, 405 U.S. 56, 74 (1972).

375. 397 U.S. 471 (1970); *see* note 378 *infra*.

376. 432 U.S. at 479.

not innovative. It simply was premised upon (1) the assertion in *Rodriguez* that wealth is not a suspect classification[377] and (2) the thesis advanced in *Dandridge* that, in the area of economic and social welfare legislation, an admittedly invidious classification is not also unconstitutional if it has some "reasonable basis."[378] What *is* new is that the Court in *Maher* applied this inherently limited standard of judicial review to the fundamental privacy interest acknowledged in *Roe v. Wade*.[379] The Court in *Dandridge* had been confronted with a challenge to a Maryland welfare scheme imposing a limit of $250 per month per recipient family, regardless of the size or the financial needs of that family. It prefaced its assertions with the warning that the suit involved "state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest [recipient] families."[380] Similarly, the Court in *Rodriguez* declined to invalidate the Texas school financing system because, *inter alia*, "[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."[381] Thus, the Court in *Rodriguez* could locate no fundamental interest that was being infringed.[382] In contrast to these two decisions, the claim in *Maher* did implicate a constitutional right, an aspect of the right of privacy recognized in the *Wade* case.[383] But Justice Powell's majority opinion simply ignores this crucial difference. In doing so, it sharply circumscribes the right of privacy developed by *Wade*, at least to the extent that such a right conflicts with governmental welfare policy.

This extension of the limiting *Dandridge* analysis to an alleged infring-

377. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 25 (1973). The Court there held that a Texas school financing scheme based partly on revenue derived from taxes on property within local school districts did not violate the Fourteenth Amendment to the extent that it created wealth-related disparities in the level of education being afforded in each district. The Court also found that education is not a fundamental right. *Id.* at 35-36.

378. Dandridge v. Williams, 397 U.S. 471, 485-86 (1970). The Court there held that 42 U.S.C. § 602(a)(10) (Supp. IV 1964) (current version at 42 U.S.C. § 602(a)(10) (Supp. V 1975)), which provides that Social Security funds be disbursed through a state Aid to Families with Dependent Children (AFDC) plan, was not infringed by a Maryland law placing a ceiling of $250 per month on all AFDC grants, regardless of the size of the recipient family and its actual need. *See also* New York Dep't. of Social Servs. v. Dublino, 413 U.S. 405, 413-14 (1973) and Jefferson v. Hackney, 406 U.S. 535, 546-51 (1972) (state policy of computing and assigning different criteria of need to different categorically needy groups deemed consistent with Social Security Act in both cases).

379. 410 U.S. 113 (1973).

380. Dandridge v. Williams, 397 U.S. 471, 484 (1970).

381. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

382. *Id.* at 35-36.

383. Roe v. Wade, 410 U.S. 113 (1973); *see* note 370 *supra*.

ement of privacy seems fundamentally gratuitous. Justice Powell had already averred that state encouragement of an alternative activity concurrent with legislative policy could not be equated with state interference with or interdiction of a fundamental right.[384] The criminal statutes involved in *Wade* were distinguished from the Connecticut statute involved in *Maher* on this basis.[385] As a result, no impingement on a fundamental right was said to exist.[386] If this is so, then why did the majority feel compelled to discuss *Dandridge* and *Rodriguez*? The answer may be provided by Justice Brennan's dissent, which made two points in this regard. First, he noted that in a case decided in the same term as *Maher, Carey v. Population Services International*,[387] the Court had struck down a New York law criminalizing the sale of contraceptives to minors and, in doing so, had said that "where a decision as fundamental as that of whether to bear or to beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn only to express those interests."[388] Second, Justice Brennan observed that in the 1976 decision of *Singleton v. Wulff*,[389] five justices[390] had agreed that *Wade* and its companion cases were not limited to those instances in which the state directly interdicted a woman's freedom to decide whether or not to abort, the reason being that

> a "direct interference" or "interdiction" test does not appear to be supported by precedent. . . . For a doctor who cannot afford to work for nothing, and a woman who cannot afford to pay him, the State's refusal to fund an abortion is as effective an "interdiction" of it as would ever be necessary. Furthermore, since the right . . . is not simply the right to have an abortion, but the right

384. 432 U.S. at 475.

385. *Id.* at 472-73.

386. *Id.* at 474.

387. 431 U.S. 678 (1977). The law invalidated in *Carey* criminalized (a) sale of contraceptives to minors, (b) distribution of contraceptives to adults by anyone other than a licensed pharmacist and (c) advertisement or display of contraceptives by anyone, even including a licensed pharmacist. N.Y. EDUC. LAW § 6811(8) (McKinney 1972).

388. 431 U.S. at 686.

389. 428 U.S. 106 (1976). *Singleton* involved a challenge to a Missouri statute excluding abortions that are not medically necessary from the purposes for which needy persons may obtain Medicaid benefits. The district court concluded that the plaintiff-physicians lacked standing to sue, Wulff v. State Bd. of Registration for the Healing Arts, 380 F. Supp. 1137, 1145 (E.D. Mo. 1974), but the Eighth Circuit reversed this ruling, Wulff v. Singleton, 508 F.2d 1211, 1214 (8th Cir. 1975), and went on to decide that the law was unconstitutional, *id.* at 1216. The Supreme Court agreed that standing existed, 428 U.S. at 118, but remanded the case for further proceedings because the district court had never rendered a decision on the merits, *id.* at 119-21.

390. Singleton v. Wulff, 428 U.S. 106, 122 (Blackmun, J., writing for the Court, joined in Part IIB by Brennan, White and Marshall, JJ.); *see also* Justice Stevens' concurrence in Part IIB of the opinion of the Court, *id.* at 121 (Stevens, J., concurring in part). *See* 432 U.S. at 485 (Brennan, J., dissenting, joined by Marshall and Blackmun, JJ.).

> to have abortions nondiscriminatorily funded, the denial of such funding is as complete an "interdiction" of the exercise of the right as could ever exist.[391]

In light of these factors, it is clear that Justice Powell, as a matter of strategy, needed to find a basis for showing why the Connecticut statute in *Maher* could be *qualitatively* differentiated from the criminal laws involved in *Singleton*, *Carey* and *Wade*. He did so by relying on the fact that the enactment in *Maher* was an example of social welfare legislation and therefore extended uncritically the *Dandridge* analysis to that enactment. Consequently, the majority in *Maher* insulated an entire class of legislation which inhibited a woman's decision whether or not to abort from the compelling interest standard of review normally accorded to laws impinging upon fundamental constitutional rights.

391. 428 U.S. 106, 118 n.7 (1976), *quoted in* Maher v. Roe, 432 U.S. 464, 485-86 (1977) (Brennan, J., dissenting, joined by Marshall and Blackmun, JJ.). The majority in *Maher* disagreed, however, arguing that *Singleton* was not reliable precedent. *See* 432 U.S. at 477-78 n.10. The dissent also argued that cases involving access to the courts by indigents, *e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); penalization of the right to travel from state to state, *e.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969); and alleged infringements of First Amendment rights, *e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963), all supported the proposition that the compelling state interest test applied not only where a fundamental right is completely denied, but also where it is restrained so as to make its exercise more difficult. 432 U.S. at 487-88 (Brennan, J., dissenting, joined by Marshall and Blackmun, JJ.). The majority dismissed the *Douglas-Boddie-Griffin* line of cases as inapposite, because they involved restrictions on governmental monopolies, such as appellate review of criminal convictions and the opportunity to institute an action for divorce; it noted that the private sector competed with Connecticut in furnishing abortion services. *Id.* at 469-70 nn.5&6. This argument seems vacuous, however, because it would appear that Connecticut did monopolize the furnishing of cost-free abortions; this was in fact the focus of the lawsuit. Indeed, one lower court arriving at a decision contrary to *Maher* relied expressly on *Boddie*. *See* Klein v. Nassau County Medical Center, 347 F. Supp. 496, 500-01 (E.D.N.Y. 1972), *vacated on other grounds*, 412 U.S. 925 (1973). But *Klein* was decided before decisions by the Court limiting the *Boddie* doctrine. *See* Ortwein v. Schwab, 410 U.S. 656, 658-60 (1973) (indigents not entitled to waive court costs for civil appeals); United States v. Kras, 409 U.S. 434, 443-50 (1973) (indigents not entitled to waive filing fee for bankruptcy). Justice Powell said *Maricopa* and *Shapiro* were not controlling because those cases involved the denial of welfare benefits to one engaging in interstate travel. "But the claim here is that the State 'penalizes' the woman's decision to have an abortion by refusing to pay for it. *Shapiro* and *Maricopa County* did not hold that States would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers." 432 U.S. at 474-75 n.8. Again, this analysis is superficial. Justice Powell focused solely on the nature of the deprivation exacted when he should have also accorded some attention to the absence or presence of a punitive purpose on the part of the Connecticut legislature when it chose to deny funding for nontherapeutic abortions. *Sherbert* was deemed inapplicable because it involved a case arising in the discrete context of the establishment and freedom of religion clauses of the First Amendment. *Id.* But as one commentator has noted, *Sherbert* stands for the proposition that unconstitutional conditions may not be placed upon the receipt of a statutory entitlement. *See* Sherbert v. Verner, 374 U.S. 398, 404-06 (1963); Butler, *The Right to Medicaid Payment For Abortion*, 28 HASTINGS L.J. 931, 952-53 (1977). Justice Powell may then have been too hasty in assuming that the doctrine of *Sherbert* was inapposite.

In doing so, the Court ignored the gloss placed on *Dandridge* by its decision in *Jimenez v. Weinberger*.[392] *Jimenez*, which invalidated a provision of the Social Security Act denying disability benefits to certain classes of illegitimates born after the onset of the wage-earner's disability,[393] declined to apply the deferential standard of *Dandridge*. The Court argued that the result in *Dandridge* was necessitated by the state's "finite resources" for welfare benefits and that "there is no evidence supporting the contention that to allow illegitimates in the classification of appellants to receive benefits would significantly impair the federal Social Security trust fund and necessitate a reduction in the scope of persons benefitted by the Act."[394] Chief Justice Burger's opinion for an eight-member majority in *Jimenez* thus seemed to limit the *Dandridge* standard of review to situations where the state could both allege and prove that the service sought by the plaintiff would cause prohibitive expenses. *Jimenez* was not cited in *Maher*, however, and understandably so. Although the Court in *Maher* referred to the "wider latitude" given the states "in choosing among competing demands for limited public funds,"[395] it cited no evidence adduced by Connecticut that the funding of nontherapeutic abortions during the first trimester would strain the state's finances. Indeed, the district court in *Maher* had noted that any attempt to make such an argument would cut the other way,

> because abortion is the least expensive medical response to a pregnancy. An abortion normally requires two expenditures of funds: a consultation to determine that an abortion is medically safe, and the medical procedure itself. By contrast, in the event of childbirth, the state pays the more extensive costs of prenatal . . . support for the unborn child. . . . Furthermore, the birth of a child to a welfare mother increases the burden on the state's welfare coffers because the newly-born indigent child will, in all likelihood, qualify for state welfare assistance.[396]

Thus, Connecticut's policy, in the long run, caused the state to spend rather than to save money. In light of this fact, it seems curious that the Court ignored the limiting gloss placed on the holding of *Dandridge* by the majority in *Jimenez*. This omission suggests that the limitation enunciated in the latter case may no longer be relied upon to circumscribe application of the standard of review developed in the former decision. Thus, *Maher* is

392. 417 U.S. 628 (1974).

393. 42 U.S.C. § 416(h)(3) (1970).

394. 417 U.S. at 633.

395. 432 U.S. at 479.

396. Roe v. Norton, 408 F. Supp. 660, 664 (D. Conn. 1975). *Accord*, Doe v. Rose, 499 F.2d 1112, 1117 (10th Cir. 1974); Klein v. Nassau County Medical Center, 347 F. Supp. 496, 500-01 (E.D.N.Y. 1972), *vacated on other grounds*, 412 U.S. 925 (1973).

important not only because it extends the doctrine of *Dandridge* to different types of constitutional claims, but also because it appears to undermine one of the chief constraints that had heretofore been placed on any application of that doctrine.

First Amendment

In the following two sections, nine cases decided by the United States Supreme Court during its 1976-77 term will be discussed. The common thread in these decisions is that they analyze the right of free speech in various contexts. The first section reviews four obscenity decisions and analyzes the Court's continuing effort to distinguish that class of expression from constitutionally protected speech. The second section considers the Court's other decisions on the right of free speech. The first case deals with the concept of symbolic speech and the related right to refrain from speaking. The next two decisions both concern expression within a particular context, namely, the right of public employees to speak freely (or to ensure that no one speaks for them) on subjects about which their elected representatives are engaged in collective bargaining. Finally, the last two cases concern the problematic area of commercial expression.

With one relatively minor exception,* this list comprises all the important speech cases decided during the 1976-77 term. These decisions are analyzed spearately and in relatively exhaustive detail in order to present a thorough summary of the difficulties that the Court has encountered in discussing free speech claims and to suggest some of the similarities and inconsistencies inherent in the various methods by which those claims have been disposed.

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* Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977), which held that a prison regulation forbidding inmates from soliciting their colleagues or staging union meetings on prison grounds did not violate the First Amendment. For a prior article analyzing the constitutional implications of this case and scrutinizing it in the context of relevant precedent, *see* Calhoun, *The Supreme Court and the Constitutional Rights of Prisoners*, 4 HASTINGS CONST. L.Q. 219, 233-35 (1977).

A. Obscenity

1. Introduction

Meaningful analysis of the four decisions by the United States Supreme Court on the subject of obscenity during the 1976-77 term[1] requires a brief summary of judicial developments in this area during the past two decades. The Supreme Court placed obscenity, along with libel and fighting words, in the category of speech that is unprotected by the First Amendment as early as 1942.[2] In *Roth v. United States*,[3] Justice Brennan, on behalf of himself and four of his colleagues,[4] specifically emphasized this point fifteen years later:

> All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties [of the First Amendment], unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws

1. Ward v. Illinois, 431 U.S. 767 (1977); Splawn v. California, 431 U.S. 595 (1977); Smith v. United States, 431 U.S. 291 (1977); Marks v. United States, 430 U.S. 188 (1977).

2. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

3. 354 U.S. 476 (1957). This decision rendered judgments in two quite separate cases. The first was a prosecution under federal obscenity statutes conducted in a district court in New York. The consequent conviction was affirmed by the Second Circuit. Roth v. United States, 237 F.2d 796 (2d Cir. 1956), *aff'd*, 354 U.S. 476 (1957). The second was a prosecution under a California obscenity law, which again resulted in a conviction that was upheld on appeal. People v. Alberts, 138 Cal. App. 2d 909, 292 P.2d 90 (1955), *aff'd*, 354 U.S. 476 (1957). For more extensive discussion of this case, see T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 471-74 (1970) [hereinafter cited as EMERSON]; F. SCHAUER, THE LAW OF OBSCENITY 33-40 (1976) [hereinafter cited as SCHAUER]; Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 7-28; Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 1, 19-29 (1960) [hereinafter cited as Lockhart & McClure].

4. Justice Brennan's opinion was joined by Justices Frankfurter, Clark, Burton and Whittaker. Chief Justice Warren concurred separately, noting that since the material in question was clearly pornographic and the defendants engaged in commercial exploitation of shameful and morbid cravings, he would affirm the convictions. 354 U.S. at 494-96 (Warren, C.J., concurring). Justice Harlan concurred in *Alberts*, but dissented in *Roth*, finding that while states could freely regulate sexually-oriented materials, the federal government's control was restricted to the regulation of hard-core pornography. *Id.* at 496-507 (Harlan, J., concurring in part and dissenting in part). Justice Douglas, joined by Justice Black, dissented, arguing that the First Amendment prohibited suppression of all utterances, offensive or not. *Id.* at 508-14 (Douglas, J., dissenting, joined by Black, J.).

> of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. . . . We hold that obscenity is not within the area of constitutionally protected speech or press.[5]

Roth decided the broad constitutional issue of whether or not obscenity is speech safeguarded by the First Amendment. Subsequent formulation of a definition of what is or is not obscene was consequently necessary. Justice Brennan offered the assertion in *Roth* that "[o]bscene material is material which deals with sex in a manner appealing to prurient interest."[6] He further concluded that a determination of whether a given publication met this criterion was dependent upon "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[7] Thus, the key words and phrases that have influenced all subsequent judicial discourse on the subject of obscenity were introduced. On the basis of this discussion, the majority in *Roth* ruled that section 1461 of Title eighteen of the United States Code, which prohibits the mailing of "obscene, lewd, lascivious, or filthy" materials,[8] and the California law criminalizing the sale of or advertisement for "obscene or indecent" publications[9] were not void for vagueness, in

5. 354 U.S. at 484-85. *Accord*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 54 (1973); Miller v. California, 413 U.S. 15, 23 (1973); Kois v. Wisconsin, 408 U.S. 229, 230 (1972); United States v. Reidel, 402 U.S. 351, 354 (1971).

6. 354 U.S. at 487. According to Justice Brennan this meant "material tending to excite lustful thoughts." *Id.* n.20. "Prurient" was further defined as "itching, longing; uneasy with desire or longing; of persons, having, morbid or lascivious longings; of desire, curiosity, or propensity, lewd. . . ." *Id.* (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1949)).

7. 354 U.S. at 489.

8. 18 U.S.C. § 1461 (1970):

> Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and—
>
> . . . .
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, . . . whether sealed or unsealed . . .
>
> . . . .
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

9. CAL. PENAL CODE § 311 (West 1955) (repealed 1961): "Every person who wilfully and lewdly . . . [w]rites, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book . . . is guilty of a misdemeanor."

that, while imprecise, each statute was sufficient to give adequate notice for purposes of due process.[10]

The consensus arrived at in *Roth* was an exceedingly fragile one, and it proved to be short-lived. One source of continuing controversy was whether the "contemporary community standards" referred to in *Roth* should be national or local in character.[11] The issue first arose in the context of a state obscenity prosecution in *Jacobellis v. Ohio*,[12] decided in 1964. Of the six different opinions in that case, only two addressed the problem of the geographical scope of community standards, and the result was a deadlock. Justices Brennan and Goldberg advocated a national standard in state prosecutions in order to ensure procedural uniformity,[13] whereas Chief Justice Warren and Justice Clark rejected such an approach on the grounds that no one national standard exists.[14] Nor did the problem disappear with subsequent changes of personnel on the Court; in three dissents in decisions handed down in 1970, Chief Justice Burger alone, and in conjunction with Justices Harlan and Blackmun, advocated a more flexible, variable approach to the problem of the applicable standard in state prosecutions.[15] Nevertheless, in spite of this indecision among the members of the Court, at least five circuit courts and a number of state tribunals elected to implement national standards in the years following *Jacobellis*.[16]

10. 354 U.S. at 492.

11. In two early cases involving federal obscenity prosecutions, the First Circuit selected the former alternative. Excellent Publications, Inc. v. United States, 309 F.2d 362, 365 (1st Cir. 1962); Flying Eagle Publications, Inc. v. United States, 273 F.2d 799, 803 (1st Cir. 1960). That approach was also adopted by Justices Harlan and Clark in the case of Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488 (1962), a suit that also involved section 1461. None of the three other opinions in this case discussed the subject. *See id.* at 495 (Black, J., concurring in the result); *id.* at 495-519 (Brennan, J., concurring in the reversal, joined by Warren, C.J., and Douglas, J.); *id.* at 519-29 (Clark, J., dissenting).

12. 378 U.S. 184 (1964). *See* O'Meara & Shaffer, *Obscenity in the Supreme Court: A Note on Jacobellis v. Ohio*, 40 NOTRE DAME LAW. 1 (1964).

13. 378 U.S. at 192-95 (Brennan, J., joined by Goldberg, J.).

14. *Id.* at 200-01 (Warren, C.J., dissenting, joined by Clark, J.).

15. *See* Hoyt v. Minnesota, 399 U.S. 524, 524-25 (1970) (Blackmun, J., dissenting, joined by Burger, C.J., and Harlan, J.); Walker v. Ohio, 398 U.S. 434, 434 (1970) (Burger, C.J., dissenting); Cain v. Kentucky, 397 U.S. 319, 319 (1970) (Burger, C.J., dissenting).

16. *See* Chemline, Inc. v. City of Grand Prairie, 364 F.2d 721, 726 (5th Cir. 1966); United States v. West Coast News Co., 357 F.2d 855, 861 (6th Cir. 1966), *rev'd on other grounds sub nom.* Aday v. United States, 388 U.S. 447 (1967); United States v. Davis, 353 F.2d 614, 615 (2d Cir. 1965); Haldeman v. United States, 340 F.2d 59, 61 (10th Cir. 1965); United States v. Ginzburg, 338 F.2d 12, 14 (3d Cir. 1964), *aff'd without considering the point*, 383 U.S. 463 (1966); State v. Locks, 97 Ariz. 148, 151, 397 P.2d 949, 951 (1964); State v. Lewitt, 3 Conn. Cir. 605, 608, 222 A.2d 579, 581 (1966); State v. Smith, 422 S.W.2d 50, 56 (Mo. 1967); Keuper v. Wilson, 111 N.J. Super. 489, 490, 268 A.2d 753, 755 (1970); People v. Stabile, 58 Misc. 2d 905, 907, 296 N.Y.S.2d 815, 820 (1969); State v. Childs, 252 Ore. 91, 101, 447 P.2d 304, 310 (1968);

A more troubling question involved the extent of the federal and state governments' respective powers to regulate obscentiy. While it appeared that this issue was settled by *Roth*, the close vote in that case and subsequent changes in the Court's personnel in effect re-opened the question for further consideration. Thus, in the succeeding decade, Justices Black and Douglas adhered to the view that federal and state governments were not empowered to regulate sexually-oriented speech at all,[17] Justice Stewart expressed the position that federal and local authorities could exercise control only over that class of obscenity labelled "hard core pornography"[18] and Justice Harlan reiterated the view that whereas the federal government could regulate only hard core publications, states could ban all materials rationally adjudged to treat sex in a "fundamentally offensive" manner.[19] A fourth view on the subject soon surfaced, however. It originated in the opinion authored by Justice Brennan, in which Justice Goldberg joined, in the *Jacobellis* case. In addition to advocating national standards, Justice Brennan construed *Roth* to imply that any sexually-oriented publication could

Robert Arthur Management Corp. v. State, 220 Tenn. 101, 110, 414 S.W.2d 638, 642 (1967) *rev'd on other grounds*, 389 U.S. 578 (1968). A number of state courts, however, adopted standards based on a smaller community. *See In re* Giannini, 69 Cal. 2d 563, 578, 446 P.2d 535, 543, 72 Cal. Rptr. 655, 664 (1968) (community-wide); Carter v. State, 388 S.W.2d 191, 191 (Tex. Crim. 1965) (statewide); McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 149, 121 N.W.2d 545, 553 (1970) (of the locality); Gent v. State, 239 Ark. 474, 477-78, 393 S.W.2d 219 226 (1965) (citywide), *rev'd on other grounds sub nom.* Redrup v. New York, 386 U.S. 767 (1967); Felton v. City of Pensacola, 200 So. 2d 842, 848 (Fla. 1967) (community-wide), *rev'd on other grounds*, 390 U.S. 340 (1968). *See generally* SCHAUER, *supra* note 3, at 116-135.

17. *See, e.g.*, United States v. Thirty-Seven Photographs, 402 U.S. 363, 379-80 (1971) (Black, J., dissenting, joined by Douglas, J.); Ginzburg v. United States, 383 U.S. 463, 476, 491-92 (1966) (Black, J., and Douglas, J., dissenting); Jacobellis v. Ohio, 378 U.S. 184, 196 (1964) (Black, J., dissenting, joined by Douglas, J.)

18. *See, e.g.*, Ginzburg v. United States, 383 U.S. 463, 499 (1966) (Stewart, J., dissenting); Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). In *Jacobellis*, Justice Stewart did not define hard core pornography, but said that he knew it when he saw it. *Id.* In *Ginzburg*, he proposed the following definition:

> Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and books, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value.

383 U.S. at 499 n.3.

19. *See, e.g.*, Walker v. Ohio, 398 U.S. 434, 434-45 (1970) (Harlan, J., dissenting); Cain v. Kentucky, 397 U.S. 319, 319-20 (1970) (Harlan, J., dissenting); Ginzburg v. United States, 383 U.S. 463, 493 (1966) (Harlan, J., dissenting); A Quantity of Books v. Kansas, 378 U.S. 205, 215 (1964) (Harlan, J., dissenting, joined by Clark, J.); Jacobellis v. Ohio, 378 U.S. 184, 204 (1964) (Harlan, J., dissenting).

not be proscribed unless it was both " 'utterly' without redeeming social importance"[20] and so constituted that one could say it went "substantially beyond customary limits of candor in description or representation."[21] This language formed the nucleus of a tripartite test for obscenity promulgated by the plurality in *Memoirs v. Massachusetts*.[22] Justices Brennan and Fortas and Chief Justice Warren argued that federal or state constraints on the distribution of sexually-oriented materials were permissible where

> three elements . . . coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[23]

The *Memoirs* plurality thus held that the Massachusetts Supreme Court had committed reversible error when, in reliance on testimony asserting that John Cleland's *Fanny Hill: Memoirs of a Woman of Pleasure* had only minimal literary value, the state court had ruled that the publication was obscene. The Supreme Court noted that the conclusion that a work lacks significant literary worth may not be equated with the further conclusion that it utterly lacks social (including but not limited to literary) value.[24] To these three tests the plurality in *Memoirs* added a fourth factor, pandering. It suggested that in close cases, evidence of commercial exploitation for the sake of prurient appeal might be a decisive indicator on which a jury could

20. 378 U.S. at 191. Justice Brennan had previously noted in *Roth* that obscenity was "utterly without redeeming social importance," Roth v. United States, 354 U.S. 476, 484 (1957), but had not, at that juncture, elevated this observation into a definitional criterion.

21. Jacobellis v. Ohio, 378 U.S. 184, 191 (1964). The language is borrowed from the Model Penal Code's definition of obscenity, which was cited in *Roth*: "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . ." ALI MODEL PENAL CODE § 207.10(2) (Tent. Draft No. 6, 1957), *quoted in* Roth v. United States, 354 U.S. 476, 487 n.20 (1957). *See also* Manual Enterprises v. Day, 370 U.S. 478, 482 (1962) (opinion of Harlan, J.) (first introduced concept of "patent offensiveness").

22. 383 U.S. 413 (1966). For discussions of this case, *see* EMERSON, *supra* note 3, at 476-78; SCHAUER, *supra* note 3, at 42-44, 138-39.

23. 383 U.S. at 418. Justices Black and Douglas concurred in the judgment, expressing their usual absolutist view, *see* note 17 and accompanying text *supra*, of the First Amendment in obscenity cases. *Id.* at 421 (Black, J., concurring); *id.* at 424 (Douglas, J., concurring). Justice Stewart also concurred, expressing his typical views, *see* note 18 and accompanying text *supra*, about hard core pornography. 383 U.S. at 421 (Stewart, J., concurring). Justice Clark dissented, claiming that social importance cannot be a separate test for determining obscenity *vel non*. *Id.* at 445 (Clark, J., dissenting). Justice White expressed a similar position. *Id.* at 462 (White, J., dissenting). Justice Harlan espoused his customary views, *see* note 19 and accompanying text *supra*, about how states have wide discretion to regulate sexually-oriented materials. *Id.* at 457-58 (Harlan, J., dissenting).

24. *Id.* at 419.

rest a finding of obscenity. The issue was said not to exist in *Memoirs*, however.[25] The element of pandering as a factor in a jury's calculus of obscenity had first been articulated by Chief Justice Warren in his separate opinion in *Roth*.[26] It was first applied in *Ginzburg v. United States*,[27] decided the same term as *Memoirs*. In *Ginzburg*, five justices upheld a prosecution for the dissemination of materials which were presumptively not obscene, but which had been advertised in a prurient fashion. As a result, the Court stated that it would be permissible in this case for the jury to make a finding of obscenity *vel non* by according decisive weight to the fact that the materials in question had been pandered.[28]

The tripartite test of *Memoirs* represented the views of only three Justices and thus was not entitled to any great deference on the part of judges in state and lower federal courts.[29] The test was, however, adopted by nine federal circuits and a number of state courts.[30] As for the Supreme Court itself, the disparate views of the justices led to a pragmatic approach in obscenity cases. Beginning in 1967,[31] the Court issued a series of per curiam

25. *Id.* at 420.

26. *See* Roth v. United States, 354 U.S. 476, 495-96 (1957) (Warren, C.J., concurring in the result) (pandering defined as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of [the purveyor's] customers."). *See also* United States v. Rebhuhn, 109 F.2d 512, 514-15 (2d Cir. 1940) (opinion of L. Hand, J.).

27. 383 U.S. 463 (1966). *See generally* Dyson, *Looking-Glass Law: An Analysis of the Ginzburg Case*, 28 U. PITT. L. REV. 1 (1966); Monaghan, *Obscenity, 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, 76 YALE L.J. 127 (1966); Semonche, *Definitional and Contextual Obscenity: The Supreme Court's New and Disturbing Accomodation*, 13 U.C.L.A. L. REV. 1173 (1966).

28. 383 U.S. at 472. The five justices who joined this opinion were the members of the *Memoirs* plurality, plus Justices Clark and White. For a further analysis of this case, *see* notes 333-352 and accompanying text *infra*.

29. *See* notes 188-191 and accompanying text *infra*.

30. *See* United States v. Groner, 479 F.2d 577, 588, 590 (5th Cir.), *vacated on other grounds*, 414 U.S. 969 (1973) (the seven dissenters and one concurring judge comprising a majority on this issue); Cinecom Theaters Midwest States, Inc. v. City of Fort Wayne, 473 F.2d 1297, 1298 (7th Cir. 1973); Huffman v. United States, 470 F.2d 386, 394 (D.C. Cir. 1971), *rev'd on other grounds but aff'd on this point*, 502 F.2d 419, 420 (D.C. Cir. 1974); United States v. Pellegrino, 467 F.2d 41, 43 (9th Cir. 1972); Southeastern Promotions, Ltd. v. Oklahoma City, 459 F.2d 282, 283-84 (10th Cir. 1972); United States v. 35mm Motion Picture Film, 432 F.2d 705, 708-09 (2d Cir. 1970), *cert. dismissed sub nom.* United States v. Unicorn Enterprises, Inc., 403 U.S. 925 (1971); United States v. Ten Erotic Paintings, 432 F.2d 420, 421 (4th Cir. 1970); United States v. A Motion Picture Entitled "I Am Curious — Yellow," 404 F.2d 196, 200 (2d Cir. 1968); Luros v. United States, 389 F.2d 200, 202 (8th Cir. 1968); Armijo v. United States, 384 F.2d 694, 695 (9th Cir. 1967); United States v. One Carton Positive Motion Picture Film Entitled "I Am Curious — Yellow," 367 F.2d 889, 891 (2d Cir. 1966); Books, Inc. v. United States, 358 F.2d 935, 937 (1st Cir. 1966), *rev'd on other grounds*, 388 U.S. 449 (1967); Attorney Gen. v. A Book Named "Naked Lunch," 351 Mass. 298, 299, 218 N.E.2d 571, 572 (1966); Commonwealth v. Dell Publications, Inc., 427 Pa. 189, 196, 233 A.2d 840, 844 (1967).

31. Redrup v. New York, 386 U.S. 767 (1967).

reversals of criminal convictions for the distribution of materials that at least five justices, applying their own individual tests, deemed nonobscene.[32] As of 1972, a total of thirty-one cases had been disposed of in this summary fashion.[33]

Recognizing that the tortured history of its obscenity decisions had failed to yield very much in the way of concrete standards, the Court attempted to formulate some comprehensive criteria in 1973. Thus, five justices in the case of *Miller v. California*,[34] announced three important points. First, they indicated that obscenity regulation would be limited to depictions or descriptions of hard core sexual conduct defined specifically by the language of the regulating statute itself, or by authoritative judicial constructions of that statute.[35] Second, the majority repudiated the *Memoirs* test, which had been incorporated into section 311 of the California Penal Code,[36] the law challenged in *Miller*. In lieu of that test, Chief Justice

32. *See* Paris Adult Theater I v. Slaton, 413 U.S. 49, 82 (1973) (Brennan, J., dissenting, joined by Stewart and Marshall, JJ.).

33. In addition to the three cases consolidated in *Redrup*, the other cases are: Wiener v. California, 404 U.S. 988 (1971); Harstein v. Missouri, 404 U.S. 988 (1971); Burgin v. South Carolina, 404 U.S. 806 (1971); Bloss v. Michigan, 402 U.S. 938 (1971); Childs v. Oregon, 401 U.S. 1006 (1971); Hoyt v. Minnesota, 399 U.S. 524 (1970); Walker v. Ohio, 398 U.S. 434 (1970); Bloss v. Dykema, 398 U.S. 278 (1970); Cain v. Kentucky, 397 U.S. 319 (1970); Henry v. Louisiana, 392 U.S. 655 (1968); Felton v. City of Pensacola, 390 U.S. 340 (1968); Robert-Arthur Management Corp. v. Tennessee, 389 U.S. 578 (1968); I.M. Amusement Corp. v. Ohio, 389 U.S. 573 (1968); Chance v. California, 389 U.S. 89 (1967); Central Magazine Sales, Ltd. v. United States, 389 U.S. 50 (1967); Conner v. City of Hammond, 389 U.S. 48 (1967); Potomac News Co. v. United States, 389 U.S. 47 (1967); Schackman v. California, 388 U.S. 454 (1967); Mazes v. Ohio, 388 U.S. 453 (1967); A Quantity of Books v. Kansas, 388 U.S. 452 (1967); Books, Inc. v. United States, 388 U.S. 449 (1967); Aday v. New York, 388 U.S. 447 (1967); Avansino v. New York, 388 U.S. 446 (1967); Sheperd v. New York, 388 U.S. 444 (1967); Cobert v. New York, 388 U.S. 443 (1967); Ratner v. California, 388 U.S. 442 (1967); Friedman v. New York, 388 U.S. 441 (1967); Keney v. New York, 388 U.S. 440 (1967).

34. 413 U.S. 15 (1973). *See generally* SCHAUER, *supra* note 3, at 40-44; Clor, *Obscenity and the First Amendment: Round Three*, 7 LOY. L.A.L. REV. 207 (1974); Hunsaker, *The 1973 Obscenity—Pornography Decisions: Analysis, Impact and Legislative Alternatives*, 11 S. DIEGO L. REV. 906 (1974); Leventhal, *The 1973 Round of Obscenity—Pornography Decisions*, 59 A.B.A.J. 1261 (1973). The majority in *Miller* consisted of Chief Justice Burger and Justices White, Powell, Blackmun and Rehnquist. Justice Douglas dissented, reiterating his usual absolutist view, *see* note 18 and accompanying text *supra*, of the First Amendment in this context. 413 U.S. at 37-47 (Douglas, J., dissenting). Justice Brennan, joined by Justices Stewart and Marshall, also dissented, finding the statute at issue overbroad. *Id.* at 47-48 (Brennan, J., dissenting, joined by Stewart & Marshall, JJ.). In a companion case, these last three justices issued a lengthy dissent, concluding that while the state might regulate the dissemination of sexually-oriented materials to juveniles and nonconsenting adults, it could not constitutionally do so with respect to consenting adults. *See* Paris Adult Theater I v. Slaton, 413 U.S. 49, 70-114 (1973) (Brennan, J., dissenting, joined by Stewart and Marshall, JJ.).

35. 413 U.S. at 24.

36. CAL. PENAL CODE § 311(a) (West Supp. 1978), *amending* CAL. PENAL CODE § 311(a) (West 1970):

Burger's opinion for the Court defined the basic guidelines for the trier of fact in obscenity cases as:

> (a) whether "the average person, applying contemporary community standards" would find that the work taken as a whole, appeals to the prurient interest . . . ; (b) whether the work, depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the "*utterly* without redeeming social value" test of [*Memoirs*]; that concept has never commanded the adherence of more than three justices at one time. . . .
>
> We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra*:
>
> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibitions of the genitals.[37]

Third, the majority in *Miller* ruled that by "contemporary community standards," it meant local, or state, as opposed to national, standards.[38] The reason given for this conclusion was identical to that expressed by Chief Justice Warren in *Jacobellis:* the impossibility of identifying any one controlling standard of decency for the nation as a whole.[39]

Miller effected changes in degree, not changes in kind. Its tripartite test is actually not a sharp departure from prior rulings. Part (a) of that test merely restates *Roth*.[40] Part (b) adopts the "patent offensiveness" rule of *Memoirs*, but appears to link that rule to definitions provided by state law rather than to contemporary community standards, as was done in *Memoirs*. At a later point in the opinion the Court does indicate that local rather than national community standards will govern the determination of what is or is not patently offensive.[41] Part (c) of the *Miller* test marks a shift of empha-

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"Obscene" means that to the average person, applying contemporary community standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; which goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which is utterly without redeeming social importance.

37. 413 U.S. at 24-25 (citations omitted).

38. *See id.* at 33-34.

39. *Id.* at 32.

40. *See* note 7 and accompanying text *supra*.

41. *See* 413 U.S. at 30: "Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this

sis—from "utterly" without social value to "seriously" without four specified types of social value. This does lessen the evidence necessary to convict, and it is in this respect that *Miller* altered prior obscenity law.[42] The other important change, of course, was the adoption of local standards as a referent, but that shift marked no departure from the Court's prior rulings, which had never adopted national standards in the first place.[43]

Miller involved state obscenity laws. The guidelines set forth in that case, however, were later held to govern judicial construction of corresponding federal statutes. Thus, in a footnote in the case of *United States v. Twelve 200-ft. Reels of Super 8mm Film*,[44] the Court indicated that it would interpret federal obscenity laws "as limiting regulated material to patently offensive representations or descriptions of that specific 'hard-core' sexual conduct given as examples" in *Miller*.[45] Indeed, in 1974, two cases provided important glosses on *Miller*; one of those cases involved a prosecution under section 1461 of Title eighteen of the United States Code.[46]

The federal case was *Hamling v. United States*.[47] The Court in that decision made three noteworthy points. First, it held that the element of pandering, which had first been utilized to sustain a conviction in the *Ginzburg* case,[48] had survived *Miller* and was still relevant in determining what is or is not obscene.[49] Second, the Court indicated that prosecutions under federal obscenity laws would, as *Miller* had held with respect to state prosecutions, be governed by local rather than national standards.[50] Third, the Court remarked that while *Miller* would be given retroactive effect with respect to cases on direct appeal when it was decided,[51] a jury instruction to give effect to national rather than local standards would not constitute reversible error unless it could be shown that such an instruction materially affected the deliberations of the jury.[52] Indeed, the Court warned that

does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.' " *Accord*, United States v. B & H Distrib. Corp., 375 F. Supp. 136, 141 (W.D. Wis. 1974).

42. *Accord*, United States v. Jacobs, 513 F.2d 564, 566 (9th Cir. 1974); United States v. Sherpix, Inc., 512 F.2d 1361, 1366 (D.C. Cir. 1975); United States v. Wasserman, 504 F.2d 1012, 1015-16 (5th Cir. 1974); United States v. Lang, 361 F. Supp. 380, 382 (C.D. Cal. 1973).

43. *See* notes 11-16 and accompanying text *supra*.

44. 413 U.S. 123 (1973).

45. *Id.* at 130 n.7. *Accord*, Hamling v. United States, 418 U.S. 87, 114 (1974); United States v. Orito, 413 U.S. 139, 145 (1973).

46. 18 U.S.C. § 1461 (1970); *see* note 8 *supra*.

47. 418 U.S. 87 (1974).

48. 383 U.S. 463 (1966); *see* notes 27-28 and accompanying text *supra*.

49. 418 U.S. at 130.

50. *Id.* at 104-06.

51. *Id.* at 102.

52. *Id.* at 108.

Miller's rejection of a uniform national standard does not mandate "the substitution of some smaller geographical area into the same sort of formula. . . ."[53] The second noteworthy case was *Jenkins v. Georgia*,[54] which offered an even more flexible interpretation of what is meant by the term "local":

> What *Miller* makes clear is that state juries need not be instructed to apply "national standards". . . . *Miller* held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards, and the States have considerable latitude in framing statutes under this element of the *Miller* decision . . . as defined [therein] without further specification, as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller*.[55]

The Court in *Jenkins*, however, proceeded to note that juries have no "unbridled discretion" to determine what is patently offensive.[56] It therefore reversed a conviction for the screening of the film "Carnal Knowledge" under a Georgia law that defined obscenity in language similar to that employed in *Memoirs*.[57] The Court pointed out that while the film included nudity and scenes of simulated copulation, the camera did not focus on the actors' or actresses' genitals during such scenes; the Court thus concluded that the motion picture was simply not "legally obscene" under the *Miller* tests.[58]

The four cases that will be discussed in this section constitute the first attempt by the Supreme Court since 1974 to indicate how the doctrines of *Miller*, *Hamling* and *Jenkins* will operate in the context of actual criminal prosecutions under state and federal obscenity laws. It is important to recognize the rather narrow issues with which this quartet of decisions grapples. After all, the broad constitutional issue in obscenity cases was decided as long ago as *Roth* and the key definitions of concepts like "obscenity" and "contemporary community standards" had already been promulgated and, to some extent, explicated by the 1973 and 1974 rulings of the Court. Thus, the four cases under consideration are interesting primarily because they suggest how the Court will manipulate its own definitions, and because they indicate how the Court will resolve certain procedural and evidentiary problems common to criminal prosecutions under state and federal obscenity statutes.

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53. *Id.* at 104.
54. 418 U.S. 153 (1974).
55. *Id.* at 157.
56. *Id.* at 160.
57. *See* GA. CODE ANN. § 26-2101(b) (1972).
58. 418 U.S. at 161.

2. Marks v. United States: *Ex Post Facto Considerations in Obscenity Cases*

The case of *Marks v. United States*[59] presented the United States Supreme Court with an opportunity to consider one of the most vexing issues in the law of obscenity: to what extent the doctrine of *Miller v. California*[60] may be applied retroactively. In dealing with this issue, the Court not only had to distinguish prior rulings that had, at least tangentially, resolved the problem in a different manner, but it also had to interpret its own case law on the retrospective application of judicial rulings in a somewhat novel fashion.

a. The Decision

The defendants in *Marks* were charged with several counts of transporting obscene materials in interstate commerce in violation of section 1465 of Title eighteen of the United States Code[61] and the general federal conspiracy statute.[62] The conduct in question occurred prior to February 27, 1973. The trial did not commence until the following October. In the interim, on June 21, 1973, the Supreme Court handed down its decision in *Miller v. California*,[63] which promulgated a new tripartite definition of obscenity[64] held to apply to federal obscenity laws.[65] The petitioners in *Marks* argued at trial that they were entitled to jury instructions framed under the more libertarian definition of obscenity advanced by the plurality in the Court's 1966 decision in *Memoirs v. Massachusetts*.[66] *Memoirs* defined material as obscene only if it was "utterly without redeeming social

59. 430 U.S. 188 (1977).

60. 413 U.S. 15 (1973). *See* notes 34-43 and accompanying text *supra*.

61. 18 U.S.C. § 1465 (1970):

> Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

See generally SCHAUER, *supra* note 3, at 182-84.

62. 18 U.S.C. § 371 (1970):

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

See generally Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405 (1959).

63. 413 U.S. 15 (1973).

64. *Id.* at 24-25. *See* note 37 and accompanying text *supra*.

65. *See* notes 44-45 and accompanying text *supra*.

66. 383 U.S. 413 (1966).

value."[67] The district court judge instructed the jury on the basis of *Miller*, however, which defined material as obscene only if, taken as a whole, it lacked serious literary, artistic, political or scientific value.[68] The United States Court of Appeals for the Sixth Circuit, in an opinion which will be scrutinized in detail later, affirmed the petitioners' resulting conviction.[69]

On appeal, the Supreme Court reversed. Justice Powell delivered the majority opinion, in which Chief Justice Burger and Justices White, Blackmun and Rehnquist joined. The Court began by noting that this case presented no issue under the ex post facto clause of article one of the Constitution,[70] which only limits the powers of legislatures.[71] But the principle embodied in that clause, "the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties",[72] was also said to prevent the retrospective application of an unforeseeable judicial enlargement of a criminal statute. In support of this contention, the Court cited the leading case on the subject, *Bouie v. City of Columbia*,[73] which had prohibited just such an application of South Carolina's criminal trespass statute by invoking the due process clause of the Fifth Amendment, and a prior obscenity ruling, *Rabe v. Washington*,[74] which was said to support the same principle. Having thus identified the relevant precedent,

67. *Id.* at 418. *See* note 23 and accompanying text *supra*.

68. United States v. Marks, 364 F. Supp. 1022, 1027 (E.D. Ky. 1973).

69. United States v. Marks, 520 F.2d 913, 922 (6th Cir. 1975). *See* notes 94-166 and accompanying text *infra*.

70. U.S. CONST. art. I, §9, cl. 3: "No Bill of Attainder or ex post facto Law shall be passed."

71. 430 U.S. at 191. *Accord*, James v. United States, 366 U.S. 213, 247-48 (1961) (Harlan, J., concurring in part and dissenting in part, joined by Frankfurter, J.); v. Frank v. Magnum, 237 U.S. 309, 344 (1915); Ross v. Oregon, 227 U.S. 150, 161 (1913).

72. 430 U.S. at 191.

73. 378 U.S. 347 (1964). For a further discussion of this case, *see* notes 167-176 and accompanying text *infra*.

74. 405 U.S. 313 (1972). In *Rabe*, the petitioner was convicted under a Washington obscenity law criminalizing the distribution of "obscene" materials and the exhibition of "obscene" shows. WASH. REV. CODE § 9.68.010 (1970). The conviction arose from the fact that the appellant, an owner of a drive-in theatre, had exhibited the film "Carmen Baby." On appeal, the state supreme court admitted that under the *Roth-Memoirs* standards, the film was probably not offensive, but nevertheless upheld the conviction, reasoning that in the "context of its exhibition," "Carmen Baby" was obscene. Rabe v. State, 79 Wash. 2d 254, 263, 484 P.2d 917, 922 (1971). On a writ of certiorari, the Supreme Court concluded:

> To avoid the constitutional vice of vagueness, it is necessary, at a minimum, that a statute give fair notice that certain conduct is proscribed. The statute under which petitioner was prosecuted, however, made no mention that the "context" or location of the exhibition was an element of the offense somehow modifying the word "obscene." Petitioner's conviction was thus affirmed under a statute with a meaning quite different from the one he was charged with violating.

405 U.S. at 315. Accordingly, it reversed the judgment of the state court. *Id.* at 316.

the Court then went on to consider the petitioners' chief contention, "that *Miller* and its companion cases unforeseeably expanded the reach of federal obscenity statutes beyond what was punishable under *Memoirs*."[75]

Justice Powell admitted that the tripartite definition of obscenity in *Memoirs* never commanded the adherence of more than three justices at one time.[76] But he went on to note that when "no single rationale explaining the result [in a decision] enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' "[77] In *Memoirs*, six justices concurred in the judgment. Three of those formed the plurality that issued the definition the petitioner in *Marks* thought should govern at his trial. Two others, Justices Black and Douglas, concurred on the far broader ground that the First Amendment barred all governmental attempts to regulate obscenity, while the last, Justice Stewart, contended that states are empowered only to restrict the dissemination of "hard core pornography."[78] Consequently, reasoned Justice Powell, "[t]he view of the *Memoirs* plurality therefore constituted the holding of the Court and provided the governing standards,"[79] a fact that many courts had recognized in subsequent years.[80]

If *Memoirs* was the law, then to the extent that *Miller* reformulated the social value aspect of the definition of obscenity in the former case, it marked a "significant departure" from that law.[81] Indeed, said Justice Powell, the majority in the 1973 case had clearly thought "that some conduct which would have gone unpunished under *Memoirs* would result in conviction under *Miller*."[82] The Court admitted that *Marks* was not entirely

75. 430 U.S. at 192.

76. *Id. See* note 23 and accompanying text *supra*.

77. 430 U.S. at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell and Stevens, JJ.)).

78. *See* note 23 *supra*.

79. 430 U.S. at 194.

80. *See* note 30 *supra*.

81. 430 U.S. at 194.

82. *Id.* Justice Powell at this juncture cited language in *Miller* to the effect that because *Memoirs* required prosecutors to prove a negative proposition (*i.e.*, utter lack of redeeming social value), it created "a burden virtually impossible to discharge under our criminal standards of proof." *Id.* (quoting Miller v. California, 413 U.S. 15, 22 (1973)). But as Justice Brennan noted in a companion case, part (c) of the *Miller* test still requires proof of a negative proposition. "[W]hether it will be easier to prove that material lacks 'serious' value than to prove that it lacks any value at all remains, of course, to be seen." Paris Adult Theater I v. Slaton, 413 U.S. 49, 98 (1973) (Brennan, J., dissenting, joined by Stewart and Marshall, JJ.). However, in a 1974 decision, the Supreme Court clearly indicated that the *Miller* standard concerning social value permits "a lesser burden on the prosecution in this phase of the proof of obscenity . . . ." Hamling v. United States, 418 U.S. 87, 116-17 (1974). For similar views, see the cases cited in note 42 *supra*.

analogous to *Bouie*. In *Bouie*, there had been an unforeseeably expansive judicial construction of a narrow and precisely-drawn statute, whereas section 1465, the statute involved in *Marks*, prohibited the transportation of "obscene, lewd, lascivious, or filthy" materials[83] and thus had always been worded broadly.[84] Because of this fact, Justice Powell noted that the reach of the statute,

> necessarily has been confined within the constitutional limits announced by this Court. *Memoirs* severely restricted its application. *Miller* also restricts its application beyond what the language might indicate, but *Miller* undeniably relaxes the *Memoirs* restrictions. The effect is the same as the new construction in *Bouie*. Petitioners, engaged in the dicey business of marketing films . . . had no fair warning that their products might be subjected to the new standards.[85]

Accordingly, the Court held, in light of *Bouie*, that the petitioners in *Marks* could not be subjected to criminal liability based upon the definition of obscenity announced in *Miller*. They were therefore entitled to jury instructions incorporating only the *Memoirs* definition.[86] At the same time, however, the Court restated its view that any constitutional principle enunciated in *Miller* that would *benefit* a petitioner should be applied retroactively.[87] The majority then remanded the case for further proceedings consistent with its opinion.

The other two opinions in this case were unmemorable. Justice Brennan, joined by Justices Stewart and Marshall, dissented in part, repeating his oft-stated view that section 1465 is unconstitutionally overbroad.[88] Justice Stevens also dissented in part, claiming that the instant criminal prosecution was impermissible for three reasons: (1) because the statute in question regulates free expression,[89] (2) because it "is predicated on the somewhat illogical premise that a person may be prosecuted criminally for providing another with material he has a constitutional right to possess" [90] and (3)

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83. *See* note 61 *supra*.

84. Despite the breadth of this language, several lower courts have held it constutitional. *See* United States v. Hill, 500 F.2d 733, 739 (5th Cir. 1974), *cert. denied*, 420 U.S. 931 (1975); United States v. New Orleans Book Mart, Inc., 490 F.2d 73, 75 (5th Cir.), *cert. denied*, 419 U.S. 1007 (1974); United States v. Manarite, 448 F.2d 583, 594 (2d Cir.), *cert. denied*, 404 U.S. 947 (1971); United States v. Marks, 364 F. Supp. 1022, 1026-27 (E.D. Ky. 1973), *aff'd*, 520 F.2d 913 (6th Cir. 1975), *rev'd on other grounds*, 430 U.S. 188 (1977).

85. 430 U.S. at 195.

86. *Id.* at 196.

87. *Id.* at 196-97.

88. *Id.* at 197-98 (Brennan, J., dissenting, joined by Stewart and Marshall, JJ.) (citing Cangiano v. United States, 418 U.S. 934, 935 (1974) (Brennan, J., dissenting)).

89. 430 U.S. at 198 (Stevens, J., dissenting).

90. *Id.* Justice Stevens at this juncture cited the case of Stanley v. Georgia, 394 U.S. 557 (1969), which held that private possession of obscene materials in one's home cannot constitu-

because the substantive and procedural standards in obscenity trials are so vague as to offend the concept of due process.[91] The authors of these opinions, then, would have reversed the petitioners' conviction, but would not have remanded the case for a new trial.

b. Analysis

The Supreme Court's peremptory analysis might imply that *Marks* was an easy case which could be dealt with summarily. If so, one wonders why the Sixth Circuit arrived at a completely contrary disposition[92] and why the Tenth Circuit, in another case, also reached the opposite result.[93] The problems raised by *Marks* are in fact more complex then one might assume at first glance. In order to explore these complexities, it is necessary first to consider the arguments offered by the Sixth Circuit in *Marks* while reviewing the Supreme Court's treatment of these issues and then to analyze some problems that were considered neither by that court of appeals nor, in some respects, by the Supreme Court.

(1) *The Supreme Court's Analysis of Issues Raised by the Court of Appeals*

(a) The Right of Fair Warning

The first issue raised by the Sixth Circuit is the construction to be accorded certain language in *Hamling v. United States*.[94] In the *Hamling* case, the petitioner was indicted on March 5, 1971, on various counts of violating section 1461 of Title eighteen of the United States Code, which prohibits the distribution through the mails of obscene materials.[95] A conviction resulted on December 23, 1971, and was affirmed by the Ninth Circuit on June 7, 1973.[96] A rehearing of this affirmance was denied on July

tionally be made a crime. *Id.* at 559. But, in later decisions, the Court has held that merely because private possession is permissible does not mean that the state is barred from regulating obscenity as it passes through the channels of commerce. *See* Smith v. United States, 431 U.S. 291, 307 (1977); United States v. Orito, 413 U.S. 139, 141-42 (1973); United States v. Twelve 200-ft. Reels of Super 8 mm Film, 413 U.S. 123, 126-29 (1973); United States v. Thirty-Seven Photographs, 402 U.S. 363, 376 (1971) (opinion of White, J.); United States v. Reidel, 402 U.S. 351, 354-56 (1971). And in Paris Adult Theater I v. Slaton, 413 U.S. 49, 66-67 (1973), the Court pointed out that the zone of privacy acknowledged by *Stanley* was confined to the home and did not follow the consumer of pornography wherever he went. *See generally* Note, *Roe and Paris: Does Privacy Have A Principle?*, 26 STAN. L. REV. 1161, 1185-89 (1974).

91. 430 U.S. at 198.

92. *See* United States v. Marks, 520 F.2d 913, 922 (6th Cir. 1975), *rev'd*, 430 U.S. 188 (1977).

93. *See* United States v. Friedman, 528 F.2d 784, 788 (10th Cir. 1976), *rev'd*, 430 U.S. 925 (1977).

94. 418 U.S. 87 (1974). *See* notes 47-53 and accompanying text *supra*.

95. *See* note 8 *supra*.

96. United States v. Hamling, 481 F.2d 307, 325 (9th Cir. 1973).

9th, but the court of appeals withdrew this order in light of the decision in *Miller*; upon reconsideration, rehearing en banc was again denied on August 22, 1973, whereupon the case was appealed to the Supreme Court.[97] The petitioners argued that until the Court's decisions in *Miller* and its companion cases, section 1461 did not apply only to those examples of obscene materials enumerated in *Miller*.[98] They therefore urged that the Court's 1973 obscenity cases imposed a specificity requirement that had not been mandated at the time the conduct in question occurred.[99] To this, the Court in *Hamling* responded:

> [n]or do we find merit in petitioners' contention that cases such as *Bouie v. City of Columbia* . . . require reversal of their convictions. The Court in *Bouie* held that since the crime for which the petitioners there stood convicted was "not enumerated in the statute" at the time of their conduct, their conviction could not be sustained . . . . The Court noted that "a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." . . . But the enumeration of specific categories of material in *Miller* which might be found obscene did not purport to make criminal, for the purpose of 18 U.S.C. § 1461, conduct which had not previously been thought criminal. That requirement instead added a "clarifying gloss" to the prior construction and therefore made the meaning of the federal statute involved here "more definite" in its application to federal obscenity prosecutions . . . . Judged by both the judicial construction of § 1461 prior to *Miller*, and by the construction of that section which we adopt today in the light of *Miller*, petitioners' claims of vagueness and lack of fair notice as to the proscription of the material which they were distributing must fail.[100]

The Sixth Circuit assumed implicitly that the language in *Hamling* governed its disposition of Marks' claim.[101] While the Supreme Court acknowledged the court of appeals' argument in a footnote, it dismissed that argument as follows:

> In *Hamling* we rejected a challenge based on *Bouie v. City of Columbia*, ostensibly similar to the challenge that is sustained here . . . . But the similarity is superficial only. There the petitioners focused on part (b) of the *Miller* test . . . . They argued that their convictions could not stand because *Miller* requires that the categories of material punishable under the statute must be specifically enumerated in the statute or in authoriative judicial construction. No such limiting construction had been announced at the time they engaged in the conduct that led to their convic-

97. 418 U.S. at 97-98.

98. *See* note 37 and accompanying text *supra*.

99. 418 U.S. at 110-11.

100. *Id.* at 115-16 (citations omitted).

101. *See* United States v. Marks, 520 F.2d 913, 921 (6th Cir. 1975).

> tions. We held that this made out no claim under *Bouie*, for part (b) did not expand the reach of the statute. . . .
>
> For the reasons noted in text, the same cannot be said of part (c) of the *Miller* test, shifting from "utterly without redeeming social value" to "lacks serious literary, artistic, political or scientific value." This was implicitly recognized by the Court in *Hamling* itself. There the trial took place before *Miller*, and the jury had been instructed in accordance with *Memoirs*. Its verdict necessarily meant that it found the materials to be utterly without redeeming social value. This Court examined the record and determined that the jury's verdict "was supported by the evidence and consistent with the *Memoirs* formulation of obscenity." . . . We did not avoid that inquiry on the grounds that *Memoirs* had no relevance, as we might have done if *Miller* applied retroactively in all respects.[102]

Implicit in this statement are two interrelated propositions. The first is that part (b) of the *Miller* test made section 1465 more definite, whereas part (c) did not; the second is that while part (c) of the *Miller* test constitutes an expansive reading of section 1465, at least when compared with part (c) of the *Memoirs* test, the same cannot be said of part (b) of the *Miller* test. Phrased in this manner, the argument is much easier to scrutinize. To begin with, how much more definite does part (b) of the *Miller* test make section 1465? As noted earlier,[103] in *United States v. Twelve 200-ft. Reels of Super 8mm Film*,[104] the Court had limited the scope of federal obscenity laws to those types of depictions specifically enumerated in *Miller*.[105] This would appear superficially to be a very narrowing construction. But the Court in *Hamling* stated that the list of representations mentioned in *Miller* was never intended to be "exhaustive"[106] and consequently implied that that list could be supplemented with innumerable other examples in a future case. Moreover, in the decision of *Ward v. Illinois*,[107] a case decided in the same term as *Marks*, the Court by its action clearly indicated that the prerequisite of specificity is an extremely elastic one, which may be fulfilled by an authoritative judicial construction that fails to proscribe explicitly any specific type of depiction or representation.[108] Thus, part (b) of the *Miller* test does not necessarily make the federal obscenity laws more definite. Indeed, Justice Brennan, in his dissent in *Paris Adult Theater I v. Slaton*,[109] a companion case to *Miller*, noted pointedly that "the valiant attempt of one

102. 430 U.S. at 195-96 n.10 (citations omitted).
103. *See* notes 44-45 and accompanying text *supra*.
104. 413 U.S. 123 (1973).
105. *Id.* at 130 n.7.
106. Hamling v. United States, 418 U.S. 87, 114 (1974).
107. 431 U.S. 767 (1977). *See* notes 667-832 and accompanying text *infra*.
108. *Id.* at 774-75. *See* notes 689-697 and accompanying text *infra*.
109. 413 U.S. 49 (1973).

lower federal court to draw the constitutional line at depictions of explicit sexual conduct seems to belie any suggestion that this approach marks the road to clarity."[110] He then cited the experience of the District of Columbia Circuit in *Huffman v. United States*,[111] wherein application of a criterion similar to part (b) of the *Miller* test was said to require an attempt to make somewhat esoteric distinctions "between 'singles' and 'duals,' between 'erect penises' and 'semi-erect penises,' and between 'ongoing sexual activity' and 'imminent sexual activity.' "[112] As Professor Schauer has noted, the attempt of the Court in *Miller* to limit part (b) of its tripartite definition of obscenity to examples of "hard core pornography" results in something that resembles "more of a conclusion than a test."[113] Even after *Miller*, then, courts may still have to resort to the crude but useful guideline suggested by Justice Stewart in *Jacobellis v. Ohio*:[114] one knows it when one sees it.[115] Nor is this the only problem. After *Miller*, patent offensiveness is to be judged according to contemporary community standards, not national standards.[116] *Hamling* extended this requirement to federal cases.[117] Therefore, one could argue that part (b) of the *Miller* test makes federal statutes less definite and certain because it substitutes for a unitary national standard, however difficult to define, a multifarious and often inconsistent set of localized standards.[118]

But what of the corollary implied by the Court in *Marks*, that part (c) of the *Miller* test, as applied to federal obscenity laws, is not merely a "clarifying gloss," intended to render the statutes in question less vague?

110. *Id.* at 99 (Brennan, J., dissenting, joined by Stewart and Marshall, JJ.)

111. 470 F.2d 386 (D.C. Cir. 1971), *rev'd on rehearing*, 502 F.2d 419 (D.C. Cir. 1974). The Court in the first *Huffman* case ruled that Danish erotic magazines depiciting nude or nearly nude women in lesbian embraces were obscene. It found that although the models depicted were not actually engaging in ultimate sexual acts, "[m]any of the photographs before us may fairly be characterized as portraying models who are sufficiently close to the point of 'sexual activity' to warrant the judgment that the First Amendment does not prohibit an obscenity determination made under the *Roth-Memoirs* standard . . . ." 470 F.2d at 401. On rehearing, however, the District of Columbia Circuit retrenched, stating that it was unsure whether the magazines in question constituted hard core pornography, as defined by *Miller*. It noted in this regard that there were no depictions of "vaginal, anal or oral penetration" and left open the question of whether representations of imminent sexual acts would suffice. 502 F.2d at 423. The Ninth Circuit has held, however, that, at least where proof of pandering is adduced, "portrayal of ultimate sexual acts is not a necessary ingredient of obscenity." United States v. Dachsteiner, 518 F.2d 20, 23 (9th Cir.), *cert. denied*, 421 U.S. 954 (1975).

112. 413 U.S. at 99 n.16.

113. SCHAUER, *supra* note 3, at 113.

114. 378 U.S. 184 (1964).

115. *Id.* at 197 (Stewart, J., concurring). *See* note 18 *supra*.

116. *See* note 41 and accompanying text *supra*.

117. Hamling v. United States, 418 U.S. 87, 104-06 (1974).

118. For a more complete discussion of how courts have defined the applicable community after *Miller*, see notes 475-556 and accompanying text *infra*.

Part (c) of the *Memoirs* test spoke only of general "social value";[119] part (c) of the *Miller* test would appear to cure the imprecision inherent in that term by specifying four relevant types of social value that courts may consider.[120] This thesis would require one to contend that the Court rejected part (c) of the *Memoirs* test because of its vagueness. The Court in *Hamling*, however, indicated that such a contention would be founded on a false premise:

> Petitioners' final *Miller*-based contention is that our rejection of the third part of the *Memoirs* test and our revision of that test in *Miller* indicate that 18 U.S.C. § 1461 was at the time of their convictions unconstitutionally vague for the additional reason that it provided insufficient guidance to them as to the proper test of "social value." But our opinion in *Miller* plainly indicates that we rejected the *Memoirs* "social value" formulation, not because it was so vague as to deprive criminal defendants of adequate notice, but instead because it represented a departure from the definition of obscenity in *Roth*, and because in calling on the prosecution "to prove a negative," it imposed a "[prosecutorial] burden virtually impossible to discharge," and not constitutionally required.[121]

Thus, one could argue that regardless of the actual effect of part (c) of the *Miller* test, it was not intended to cure the vagueness inherent in part (c) of the *Memoirs* test. Therefore, parts (b) and (c) of *Miller*'s definition of obscenity are distinguishable on the basis of the intent of the Court in promulgating them. The Court in *Marks* could then perhaps find part (b) but not part (c) of the *Miller* test to be a "clarifying gloss" by taking into account only the purpose underlying its formulation and not the actual practical effect it has had in federal obscenity prosecutions.

Similar problems arise in connection with the issue of whether part (c), but not part (b), of the *Miller* test expands the reach of federal obscenity statutes. Certainly part (c), by repudiating the "utterly without redeeming social value" criterion of *Memoirs*, does increase the risks of criminal liability for the dissemination of sexually-oriented materials. But the same could be said for part (b); as noted earlier,[122] patent offensiveness in federal cases after *Hamling* was to be judged by local, not national, standards. This shift in emphasis arguably improves the opportunities for a federal prosecutor to obtain an obscenity conviction by making it relatively easier for him to prove the content of those standards. Thus, it would appear that both part (b) and part (c) of the *Miller* test extend the scope of potential criminal liability under the federal obscenity statutes. Yet the Court in *Marks* was wholly oblivious to this counter-argument. As a result, it was able to draw a rather

119. *See* note 23 and accompanying text *supra*.
120. *See* note 37 and accompanying text *supra*.
121. Hamling v. United States, 418 U.S. 87, 116-17 (1974).
122. *See* note 41 and accompanying text *supra*.

vacuous distinction between what it said in *Hamling* and the effect of its decision in the instant case.

(b) The Retroactive Effect of the "Benefits" and "Burdens" of *Miller*

After quoting *Hamling*, the Sixth Circuit then proceeded to consider the applicability of the decision by the First Circuit in *United States v. Palladino*.[123] In that case, both a trial and a decision by the appellate court had occurred prior to *Miller*. The Supreme Court vacated the judgment and remanded the case for further proceedings.[124] On remand, the First Circuit adopted a position that had originally been advanced by the Fifth Circuit in its 1973 decision in *United States v. Thevis*.[125] In the *Thevis* case, the court of appeals had held that the material in question must be found to be obscene under both *Memoirs* and *Miller*, or the defendants must be acquitted.[126] This reasoning was based on the premise that *Miller* and its companion cases had imposed a requirement of specificity regarding what is or is not patently offensive that had not theretofore existed under the *Memoirs* test. Consequently, the First Circuit believed that the defendants in *Palladino* should have reaped the benefits conferred by *Miller*'s adoption of a specificity requirement.[127] The court of appeals in *Marks* was unimpressed with this logic and cited the dissent of Judge Bailey Aldrich in *Palladino*:

> [T]he Court majority in *Miller* evinced no compunction about convicting Miller by a definition of obscenity that was not in effect at the time of his publication. Having in mind the mass of uncertainties in this field . . . I can see why the Court felt that the First Amendment did not bar an adverse change in the rules. If not for Miller, why for Palladino?[128]

Judge Aldrich raises an interesting point. The Court in *Miller* remanded that case "for further proceedings not inconsistent with the First Amend-

123. 490 F.2d 499 (1st Cir. 1974).

124. Palladino v. United States, 475 F.2d 65 (1st Cir. 1972), *vacated and remanded*, 413 U.S. 916 (1973).

125. 484 F.2d 1149 (5th Cir. 1973), *cert. denied*, 418 U.S. 932 (1974).

126. 484 F.2d at 1154-55. The combined *Miller-Memoirs* test was summarized as follows by the First Circuit in *Palladino*:

> (1) do the materials depict or describe sexual conduct specifically defined by the applicable federal law; (2) do the materials, taken as a whole, appeal primarily to prurient interests of the average adult (or, if directed to deviants, to the prurient interests of the intended group . . .); (3) are the materials patently offensive because they affront contemporary community standards relating to sexual matters; (4) are the materials utterly without redeeming social value.

490 F.2d at 501 (footnote omitted).

127. *Id.* at 501.

128. *Id.* at 504 (Aldrich, J., dissenting), *quoted in* Marks v. United States, 520 F.2d 913, 921-22 (6th Cir. 1975).

ment standards established by this opinion."[129] Justice Douglas, in his dissent, argued cogently that this disposition of the case violated the *Bouie* rule, because the defendant in *Miller* had not received fair warning at the time of his conduct that his acts could be classified as criminal under a standard that would subsequently come into existence.[130] One could argue that the policy reasons for applying *Bouie* in *Miller* were even greater than those present in *Marks*. At least in the latter case, the trial and the appeal occurred after *Miller* was decided, so the defendant was not totally surprised by the district court's instructions. Indeed, if one can construe the Supreme Court's decision in *Marks* as holding that due process requires that conduct occurring before *Miller* be judged by a jury instructed under part (c) of the *Memoirs* test,[131] one may legitimately wonder why the same five justices in *Miller* did not use similar language in framing the terms on which they remanded that case to the California courts.

This raises the inferential problem of whether the terms of the remand in *Miller* mandated a retroactive application of the principles announced in that case. This argument would seem to have merit, especially in light of one of Miller's companion cases, *Kaplan v. California*,[132] in which the same remand was ordered, although the majority specifically agreed that the materials in question were obscene under the *Memoirs* standard.[133] Confronted with this argument, the Fifth Circuit in *United States v. Thevis*[134] had responded:

> We decline to read so much into *Miller*. Rather, we conclude that by indiscriminately vacating and remanding these cases, the Supreme Court declared that all obscenity cases which had not reached final adjudication should be re-examined in light of its clarification of previous standards and its declaration of new

129. Miller v. California, 413 U.S. 15, 37 (1973). Following this statement, the Court cited United States v. Twelve 200-ft. Reels of Super 8mm Film, 413 U.S. 123, 130 n.7 (1973). This citation suggests that the "First Amendment standards" adverted to may well have been the examples offered to explicate part (b) of the *Miller* test, to which the footnote in *Twelve 200-ft. Reels* had referred. Nevertheless, the cited language is not a model of clarity.

130. Miller v. California, 413 U.S. 15, 41-42 (1973) (Douglas, J., dissenting).

131. 430 U.S. at 196.

132. 413 U.S. 115 (1973).

133. *Id.* at 118:

> Finally the state court considered petitioner's argument that the book was not "obscene" as a matter of constitutional law. Pointing out that petitioner was arguing, in part, that all books were constitutionally protected in an absolute sense, it rejected that thesis. On "independent review," it concluded "Suite 69 appeals to a prurient interest in sex and is beyond the customary limits of candor within the State of California." It held that the book was not protected by the First Amendment. We agree.

Earlier, the Court observed that the appellate department of the superior court had detected sufficient evidence of lack of redeeming value. *Id.*

134. 484 F.2d 1149 (5th Cir. 1973), *cert. denied*, 418 U.S. 932 (1974).

> standards. We do not read this as precluding our application of the *Memoirs* standard to materials involved in transactions occurring in 1970.[135]

As a result, the court in *Thevis* interpreted the remand in *Miller* as requiring a retrospective application of any of the benefits that might accrue to a defendant from the latter decision.[136] Thus, any count of the indictment in *Thevis* that was based on the distribution of a periodical which was not obscene under both *Miller* and *Memoirs* was dismissed.[137] This was in fact the position that had been adopted subsequently by the First Circuit in *Palladino*;[138] it was also a position that had been restated by the Fifth Circuit in numerous cases[139] and accepted by the Second[140] and Ninth[141] Circuits. The point was finally settled in the Court's decision in *Hamling v. United States*,[142] in which the Supreme Court held that "any constitutional princi-

135. 484 F.2d at 1154. In *Thevis*, trial occurred prior to *Miller*, so the standard used therein was that of *Roth-Memoirs*. Between the date of conviction and the date that the Fifth Circuit heard Thevis' appeal, *Miller* was decided. United States v. Wasserman, 504 F.2d 1012, 1014 (5th Cir. 1974).

136. 484 F.2d at 1155. "Benefits" is an ambiguous term. In *Palladino*, the First Circuit deemed the benefit of *Miller* to be its requirement that an obscenity law define specifically that sexual conduct the description of which was proscribed. United States v. Palladino, 490 F.2d 499, 501 (1st Cir. 1974). *Thevis* adopted a similar view. 484 F.2d at 1154. But the concept of "benefits" in this context really connotes something far more pragmatic: namely, any aspect of *Miller* that will afford a new trial to a person appealing an obscenity conviction. Thus, petitioners have even used *Miller*'s "contemporary community standards" language in the hopes of winning a new trial. *See, e.g.*, Hamling v. United States, 418 U.S. 87, 107 (1974); United States v. Cutting, 538 F.2d 835, 840-42 (9th Cir. 1976); United States v. Marks, 520 F.2d 913, 921 (6th Cir. 1975), *rev'd on other grounds*, 430 U.S. 188 (1977); United States v. Dachsteiner, 518 F.2d 20, 21-22 (9th Cir.), *cert. denied*, 421 U.S. 975 (1975); United States v. Henson, 513 F.2d 156, 158 (9th Cir. 1975); United States v. Carter, 506 F.2d 1251, 1252 (6th Cir. 1974); United States v. Ratner, 502 F.2d 1300, 1302 & n.3 (5th Cir. 1974). In all these cases, petitioners attempted to win reversals of their convictions because the trial judge instructed the jury to apply national standards rather than community standards, as prescribed by *Miller*. Thus, in this context *Miller*'s requirement on this point may be perceived as a benefit, even though in other contexts it might be interpreted as a burden. This only underscores the fact that the concept of "the benefits of *Miller*" is a phrase of distinctly protean significance.

137. 484 F.2d at 1155.

138. *See* United States v. Palladino, 490 F.2d 499, 501 (1st Cir. 1974). *See* note 126 and accompanying text *supra*.

139. United States v. Linetsky, 533 F.2d 192, 202 (5th Cir. 1976); United States v. Thevis, 526 F.2d 989, 992 (5th Cir. 1976); United States v. Hill, 500 F.2d 733, 737 (5th Cir. 1974), *cert. denied*, 420 U.S. 952 (1975); United States v. Groner, 494 F.2d 499, 500-01 (5th Cir. 1974); United States v. Sulaiman, 490 F.2d 78, 79 (5th Cir. 1974); United States v. New Orleans Book Mart, 490 F.2d 73, 75 (5th Cir.), *cert. denied*, 419 U.S. 1007 (1974); United States v. Millican, 487 F.2d 331, 332 (5th Cir. 1973), *cert. denied*, 418 U.S. 947 (1974); United States v. Cote, 485 F.2d 574, 575 (5th Cir. 1973).

140. *See* United States v. Alexander, 498 F.2d 934, 935 (2d Cir. 1974).

141. *See* United States v. Cutting, 538 F.2d 835, 838 (9th Cir. 1976); United States v. Jacobs, 513 F.2d 564, 567 (9th Cir. 1975); United States v. Henson, 513 F.2d 156, 158 n.3 (9th Cir. 1975). *See also* United States v. Elkins, 556 F.2d 978, 979-80 (9th Cir. 1977).

142. 418 U.S. 87 (1974).

ple enunciated in *Miller* which would serve to benefit petitioners must be applied in their case."[143]

This language was cited with approval by the Supreme Court in *Marks*, in which the majority declared:

> The Court of Appeals apparently thought that our remand in *Miller* and the companion cases necessarily meant that *Miller* standards were fully retroactive. . . . But the [quoted] passage from *Hamling* . . . makes it clear that the remands carried no such implication. Our 1973 cases were remanded for the courts below to apply the "benefits" of *Miller*.[144]

There are some difficulties with this holding, however, and they are best emphasized by a closer examination of the *Hamling* case. The passage from *Hamling* that is quoted in *Marks* appears in a paragraph in which the Court also stated: "[o]ur prior decisions establish a general rule that a change in the law occurring after a relevant event in a case will be given effect while the case is on direct review . . . . Since the judgment in this case has not become final, we examine the judgment against petitioners in the light of principles laid down in the *Miller* cases."[145] In support of this proposition, the key ruling cited by the Court was *Linkletter v. Walker*,[146] a 1965 decision addressing the problem of whether to give retroactive effect to the exclusionary rule announced in *Mapp v. Ohio*.[147] The Court in *Linkletter* had ruled that retrospectivity must be considered on a case-by-case basis;[148] it did, however, permit the application of the new constitutional principles promulgated in *Mapp* to all cases pending on appeal at the time those principles were first declared.[149] But two years after *Linkletter*, the Court decided *Stovall v. Denno*,[150] a case involving the issue of the retroactive effect of the Court's earlier ruling in *United States v. Wade*.[151] In the *Wade* case, the Court had held that an identification of criminal defendants in a post-indictment police "line-up" from which the defendant's attorney was barred was inadmissible as evidence in any subsequent trial.[152] The Court in *Stovall* held that a choice in favor of retroactivity must be made after a consideration of the following factors: "(a) the purpose to be served by the

143. *Id.* at 102.
144. 430 U.S. at 197 n.12.
145. 418 U.S. at 102 (citations omitted).
146. 381 U.S. 618 (1965).
147. 367 U.S. 643 (1961). *Mapp* held that evidence obtained as the result of a search and seizure that violated the right of privacy guaranteed by the Fourth Amendment must be excluded from admission in any subsequent criminal proceeding in state courts. *Id.* at 659.
148. 381 U.S. at 629.
149. *Id.*
150. 388 U.S. 293 (1967).
151. 388 U.S. 218 (1967).
152. *Id.* at 236-37.

new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[153] Accordingly, *Stovall* adopted a rule of almost pure prospectivity, making those who had raised the constitutional challenge in the *Wade* case the *only* retroactive beneficiaries of the new principles declared as a result of that challenge. This approach was said to be grounded on considerations of practicality and "of the necessity that constitutional adjudications not stand as dictum."[154]

Cases like *Marks* present few problems under *Stovall*; the same is not true for cases like *Pallandino* and *Thevis*. Certainly, the language of the remand in *Miller* does not, by itself, mandate retroactivity. Moreover, the courts of appeal in *Thevis* and *Palladino* never engaged in the balancing test required by *Stovall*, although the concern for the efficient administration of the federal court system should have been sufficient to compel such a weighing process. The Supreme Court in *Hamling* was, however, guilty of the same omission; it never even cited *Stovall*. Moreover, the language in *Marks*, which appears to have interpreted the remand in *Miller* as a policy choice to grant retroactive effect to the benefits of that decision, suggests that obscenity prosecutions may well present an exception to the *Stovall* rule. If so, *Marks* adds an important "clarifying gloss" to the Court's prior decision in *Hamling*.

153. 388 U.S. at 297. The balancing test has been applied by the Court in a number of other cases, some of which have granted retroactivity and some of which have not. *See, e.g.*, Michigan v. Payne, 412 U.S. 47, 51-57 (1973) (denying retroactivity to the rule of North Carolina v. Pearce, 395 U.S. 711 (1969), which held that while there exists no absolute bar to the imposition of a more severe sentence upon retrial, that sentence may not be the product of a judge's vindictiveness toward a defendant who succeeded in getting his first conviction reversed); Ivan V. v. New York, 407 U.S. 203, 204-05 (1972) (holding retroactive the rule of *In re* Winship, 397 U.S. 358 (1970), which ruled that in state proceedings involving juveniles, "proof beyond a reasonable doubt" was a requirement of due process); Elkanich v. United States, 401 U.S. 646, 650-56 (1971) (denying retroactivity to Chimel v. California, 395 U.S. 752 (1969), which limited searches incident to a lawful arrest to that area from within which the arrestee could have obtained a weapon or incriminating evidence); Desist v. United States, 394 U.S. 244, 249-54 (1969) (denying retroactivity to the rule of Katz v. United States, 389 U.S. 347 (1967), which excluded evidence obtained through an unauthorized wiretap of any area where a defendant has a reasonable expectation of privacy); Berger v. California, 393 U.S. 314, 315 (1969) (holding retroactive the rule of Barber v. Page, 390 U.S. 719 (1968), which deemed those situations in which a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant as exceptions to the Sixth Amendment's confrontation clause); DeStefano v. Woods, 392 U.S. 631, 633-35 (1968) (holding nonretroactive Duncan v. Louisiana, 391 U.S. 145 (1968) and Bloom v. Illinois, 391 U.S. 194 (1968), which extended the Sixth Amendment's guarantee of jury trial to the states); Roberts v. Russell, 392 U.S. 293, 294-95 (1968) (holding retroactive the rule of Bruton v. United States, 391 U.S. 123 (1968), which held that a conviction must be set aside even though the jury rendering it was instructed to disregard the confession of a codefendant inculpating the one convicted).

154. 388 U.S. at 301.

Aside from this complexity, Judge Bailey Aldrich's dissent in *Palladino* raises a more important problem: that case and *Thevis* involved the retroactive application of the *benefits* of *Miller*; *Marks* concerned the problem of whether to give retrospective effect to the *burdens* of *Miller*. In *Thevis*, the Fifth Circuit had noted that it could not assume, "given ex post facto considerations, that the Supreme Court intended to impose any detriment ensuing from the *Miller* standards on appellants";[155] in *Palladino*, the First Circuit had simply commented that the case presented no due process or ex post facto problems.[156] Both these passages were dicta, and were unrelated to the chief issues confronted by the First and Fifth Circuits. But according to the Sixth Circuit in *Marks*, the cases that *did* deal with retroactive application of the detriments of *Miller*, the Fifth Circuit's opinion in *United States v. Wassermcn*[157] and the Ninth Circuit's opinion in *United States v. Jacobs*,[158] did so by relying erroneously on either *Palladino*, or *Thevis* or both.[159] That assertion is simply false. In *Jacobs*, which involved a situation identical to that of *Marks*, the Ninth Circuit had found a violation of due process by relying on *Bouie*.[160] It cited *Thevis* solely for the proposition that, should the government wish to retry Jacobs, it would have to afford him the benefits of *Miller*.[161] In *Wasserman*, the Fifth Circuit had noted the problem even more clearly:

> Thus *Thevis* held that where a defendant was tried under *Roth-Memoirs* standards, on appeal he may obtain any benefits to be derived from the recent *Miller* decision. In the present case by contrast, Wasserman and his co-defendants were tried under the *Miller* standard, and they contend that this ex post facto application of a new obscenity standard to pre-*Miller* acts was improper. *Thevis* thus has no direct application here.[162]

The application of *Thevis*[163] was at best, indirect, because "by applying solely the benefits of *Miller*, [the *Thevis* court refused] to apply retroactively the detriments of *Miller*."[164] The direct authority given for the holding in *Wasserman*, however, was *Bouie* and *Jacobs*.[165] Similarly, the District of Columbia Circuit, the only other court of appeals that has approached this

155. United States v. Thevis, 484 F.2d 1149, 1155 n.7 (5th Cir. 1974).
156. United States v. Palladino, 490 F.2d 499, 501 n.7 (1st Cir. 1974).
157. 504 F.2d 1012 (5th Cir. 1974).
158. 513 F.2d 564 (9th Cir. 1974).
159. United States v. Marks, 520 F. 2d 913, 922 (6th Cir. 1975).
160. 513 F.2d at 566 (quoting Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1964)).
161. *Id.* at 567.
162. 504 F.2d at 1014.
163. The Fifth Circuit also cited *Palladino* in a footnote as another example of a case of indirect application. *Id.* at 1014 n.7.
164. *Id.* at 1014.
165. *See id.* at 1014-15.

problem, applied the *Bouie* rule in reliance on *Wasserman* and *Jacobs*, without even mentioning *Thevis* or *Palladino*.[166] Thus, at least in this aspect of its argument, the Sixth Circuit simply engaged in a tactic of deliberate obfuscation. Nevertheless, the court of appeals did elsewhere suggest genuine difficulties, which the Supreme Court subsequently glossed over.

(2) *Residual Issues Raised by the Supreme Court's Opinion*

(a) **Applicability of the *Bouie* Rule**

One issue that was not considered by the Sixth Circuit is whether the *Bouie* rule is applicable to a case like *Marks*. In order to analyze this question, the case of *Bouie v. City of Columbia*[167] must be examined more closely. South Carolina's criminal trespass statute prohibited entry upon the property of another after "notice . . . prohibiting such entry."[168] The defendants in *Bouie* were blacks who entered a local drug store and sat at booths reserved for whites only. After doing so, the management requested that they leave but the defendants refused. The South Carolina Supreme Court affirmed the defendants' convictions for violating the criminal trespass laws. In doing so, it relied on the contemporaneous construction given in a companion case to the effect that the statute in question proscribed not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to depart.[169] The United States Supreme Court concluded that South Carolina had punished the defendants "for conduct that was not criminal at the time they committed it, and hence has violated the requirements of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits."[170]

In reviewing the facts, the Court in *Bouie* was careful to identify what the South Carolina Supreme Court had, in fact, done. The code section in question was narrow and precise. It thus "lull[ed] the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactive-

166. *See* United States v. Sherpix, Inc., 512 F.2d 1361, 1366-67 (D.C. Cir. 1975). Similarly, the other federal courts that have declined to apply the burdens of *Miller* retrospectively did so primarily on the authority of *Bouie*. *See* Detco, Inc. v. McCann, 380 F. Supp. 1366, 1368 (E.D. Wis. 1974); United States v. B & H Distrib. Corp., 375 F. Supp. 136, 144 (W.D. Wis. 1974); United States v. Lang, 361 F. Supp. 380, 382 (C.D. Cal. 1973).

167. 378 U.S. 347 (1964)).

168. S.C. CODE § 16-836 (Supp. 1960).

169. City of Columbia v. Bouie, 239 S.C. 570, 573, 124 S.E.2d 332, 333 (1961) (citing City of Charleston v. Mitchell, 239 S.C. 376, 387, 123 S.E.2d 512, 516 (1961), *rev'd*, 378 U.S. 551 (1964)).

170. 378 U.S. at 350.

ly brought within it by an act of judicial construction."[171] The effect of the state court's decision was to give retrospective effect to an unforeseeably broad construction of that precise statutory language. This was impermissible: "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue,' it must not be given retroactive effect."[172] The Court found such an unexpected construction in the *Bouie* case. The terms of the law itself did not indicate that they prohibited a person from remaining on the premises of another after being asked to leave, and prior South Carolina criminal cases did not support a different interpretation, but in fact emphasized that proof of notice before entry was a prerequisite to any conviction under the statute.[173] The Court noted that the state supreme court had relied on two factors in support of its ruling: several of its prior decisions that were simply not on point[174] and a construction by the North Carolina Supreme Court of that state's own criminal trespass law, which *was* consistent with prior rulings by other North Carolina tribunals.[175] Both of these factors were dismissed as irrelevant by the United States Supreme Court: "[t]he South Carolina Supreme Court's retroactive application of such a construction here is no less inconsistent with the law of other States than it is with the prior case law of South Carolina and, of course, with the language of the statute itself."[176] Thus, the *Bouie* rule consists of three elements: (1) the retroactive application (2) of an unexpected, unforeseeable and inconsistent judicial interpretation (3) of narrow and precise statutory language.

However, did the facts in *Marks* fall within the ambit of the *Bouie* rule? Prior to the Supreme Court's ruling in *Marks*, only one court of appeals had even examined the ramifications of this problem. In *United States v. Wasserman*,[177] wherein the Fifth Circuit applied the *Bouie* rule, the court admitted:

171. *Id.* at 352.

172. *Id.* at 354 (quoting J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 61 (2d ed. 1960)).

173. 378 U.S. at 356 (citing State v. Green, 35 S.C. 266, 268, 14 S.E. 619, 620 (1892); State v. Cockfield, 15 S.C.L. (3 Rich.) 53, 55 (1867)).

174. *See* Shramek v. Walker, 152 S.C. 88, 99-100, 149 S.E. 331, 336 (1929) (civil trespass action); State v. Williams, 76 S.C. 135, 142, 56 S.E. 783, 785 (1907) (prosecution for murder in which the defense was raised that the victim was a trespasser who refused to obey an order to leave).

175. *See* State v. Clyburn, 247 N.C. 455, 462, 101 S.E.2d 295, 300 (1958). The Court noted that under traditional principles of American law, an action for criminal trespass usually lies when one enters the property of another after being told not to do so. 378 U.S. at 360-61 (citing Martin v. City of Struthers, 319 U.S. 141, 147 (1942); Brunson v. State, 140 Ala. 201, 203, 37 So. 197, 198 (1904); Goldsmith v. State, 88 Ala. 55, 57, 5 So. 480, 480-81 (1889); Commonwealth v. Richardson, 313 Mass. 632, 640, 48 N.E.2d 678, 682 (1943); Pennsylvania R.R. v. Fucello, 91 N.J.L. 476, 477, 103 A. 988, 989 (1918)).

176. 378 U.S. at 361.

177. 504 F.2d 1012 (5th Cir. 1974).

> *Bouie* is somewhat distinguishable in that judicial interpretation in that case expanded the reach of the statute in an extreme and unpredictable way while the judicial opinion with which we are concerned [*Miller*] merely redefines "obscenity" in a manner which in no way runs counter to the plain words of the statute [18 U.S.C. § 1461]. *Miller* did, however, represent a marked shift in the scope of material deemed to be obscene. Therefore in terms of notice to the defendant and the just application of criminal sanctions, we believe the effect on the defendant is the same. Prior to *Miller*, a distributor of sexually oriented material could not recognize that material which simply lacked "serious literary, artistic, political or scientific value" could be constitutionally regulated. As far as such a distributor could determine, he was protected as long as the material was not utterly without redeeming social value. To convict Wasserman for distribution of material which was protected under the *Roth-Memoirs* standard violates the rationale underlying *Bouie.*
>
> We do not go so far as to hold that the application of the *Miller* standard to Wasserman violated the due process clause. We do hold, however, that such a retroactive application is inappropriate without substantial justification outweighing the above discussed ex post facto considerations. Lacking such justification, the conviction must be reversed.[178]

Wasserman illustrates the pitfalls inherent in trying to be too scrupulous about explaining a ground for decision. The initial sentence admitted that *Miller* in no way established a definition contrary to the terms of section 1461; therefore a situation analogous to *Bouie*, in which a court gives an unforeseeable reading to a facially precise law, was not presented. The Fifth Circuit proceeded to argue by implication, however, that the *Memoirs* definition of obscenity had in fact been "read into" section 1461, at least until the *Miller* decision, and thus, the abrupt shift in emphasis signalled by *Miller* constituted a denial of fair notice. The court of appeals, however, then concluded that retroactive application of the detriments of *Miller* did not violate the due process clause in Wasserman's case. Yet, the *Bouie* rule is premised on the concept that the judicial action proscribed by that rule does infringe constitutional rights to procedural due process. Consequently, if such rights are not violated, it seems anomalous nevertheless to invoke the rule. The Fifth Circuit glossed over this problem, and purported instead to apply a balancing test to determine whether to give retrospective effect to the burdens of *Miller* in obscenity cases. Such a technique was not advocated in *Bouie*; as a result, a new legal doctrine was, in effect, established by the court of appeals in *Wasserman*.

Justice Powell's opinion in *Marks* avoids some of the more obvious pitfalls that marked the Fifth Circuit's opinion in *Wasserman*. He also

178. *Id.* at 1015-16.

admits that the case is not "strictly" analogous to *Bouie*.[179] Section 1465, the statute involved in *Marks*, is clearly not as narrow and precise as the South Carolinia criminal trespass law considered in *Bouie*.[180] Like the Fifth Circuit, however, the Supreme Court assumed that the necessary precision of the law in question was supplied by the Court's own judicial constructions.[181] One confronts a problem in this regard, however. The Supreme Court indicated in *Hamling v. United States*[182] that the *Miller* standards in general apply to federal obscenity legislation.[183] The Court has never indicated that the *Memoirs* standards applied to such legislation, although a number of lower federal courts have so held.[184] The Supreme Court never chastised these courts for making this assumption, at least until 1973. But is this silence by the Court, which might be presumed to indicate approbation of a certain construction placed upon federal obscenity statutes, an adequate surrogate for the facial precision of a law, such as the statute involved in *Bouie*? Arguably, not. The Court pointed out in *Bouie* that a person could be lulled into a "false sense of security" by overreliance on the text of a statute as written.[185] How can a similar sense of security occur with respect to a law that is facially broad, but which has been construed narrowly *only* by lower federal courts? The differences in degree between these factual situations would seem to produce a cumulative difference in kind.

Justice Powell did not adequately analyze this problem in *Marks*. Indeed, his main concern was to determine if *Miller* represented an unforeseeable, unpredictable departure in the interpretation of section 1465. In order to make such a determination, it was necessary to ascertain in what body of law *Miller* effected a change: that represented by the *Roth* case or that represented by the plurality opinion in *Memoirs*. As Justice Powell noted, "[i]f indeed *Roth*, not *Memoirs* stated the applicable law prior to *Miller*, there would be much to commend the apparent view of the Court of Appeals that *Miller* did not significantly change the law."[186]

The majority noted, in this regard, that when a court is completely fragmented, its holding will be that of the justices who concurred in the judgment on the narrowest grounds; under this rule, the holding in *Memoirs*

179. 430 U.S. at 195.
180. *See* note 168 *supra*.
181. 430 U.S. at 195.
182. 418 U.S. 87 (1974).
183. *Id.* at 105 (citing United States v. Twelve 200-ft. Reels of Super 8mm Film, 413 U.S. 123, 129-30 (1973)).
184. *See* cases cited in note 30 *supra*.
185. *See* note 171 and accompanying text *supra*.
186. 430 U.S. at 193.

could indeed be construed as that presented by the plurality opinion.[187] Therefore, Justice Powell asserted that the plurality opinion provided the "governing standards" in obscenity cases. But this assertion is false. The plurality opinion in *Memoirs*, was, as the Tenth Circuit noted in *United States v. Friedman*,[188] never entitled to binding effect.[189] In support of this statement, the Tenth Circuit pointed to the following language in the decision of the Supreme Court in *United States v. Pink*:[190]

> Nor was our affirmance of the judgment . . . by an equally divided court an authoritative precedent. While it was conclusive and binding upon the parties as respects that controversy . . . the lack of an agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases.[191]

If this is true in a situation where the justices on the Court are divided four-to-four, it should be even more apt where the statement "on the principles of law involved" emanated from only three of the nine members on the deciding tribunal. Thus, Justice Powell's broad assertion that *Memoirs* provided a governing standard is invalid. It is true that all federal courts that considered the problem between 1967 and 1973 elected to follow *Memoirs*;[192] but the Supreme Court is certainly not bound by the choices of inferior tribunals. Thus, the question that Justice Powell should have asked is: between 1967 and 1973, did a majority of the Court itself ever adopt the *Memoirs* standard or some other standard? This is especially advisable when one remembers that two of the three members of the *Memoirs* plurality, Chief Justice Warren and Justice Fortas, were no longer sitting on the Court by 1973.

The period between 1967 and 1973 was one marked by the so-called "*Redrup* reversals,"[193] in which the Court overturned "convictions for the

187. *Id.*

188. 528 F.2d 784 (10th Cir. 1976), *rev'd*, 430 U.S. 925 (1977). *Friedman* was the one other decision by a federal court of appeals that has followed the rationale expressed by the Sixth Circuit in *Marks*. The appellees in *Friedman* had been convicted in 1971 under section 1465 of Title eighteen of the United States Code for transporting in interstate commerce a book entitled *The Animal Lovers*. After *Miller* was decided, the Tenth Circuit remanded the case for reconsideration. United States v. Friedman, 488 F.2d 1141, 1142 (10th Cir. 1973). A retrial, in which the *Miller* standards were applied, resulted in a second conviction. On appeal the Tenth Circuit affirmed. It concluded that *The Animal Lovers* "would be considered obscene under any standards, whether it be *Memoirs*, *Miller* or for that matter even those of ancient Sodom and Gomorrah." 528 F.2d at 789.

189. 528 F.2d at 788.

190. 315 U.S. 203 (1942).

191. *Id.* at 216. *Accord*, Hertz v. Woodman, 218 U.S. 205, 213-14 (1910); Berlin v. E. C. Pub. Inc., 329 F.2d 541, 545 n.3 (2d Cir. 1964).

192. *See* cases cited in note 30 *supra*.

193. *See* notes 31-33 and accompanying text *supra*.

dissemination of materials that at least five members of the Court, applying their separate tests, deemed not to be obscene."[194] But even during this period, there was some evidence to suggest that the Court might be leaning toward the *Memoirs* standard. Thus, in the per curiam opinion of *Landau v. Fording*,[195] five justices, not including the members of the *Memoirs* plurality,[196] upheld a conviction based upon the finding by a state trial court that the materials in question were obscene under the *Memoirs* standard.[197] Similarly, in *Ginsberg v. New York*,[198] five justices[199] joined in an opinion allowing special restrictions on the purveyance of obscenity to minors. In doing so, they upheld a New York law that incorporated the *Memoirs* test in modified form.[200] Thus, prior to the changes of personnel on the Court that occurred in 1969, there might have been some grounds to suspect that a majority of the justices would, in fact, accept *Memoirs*.

In later cases, however, this contention becomes less plausible. Thus, in *United States v. Reidel*,[201] a section 1461 case,[202] six justices, including Justice Brennan,[203] concluded that the *Roth* decision "remains the law in

194. Paris Adult Theater I v. Slaton, 413 U.S. 49, 82 (1973) (Brennan, J., dissenting, joined by Stewart and Marshall, JJ.).

195. 388 U.S. 456 (1967).

196. The five justices were Chief Justice Warren and Justices Brennan, Harlan, Marshall and White.

197. Landau v. Fording, 245 Cal. App. 2d 820, 830, 54 Cal. Rptr. 177, 183 (1967). For similar interpretations of the meaning of *Landau*, see United States v. A Motion Picture Film Entitled "I Am Curious—Yellow," 404 F.2d 196, 201 (2d Cir. 1968) (Friendly, C.J., concurring); Luros v. United States, 389 F.2d 200, 206 n.15 (8th Cir. 1968); United States v. B & H Distrib. Corp., 375 F. Supp. 136, 143 (W.D. Wis. 1974).

198. 390 U.S. 629 (1968). *See generally* SCHAUER, *supra* note 3, at 88-92; Krislov, *From Ginzburg to Ginsberg: The Unhurried Children's Hour in Obscenity Ligitation*, 1968 SUP. CT. REV. 153; Note, *A Double Standard of Obscenity: The Ginsberg Decision*, 3 VAL. L. REV. 57 (1968).

199. The five justices were Justice Brennan, joined by Chief Justice Warren and Justices Harlan, Marshall and White. Although he joined the opinion of the Court, however, Justice Harlan filed a separate opinion in a companion case in which he reaffirmed his view that while federal control of obscene materials should be limited to "hard core pornography," the Court should defer to state determinations of obscenity except in those instances where such a determination appears to be no more than the product of prudish over-zealousness. *See* Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 708 (1968) (opinion of Harlan, J.).

200. N.Y. PENAL LAW § 484-h(1)(F) (McKinney 1965)(repealed 1967):

> "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it: (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors, and (iii) is utterly without redeeming social importance for minors.

201. 402 U.S. 351 (1971).

202. *See* 18 U.S.C. § 1461 (1970); note 8 *supra*.

203. The six justices were Justice White, joined by Chief Justice Burger and Justices Harlan, Brennan, Stewart and Blackmun.

this Court and governs this case."[204] The ruling in *Memoirs* was not even discussed. One can, of course, argue that because *Roth* also involved the constitutionality of section 1461,[205] it was deemed to be governing precedent; but if so, this suggests that *Roth*, not *Memoirs*, always remained the controlling rule in federal cases,[206] a point that Justice Powell disputes in *Marks*. The difficulties are exacerbated by *Kois v. Wisconsin*,[207] a case decided in 1972 involving a conviction under state obscenity laws. In that case, seven justices[208] again ignored *Memoirs* and ruled that the applicable standard was the "prurient interest" test of *Roth*.[209] These cases suggest that by 1970, and certainly by 1972, no majority of the Court was willing to accept the *Memoirs* standards as governing, and that therefore those standards did not in any sense constitute the law.[210]

Is this interpretation borne out by a consideration of the *Miller* opinion itself? The Fifth Circuit in *United States v. Thevis*[211] did not seem to think so; it claimed that the Court in *Miller* viewed the *Memoirs* standard as the source of previous judicial limits on the powers of legislatures to impose criminal sanctions for the distribution of obscenity, citing general language in *Miller* to that effect.[212] But the court in *Thevis* may well have read too

204. 402 U.S. at 354.

205. *See* note 8 and accompanying text *supra*.

206. The attempted distinction is further undermined by the fact that consolidated with *Roth* was Alberts v. California, 354 U.S. 476 (1957), a case involving an obscenity prosecution under state law. *See* note 3 *supra*. Thus, *Roth* stated a rule generally applicable to both state and federal proceedings.

207. 408 U.S. 229 (1972). *Kois* involved a prosecution under a Wisconsin obscenity statute for the publication in an underground newspaper of pictures of nudes and of a sex poem. The Court reversed one count of the petitioner's conviction, finding that the poem as a whole did not possess a dominant appeal to prurient interest. *Id.* at 232. *See* notes 641-643 and accompanying text *infra*.

208. The only dissenter in *Kois* was Justice Douglas, 408 U.S. at 232-33 (Douglas, J., dissenting). Justice Stewart concurred in the judgment only. *Id.* at 232 (Stewart, J., concurring).

209. *Id.* at 230.

210. *Accord*, United States v. Groner, 479 F.2d 577, 580-82 (5th Cir.), *vacated on other grounds*, 414 U.S. 969 (1973). The quotation represents the views of Judge Gewin, joined by Judges Bell, Coleman, Ainsworth, Dyer, Ingraham and Roney. Judge Clark concurred separately, finding the tripartite standard of *Memoirs* applicable. 479 F.2d at 588 (Clark, J., concurring). Judge Thornberry, joined by Chief Judge Brown and Judges Wisdom, Goldberg, Godbold, Simpson and Morgan essentially agreed that the trial court had not erred in relying on the tripartite test. *Id.* at 590 (Thornberry, J., dissenting). So a total of seven judges in *Groner* prevailed on this issue. The dissenters argued that *Roth* itself had formulated a patent offensiveness test for obscenity because in that case Justice Brennan cited with approval the definition set forth in the Model Penal Code, *see* note 21 *supra*. 479 F.2d at 590. It is true that Justice Brennan cited that definition, but there is no indication that he adopted its language as a test for determining obscenity *vel non*. *Accord*, SCHAUER, *supra* note 3, at 102.

211. 484 F.2d 1149 (5th Cir. 1973), *cert. denied*, 418 U.S. 932 (1974).

212. 484 F.2d at 1152 (citing Miller v. California, 413 U.S. 15, 30 (1973)).

much into the Supreme Court's opinion. The criticism has been cogently presented by Judge Doyle in his opinion in *United States v. B & H Distributing Corp.*:[213]

> In *Miller* the Supreme Court reviewed a conviction for distributing obscene material in violation of a California statute that limited prosecution to "matter which is utterly without redeeming social importance." . . . The *Miller* observation, relied on by *Thevis* . . . that *Memoirs* "was correctly regarded at the time of trial as limiting state prosecution under the controlling case law" must be read together with the immediately preceding statement that "this case was tried on the theory that the California obscenity statute sought to incorporate the tripartite test of *Memoirs*" . . . . I find the former passage ambiguous as to whether *Miller* viewed *Memoirs* as only the controlling California standard, or also as the controlling constitutional standard. At the outset of the *Miller* opinion, the Court described the constitutional standard set forth in *Roth* as a balancing test between free expression of ideas and the social interest in order and morality. It characterized the *Memoirs* plurality standard as a "drastically altered test" that gave absolute protection to any material not "utterly without redeeming social value." . . . The Court also remarked . . . that only "the necessity of circumstances" justified the series of summary reversals of obscenity convictions which followed Redrup v. New York . . . . Although not directly controverting the *Thevis* interpretation, these remarks raise additional doubts as to whether *Miller* viewed *Memoirs* as a constitutional standard.[214]

Other passages in *Miller* support Judge Doyle's reading. It was thus stated in *Miller* that "[a]part from the initial formulation in the *Roth* case no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power."[215] Similarly, both the majority in *Miller* and Justice Brennan's dissent in *Paris Adult Theater I* reiterated the point that the *Memoirs* standard never represented the views of more than three justices on the Court.[216] In light of all these statements, it would seem that the majority in *Miller* never believed that *Memoirs* had been a source of governing law in obscenity cases. Thus, at least from the perspective of the Supreme Court, as expressed in *Miller, Kois* and *Reidel*, the controlling standard between 1957 and 1973 was, and always had been, that of *Roth*.

This yields one additional question: is *Miller* a sharp departure from *Roth*? Justice Powell in *Marks* assumed that this question could only be

213. 375 F. Supp. 136 (W.D. Wis. 1974).

214. Id. at 142-43 n.7 (citations omitted).

215. Miller v. California, 413 U.S. 15, 22 (1973).

216. Paris Adult Theater I v. Slaton, 413 U.S. 49, 82 (1973) (Brennan, J., dissenting, joined by Stewart and Marshall, JJ.); Miller v. California, 413 U.S. 15, 25 (1973).

answered in the negative. This is an accurate assumption. Certainly part (a) of the *Miller* test, relating to "prurient interest," does no more than restate *Roth*. But part (b) of that test, relating to "patent offensiveness," was never adverted to in *Roth*. This concept first appeared in Justice Harlan's opinion in *Manual Enterprises v. Day*[217] and was later adopted by Justice Brennan's opinion in *Jacobellis v. Ohio*[218] and then by the plurality in *Memoirs*.[219] However, as *Jacobellis* points out, this test of patent offensiveness is based on certain language in the Model Penal Code[220] that was quoted approvingly by the Court in *Roth*.[221] One could thus perhaps argue that this element of the *Miller* criteria was implicit in *Roth*, although not as a full-fledged test for differentiating obscenity from protected speech. As for part (c) of the *Miller* standard, which relates to literary, artistic, political or scientific value, the Court in *Roth* did point out that obscenity was not entitled to First Amendment protection because it was utterly lacking in social importance.[222] Again, however, this language forms no part of the definition utilized in Justice Brennan's 1957 opinion; that came later, in his plurality opinions in *Jacobellis* and *Memoirs*.[223] Thus, upon closer examination, two aspects of the tripartite *Miller* test do mark a significant departure from *Roth*. But they do not mark an unpredictable departure thoroughly inconsistent with prior case law, as *Bouie* requires. The evolution of the Court's views on this subject from *Roth* to *Miller* was not sudden and unexpected, and *could* be gauged by a consideration of intervening opinions. Thus, one is left with the inevitable conclusion that the *Bouie* rule, as stated by the Court in 1964, simply has no application to a case like *Marks*.

Was the decision in *Marks* therefore incorrect? As a matter of constitutional law, yes; as a matter of policy, perhaps not. While lower courts were never obliged to give binding effect to the plurality opinion in *Memoirs*, it is easy to see why they chose to do so. That opinion provided specific, succinct guidelines, however inadequate, by which obscenity could be determined. No doubt *Memoirs* appeared to provide a relative haven of certainty in what was otherwise an area of stormy confusion in the law. Recognizing this, the majority in *Marks* perhaps decided to deny retroactive application of the burdens of *Miller* in order to alleviate, in part, problems

217. 370 U.S. 478, 486 (1962) (opinion of Harlan, J., joined by Stewart, J.).

218. 378 U.S. 184, 191-92 (1964).

219. Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966). *See* note 23 and accompanying text *supra*. *See generally* SCHAUER, *supra* note 3, at 102-05.

220. *See* note 21 *supra*.

221. 354 U.S. at 487 n.20.

222. *Id.* at 484.

223. Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966); Jacobellis v. Ohio, 378 U.S. 184, 191 (1964). *See* SCHAUER, *supra* note 3, at 137.

that it had created for lower federal courts and criminal defendants due to its vacillation prior to *Miller*. As a judicial policy choice, this is an acceptable option. One merely regrets that the Court attempted to fit the *Bouie* rule onto the Procrustean bed engendered by this choice. The deformed result creates some uncertainty about whether the newly-expanded scope of that rule will cover factual situations arising in contexts other than obscenity. Yet, one can understand why the Court in *Marks* chose to apply *Bouie* in a creative fashion. The other alternative would be to acknowledge that, at least prior to *Miller* and its companion cases, the federal obscenity statutes had never received an authoritative judicial construction incorporating sufficiently specific standards to rebut a claim of vagueness. The result of such an acknowledgement might be to invalidate all convictions under those statutes that were based on conduct occurring before June 21, 1973, and that were not yet final. Undoubtedly, the majority in *Marks* considered this alternative to be unacceptable, which is why they elected to manipulate the *Bouie* rule as they did.

(b) The Power of Appellate Courts to Make an Initial Finding of Obscenity

There remains one final issue in *Marks*. The Sixth Circuit in that case asserted that the materials in question were obscene under either the *Miller* or the *Memoirs* standard;[224] it apparently regarded the error of the trial judge in framing jury instructions solely on the basis of *Miller* as essentially harmless. Thus, an issue was raised about the power of appellate courts to make independent *initial* determinations on the issue of obscenity under a given judicial standard. The problem is a troublesome one. In the *Thevis* case, for example, the Fifth Circuit itself inspected the magazines in question and determined whether they were obscene under both *Memoirs* and *Miller*.[225] This technique has been applied by the Fifth Circuit in other cases similar to *Thevis*, where the appellate court was asked to give retrospective effect to the *benefits* of *Miller*.[226] In the *Wasserman* case, however, in

224. United States v. Marks, 520 F.2d 913, 922 (6th Cir. 1975). It did so apparently without having ever viewed the films that were the subject of the prosecution in the first place. *See id.* at 932 n.1 (McCree, J., dissenting). The Tenth Circuit in United States v. Friedman, 488 F.2d 1141 (10th Cir. 1973), did not take a similar position. On an appeal from the first conviction in that case, it did not apply *Miller* unilaterally, but remanded it for a new trial. *Id.* at 1142. *See* note 188 *supra*.

225. *See* United States v. Thevis, 484 F.2d 1149, 1155-57 (5th Cir. 1973), *cert. denied*, 418 U.S. 932 (1974).

226. *See, e.g.*, United States v. Linetsky, 533 F.2d 192, 202 (5th Cir. 1976); United States v. Thevis, 526 F.2d 989, 993 (5th Cir. 1976); United States v. Hill, 500 F.2d 733, 738 (5th Cir. 1974), *cert. denied*, 420 U.S. 931 (1975); United States v. Groner, 494 F.2d 499, 501 (5th Cir. 1974); United States v. Sulaiman, 490 F.2d 78, 79 (5th Cir. 1974); United States v. New Orleans Book Mart, 490 F.2d 73, 75 (5th Cir.), *cert. denied*, 419 U.S. 1007 (1974); United States v. Millican, 487 F.2d 331, 332 (5th Cir. 1973), *cert. denied*, 418 U.S. 947 (1974); United States v. Cote, 485

which the issue was the retroactivity of the burdens of *Miller*, the Fifth Circuit drew the line as follows:

> Although in a *Thevis*-type situation the appellate court will apply the benefits of *Miller* without requiring a remand . . . it would be inappropriate for this court to usurp the jury function of applying the *Roth-Memoirs* test to the materials at issue. Under *Thevis*, the application of the *Miller* test by the appellate court is justified since the *Miller* formulation was unavailable to the trial court. In the present case, however, the trial court erroneously failed to employ the appropriate existing standard as set forth in *Roth-Memoirs*.[227]

This position makes a good deal of sense. While courts do have an independent duty of review in cases, like those involving obscenity, where issues of "constitutional fact" are present, this power should not be abused so as to infringe the right to a jury trial in criminal prosecutions, as guaranteed by the Sixth Amendment. The Supreme Court in *Marks* seemed to recognize this point when it asserted:

> The Court of Appeals stated, apparently without viewing the materials . . . that in its opinion the materials here were obscene under either *Memoirs* or *Miller* . . . . Such a conclusion, absent other dependable means of knowing the character of the materials, is of dubious value. But even if we accept the court's conclusion, under these circumstances it is not an adequate substitute for the decision in the first instance of a properly instructed jury, as to this important element of the offense under 18 U.S.C. § 1465.[228]

In light of this statement, one must also wonder about the permissibility of the Fifth Circuit's action in *Thevis*-type cases. In such situations, a conclusion by the appellate court would also seem to be an inadequate substitute for the judgment of a jury. Thus, although the Court in *Marks* limited its comments to the circumstances of the case, its broad assertion suggested that the powers of courts of appeal in this respect are very limited.

In sum, *Marks* is a case in which the result seems correct, but the rationale underlying that result seems incorrect. The decision would seem to require an elaborate due process analysis any time a new judicial construc-

F.2d 574, 575 (5th Cir. 1973). Of the three circuits that have followed *Thevis*, two have indicated that the court of appeals may itself review the materials in question under the combined *Memoirs-Miller* test. *See* United States v. Alexander, 498 F.2d 934, 935 (2d Cir. 1974); United States v. Palladino, 490 F.2d 499, 501 (1st Cir. 1974). *See also* United States v. One Reel of 35mm Color Motion Picture Film Entitled "Sinderella," 491 F.2d 956, 959 (2d Cir. 1974); United States v. One Reel of Film, 481 F.2d 206, 210 (1st Cir. 1973) (both cases where the trial antedated *Miller*, but the appellate court heard the case afterwards and applied *Miller* without remanding).

227. United States v. Wasserman, 504 F.2d 1012, 1016 n.11 (5th Cir. 1974) (citations omitted).

228. 430 U.S. at 196-97 n.11 (citations omitted).

tion of an obscenity statute yields a change in the kind of evidence needed for a conviction. This analysis would be necessary regardless of how unforeseeable, as a practical matter, that change was, or to what extent there existed a fixed body of prior law that could be said to have been changed.

3. Splawn v. California: *Procedural Errors and the Pandering Problem*

The most difficult problems presented in any of the four obscenity cases decided this term were raised by *Splawn v. California*.[229] This decision dealt with a number of crucial issues relating to appellate review of alleged procedural errors committed by a state trial court, particularly in the areas of instructions to the jury, and the criteria by which an ex post facto claim is to be judged. More importantly, the majority in *Splawn* and Justice Stevens in his dissent raised troubling questions about the current scope of the doctrine of pandering in obscenity prosecutions, particularly the extent to which that doctrine has been affected by the new concept of commercial speech espoused in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.[230]

a. The Decision

Roy Splawn was convicted in 1971 of selling two reels of obscene film in violation of section 311.2 of the California Penal Code.[231] The California obscenity law[232] essentially incorporates the tripartite definition of obscenity advanced by the plurality in *Memoirs v. Massachusetts*;[233] section 311(a)(2) of that law, added by the California legislature in 1969 after Splawn's offense occurred, reads:

> In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.[234]

229. 431 U.S. 595 (1977).

230. 425 U.S. 748 (1976).

231. CAL. PENAL CODE § 311.2(a) (West Supp. 1977):

> Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

232. CAL. PENAL CODE § 311(a) (West Supp. 1978.) *See* note 36 *supra*.

233. 383 U.S. 413 (1966). *See* note 23 and accompanying text *supra*.

234. CAL. PENAL CODE § 311(a)(2) (West Supp. 1977).

Splawn was duly convicted. After a state appellate court upheld this judgment, the Supreme Court in 1974 vacated that conviction[235] and remanded the case for reconsideration in light of *Miller v. California*,[236] which set forth the standards by which the constitutionality of section 311 as a whole was to be determined. In a separate case decided in 1976, the California Supreme Court ruled that the statute satisfied the requirements articulated in *Miller*.[237] The state court of appeal then reaffirmed Splawn's conviction and the state supreme court denied review of the judgment.[238]

Splawn presented a number of contentions on appeal. The first was that the trial judge's instruction to the jury constituted reversible error. The challenged portion of the instruction reads as follows:

> In determining the question of whether the allegedly obscene matter is utterly without redeeming social importance, you may consider the circumstances of sale and distribution, and particularly whether such circumstances indicate that the matter was being commercially exploited by the defendants for the sake of its prurient appeal. Such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance. The weight, if any, such evidence is entitled [to] is a matter for you, the Jury to determine.
>
> . . . .
>
> Circumstances of production and dissemination are relevant to determining whether social importance claimed for material was in the circumstances pretense or reality. If you conclude that the purveyor's sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter is utterly without redeeming social importance.[239]

In an opinion written for the Court, Justice Rehnquist, joined by Chief Justice Burger and Justices White, Blackmun and Powell, ruled that evidence of pandering was admissible on the issue of obscenity *vel non*. In support of this assertion, he cited the Court's prior rulings in *Ginzburg v. United States*[240] and *Hamling v. United States*.[241] Indeed, Justice Rehnquist pointed out that the Court in *Hamling* had upheld an instruction similar to the one at issue in *Splawn*.[242] Moreover, he remarked that *Hamling* and *Ginzburg*

235. Splawn v. California, 414 U.S. 1120 (1973).

236. 413 U.S. 15 (1973). *See* notes 34-43 and accompanying text *supra*.

237. Bloom v. Municipal Court, 16 Cal. 3d 71, 81, 545 P.2d 229, 235, 127 Cal. Rptr. 317, 323 (1976).

238. 431 U.S. at 597.

239. *Id.* at 597-98 (quoting Brief for Appellee, at 38-39).

240. 383 U.S. 463 (1966). For an analysis of this case, see notes 333-352 and accompanying text *infra*.

241. 418 U.S. 87 (1974). *See* notes 47-53 and accompanying text *supra*.

242. 431 U.S. at 599 (citing Hamling v. United States, 418 U.S. 87, 130 (1974)). The trial judge in *Hamling* had instructed the jury to apply the tripartite *Memoirs* test of obscenity and,

> were prosecutions under federal obscenity statutes in federal courts, where our authority to review jury instructions is a good deal broader than is our power to upset state-court convictions by reason of instructions given during the course of a trial. . . . We can exercise the latter authority only if the instruction renders the subsequent conviction violative of the United States Constitution. Questions of what categories of evidence may be admissible and probative are otherwise for the courts of the States to decide.[243]

Splawn also contended that his conviction violated the ex post facto prohibition contained in article one of the Constitution,[244] and that it contravened the fair notice principle established in *Bouie v. City of Columbia*.[245] The claim based on *Bouie* was rejected because the majority found no attempt by the California courts to give retrospective effect to a new and unforeseeable interpretation of a state law.[246] The ex post facto argument was dismissed because it was said that section 311(a) "does not create any new substantive offense, but merely declares what type of evidence may be received and considered in deciding whether the matter in question was 'utterly without redeeming social importance.' "[247] Justice Rehnquist observed that Splawn's ex post facto argument was based upon the petitioner's reading of the California Supreme Court's 1967 ruling in *People v. Noroff*.[248] The petitioner claimed that under the *Noroff* rule evidence such as that admitted at his trial would be inadmissible were it not for the enactment of section 311(a)(2). The Court repudiated this contention, noting that the court of appeal in *Splawn* said of *Noroff* that it did not " 'disapprove of any use of evidence of pandering for its probative value on the issue of whether the material was obscene. It merely rejected the concept of pandering of non-obscene material as a separate crime under the existing laws of California.' "[249] Since the majority claimed that the ex post facto determination must "turn on a proper reading of the California decisions,"[250] this language by the court of appeal was deemed to foreclose the need to make any such determination.[251] Accordingly, the Court affirmed Splawn's conviction.

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if it found the case to be close, also to consider whether the materials in question had been pandered by looking to their " '[m]anner of distribution, circumstances of production, sale, . . . advertising . . . . [and] editorial intent . . . .' " 418 U.S. at 130 (quoting Brief for Appellee, at 245).

243. 431 U.S. at 599 (citations omitted).

244. U.S. CONST. art. I, § 10, cl. 1: "No State shall . . . pass any . . . ex post facto Law . . . ."

245. 378 U.S. 347 (1964). *See* notes 167-176 and accompanying text *supra*.

246. 431 U.S. at 601.

247. *Id.* at 600.

248. 67 Cal. 2d 791, 433 P.2d 479, 63 Cal. Rptr. 575 (1967).

249. 431 U.S. at 600-01 (quoting Petition for Certiorari, at ix app.).

250. *Id.* at 600.

251. *Id.* at 601.

Justice Brennan, joined by Justices Stewart and Marshall, dissented, expressing his oft-stated view that section 311 as a whole was unconstitutionally overbroad.[252] Justice Stevens, joined by Justices Brennan, Stewart and Marshall, also dissented, but proffered a far more interesting argument. He contended that the pandering doctrine of *Ginzburg v. United States*[253] could not survive the ruling in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[254] which had held that commercial speech is protected by the First Amendment unless such speech is deceptive or otherwise subject to regulation.[255] Accordingly, he claimed:

> Truthful statements which are neither misleading nor offensive are protected by the First Amendment even though made for a commercial purpose. . . . Nothing said on petitioner's behalf in connection with the marketing of these films was false, misleading, or even arguably offensive either to the person who bought them or to an average member of the community. The statements did make it clear that the films were "sexually provocative," but that is hardly a confession that they were obscene. And, if they were not otherwise obscene, I cannot understand how these films lost their protected status by being truthfully described.[256]

Consequently, Justice Stevens said he would not send Splawn to jail "for telling the truth about his shabby business."[257]

He also found that Splawn had presented a cognizable ex post facto claim. Unlike the majority, Justice Stevens construed the decision of the California Supreme Court in *Noroff* as one barring any submission of evidence of pandering to the jury. "After petitioner's offense, the California Legislature retroactively adopted *Ginzburg* by statute. In my view, petitioner had the right to rely on the *Noroff* decision, and to believe that he was entitled to truthfully advertise otherwise nonobscene material."[258] Thus, on this issue also, the dissenters detected reversible error.

b. Analysis

For so brief an opinion, *Splawn* raises a surprisingly large number of troublesome questions. Perhaps the best method of dealing with these questions is to divide the analysis of the case into three sections dealing with

252. *Id.* at 601-02 (Brennan, J., dissenting, joined by Stewart and Marshall, JJ.).

253. 383 U.S. 463 (1966).

254. 425 U.S. 748 (1976).

255. 431 U.S. at 603 n.2 (Stevens, J., dissenting, joined by Brennan, Stewart and Marshall, JJ.). Justice Brennan, the author of the majority opinion in *Ginzburg*, did not join in this footnote. *Id.*

256. *Id.* at 602-03 (citation omitted). Justice Stevens also argued that truthful advertising ought to be encouraged because it provides "a warning to those who find erotic materials offensive that they should shop elsewhere for other kinds of books . . . ." *Id.* at 604.

257. *Id.*

258. *Id.* at 604-05 n.4.

(a) the problem of the scope of review of jury instructions, (b) the ex post facto problem and (c) the pandering problem.

(1) *Scope of Review of Jury Instructions*

In reviewing Splawn's claims, Justice Rehnquist initially asserted that the Court's power to upset state court convictions because of allegedly erroneous jury instructions was extremely limited. Citing *Cupp v. Naughton*[259] and *Henderson v. Kibbe*,[260] he argued that in such a situation, reversal was mandated only if the instruction renders the conviction violative of the Constitution.[261] While both of these cases involved state prosecutions, and the constitutional validity of jury instructions given therein, both, unlike *Splawn*, involved collateral attacks on the convictions in question. The significance of this fact was explicitly noted in each decision.

Cupp involved a "presumption of truthfulness" instruction[262] that was challenged, after exhaustion of all remedies in state court, in a federal habeas corpus proceeding. The Court in that case noted:

> Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even "universally condemned," but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment.[263]

Similarly, in *Henderson*, which involved a challenge by a habeas corpus petitioner based on a New York trial judge's failure to instruct the jury on the issue of causation in a murder case, the Court said:

> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," *Cupp v. Naughton*, 414 U.S. 141, 147, not merely whether "the instruction is undesirable, erroneous or even 'universally condemned,' " *id.*, at 146.[264]

The net effect of *Henderson* and *Cupp* is to place severe limits on the power of federal courts in habeas corpus proceedings to overturn state court convictions because of faulty jury instructions. In that particular context,

259. 414 U.S. 141 (1973).

260. 431 U.S. 145 (1977).

261. 431 U.S. at 599.

262. Under the ruling of *In re* Winship, 397 U.S. 358, 364 (1970), the dictates of due process require that guilt beyond a reasonable doubt be proven, even in delinquency proceedings.

263. 414 U.S. at 146.

264. 431 U.S. at 154 (citation omitted).

these limits are sensible. The desirability of conferring collateral relief is countervailed by the need to preserve the finality of state court judgments, especially if a habeas corpus proceeding is initiated many years after the state conviction, when it may be impossible, as a practical matter, to conduct a retrial.[265]

The *Cupp-Henderson* doctrine has no applicability to a case like *Splawn*, however. The petitioner therein lodged his challenge against the trial judge's instructions while the case was on direct appeal; no collateral attack was involved. Thus, it would seem that in the specific context of state obscenity prosecutions, *Splawn* applied a standard of review appropriate for considering the merits of collateral attacks to a judgment being contested on direct appeal, where the reasons for implementing such a standard are not present. If the *Cupp-Henderson* standard is inapposite in such a situation, one may still ask what reviewing criterion should control direct appeals like the one involved in *Splawn*.

Henderson implies, at the very least, that the burden of proof to establish reversible error with respect to a jury instruction is significantly less onerous in a direct appeal. In the context of obscenity cases, the key Supreme Court decision discussing the appropriate burden of proof is *Hamling v. United States*.[266] In that case, the petitioner, in an appeal from his conviction under section 1461 of Title eighteen of the United States Code,[267] argued that the instruction of the trial judge advising the jury to apply national standards in its determination of obscenity *vel non* constituted reversible error, because the Court in *Miller v. California*[268] had mandated the application of local community standards. There were eighteen questioned references to national standards in the instructions in *Hamling*, which admittedly encompassed a wider geographical basis for deriving criteria by which obscenity could be judged than was warranted under *Miller*. The Court held that these references did not require reversal absent a showing that they "would have materially affected the deliberations of the jury."[269] Clearly, this test is less restrictive than that expressed in *Cupp* and *Henderson*. Should it have been applied in the *Splawn* case?

Several decisions emanating from the Ninth Circuit suggest that this question ought to be answered affirmatively. In *United States v. Dachstein-*

265. *See id.* at 154 n.13; Blackledge v. Allison, 431 U.S. 63, 83 (1977) (Powell, J., concurring); Schneckloth v. Bustamonte, 412 U.S. 218, 256-66 (1973) (Powell, J., concurring); Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting).

266. 418 U.S. 87 (1974). *See* notes 47-53 and accompanying text *supra*.

267. 18 U.S.C. § 1461 (1970). *See* note 8 *supra*.

268. 413 U.S. 15 (1973). *See* notes 34-43 and accompanying text *supra*.

269. 418 U.S. at 108.

er,[270] another section 1461 prosecution, the trial court judge also issued jury instructions incorporating references to "contemporary national community standards" rather than to the standards of the judicial district from which the jurors were drawn. Since there was no proof that the national standards were more stringent than local ones, the Ninth Circuit applied *Hamling*, and said, "[j]udging from the evidence, arguments and instructions in this case, [the defendant] was not significantly prejudiced by the trial judge's erroneous instructions on national standards."[271]

In contrast, in *United States v. Henson*,[272] the Ninth Circuit reached a different result. The defendant in *Henson* was prosecuted under section 1462 of Title eighteen of the United States Code,[273] which forbids interstate transportation of obscene materials. There, also, instructions on national standards were tendered to the jury. But in that case, the government introduced expert testimony disclosing that the hypothetical national standard "likely would tolerate *less* sexual candor than the attitudes prevailing in Southern California [where the trial was conducted] or in the State of California as a whole."[274] Thus, the Ninth Circuit concluded that such efforts by the government to posit a less libertarian national standard ensured that any jury instruction embodying a reference to that standard would be so prejudicial as to require a new trial.[275]

Finally, in *United States v. Cutting*,[276] the court of appeals discussed the problem of prejudice at length. National standards were mentioned in *Cutting* only in the jury instructions and once in the defense counsel's

270. 518 F.2d 20 (9th Cir.), *cert. denied*, 421 U.S. 954 (1975).

271. 518 F.2d at 22.

272. 513 F.2d 156 (9th Cir. 1975).

273. 18 U.S.C. § 1462 (1970):

> Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—
>
> (a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion picture film, paper, letter, writing, print, or other matter of indecent character; or
>
> . . . .
>
> [w]hoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—
>
> shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

274. 513 F.2d at 158 (emphasis in original). The government had introduced the expert testimony of Homer Young, a former FBI agent and then Director of the Administration of Justice Department at California Lutheran College. He claimed that the contemporary standards of California were far less stringent than those of the nation as a whole.

275. *Id.*

276. 538 F.2d 835 (9th Cir. 1976).

closing arguments;[277] no evidence was admitted to show that the putative national standard was any stricter than that prevalent in the Central District of California, where the trial occurred.[278] Thus, the case could be, and was, distinguished from *Henson*. In making such a distinction, the court noted that the essence of prejudice in these cases was whether or not the challenged instruction led the jury to apply some specialized test other than that consisting of the "average person, applying contemporary community standards."[279] Therefore,

> [p]rejudice does not depend on whether the [local and national] standards differ in fact, but whether the jury thought they did. A remand to determine whether the national standard is more or less strict than the local standard would be an exercise in futility. To be relevant to the question of prejudice the hearing would have to determine whether the jurors thought the two standards differed, and if so, whether they thought the national standard was stricter. Obviously such a hearing would be inappropriate. The question of prejudice is to be resolved on what the record shows as to the probability that the reference to a national standard would have materially affected the deliberations of the jury.[280]

At this juncture, two questions could be raised: does the "materially affect the deliberations of the jury" criterion apply to all types of jury instructions, or only to instructions relating to contemporary community standards? If the former characterization is accurate, does it apply only in federal cases, such as *Hamling, Dachsteiner, Henson* and *Cutting*? The Court in *Hamling* also confronted a challenge to a trial instruction on the issue of pandering. It held such an instruction permissible "as long as the proper constitutional definition of obscenity is applied,"[281] but said nothing about what the criterion for reviewing such an instruction would be. In *Splawn*, the petitioner contended that the instruction given by the California trial judge allowed the jury to convict him for advertising material that was not obscene per se under the *Miller* standards.[282] This contention raises the same issue discussed by *Hamling* and the Ninth Circuit: whether the challenged instruction prejudiced the jury against the defendant, causing it to fit the evidence adduced at trial into an incorrect theoretical framework.

277. *Id.* at 840-41.

278. *Id.* at 841.

279. *Id.*

280. *Id.* at 841-42. Of course, this level of scrutiny applies only to jury instructions. Instructions to a grand jury that incorporate an erroneous test for obscenity will not serve to invalidate an indictment. United States v. Linetsky, 533 F.2d 192, 200-01 (5th Cir. 1976); United States v. Slepicoff, 524 F.2d 1244, 1247 (5th Cir. 1975).

281. Hamling v. United States, 418 U.S. 87, 130 (1974). Of course, if one fails to object to a particular pandering instruction, one forfeits the right to argue any error on appeal. United States v. Wild, 422 F.2d 34, 37 (2d Cir. 1969), *cert. denied*, 402 U.S. 986 (1971).

282. 431 U.S. at 597.

Indeed, *Cutting*'s discussion of prejudice as a concept would appear to be useful in a variety of contexts. It would appear to suggest that the "materially affect the deliberations of the jury" test comprises a general standard that should be applied by an appellate court whenever it reviews an instruction in an obscenity case on direct appeal. Applying the *Hamling* standard to the facts in *Splawn*, it could be argued that the challenged instruction did, in fact, constitute error that materially influenced the jury's consideration on the issue of obscenity *vel non*. By instructing that "commercial exploitation for the sake of prurient appeal" justified the conclusion that the material being exploited was utterly without redeeming social value,[283] the trial judge permitted the jury to apply a "specialized test" to the defendant's disadvantage. Even if the trier of fact found inadequate evidence to support a finding of obscenity under the *Memoirs* standard, which is embodied in the California penal code, it could nevertheless render a guilty verdict by concluding that material not obscene in the abstract became proscribable because of the manner in which it was merchandised. Such a result would clearly be improper. As Professor Schauer observed, "no amount of pandering can render a clearly nonobscene work obscene, and without some evidence of prurient appeal, patent offensiveness, and lack of value, the question of pandering is irrelevant."[284] The effect of the trial judge's instruction in *Splawn* is to make pandering the decisive criterion by which lack of social value is to be ascertained. In so doing, it makes one component of the definition of obscenity depend upon evidence purportedly admitted for the sole purpose of assisting the jury in deciding close cases where there is already independent evidence of prurient appeal, patent offensiveness and lack of value. So under the *Hamling* standard of review, the jury instruction in *Splawn* would seem to constitute reversible error. But one could argue that, even assuming that the *Hamling* criterion applied to instructions on pandering, it does not govern federal appellate review of state prosecutions. While it is true that the test of *Hamling* has been analyzed solely in the context of federal cases, that test, articulated in a case involving an obscenity prosecution being challenged on direct appeal, would seem to be far more relevant to *Splawn* than the doctrines espoused in *Cupp* and *Henderson*. Both of the latter cases involved collateral attacks on state court judgments in habeas corpus proceedings; neither of them concerned prosecution for the dissemination of obscene materials. Thus, while Justice Rehnquist may be correct in asserting that the state has wide discretion in determining the categories of admissible evidence in trials conducted in its

283. *See* note 239 and accompanying text *supra*.

284. SCHAUER, *supra* note 3, at 85.

courts, he neglects to take into account the Supreme Court's duty to subject such evidence, and the instructions relating to it, to exacting review; "it remains the function and obligation of the appellate court to restrict obscenity findings to the guidelines of the *Miller* case, both as to legal and factual determinations."[285] Thus, in *Jenkins v. Georgia*,[286] the key post-*Miller* case reviewing a conviction under state obscenity laws, the Court focused on the jury's fact-finding process, and emphasized that the scope of review in general is greater where the issues under review involve First and Fourteenth Amendment rights.[287] If so, the restrictive *Cupp-Henderson* test would simply seem to be inapposite in a case like *Splawn*.[288]

Even if one assumes otherwise, however, there remains another problem with the scope of review utilized in *Splawn*. In *Ginzburg v. United States*,[289] the case that established the concept of pandering, the Supreme Court defined its reviewing function as follows:

> In the cases in which this Court has decided obscenity questions since *Roth [v. United States]*, it has regarded the materials as sufficient in themselves for the determination of the question. In the present case, however, the prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene. We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity, and assume without deciding that the prosecution could not have succeeded otherwise. As . . . did the courts below . . . we view the publications against a background of commercial exploitation of erotica solely for the sake of their prurient appeal. The record in that regard amply supports the decision of the trial judge that the mailing of all three publications offended the statute.[290]

The majority in *Ginzburg* then proceeded to scrutinize in detail the evidence of pandering, including the choice of a place from which the material in question was mailed, the extent of the mailings actually made and the nature of the advertising brochures used to promote the material in question.[291] On the basis of such a scrutiny, the majority concluded that this evidence resolved all "ambiguity and doubt."[292] The upshot of *Ginzburg*, then, is that an appellate court always has the duty to review the sufficiency of the

285. *Id.* at 115.

286. 418 U.S. 153 (1974). *See* notes 54-58 and accompanying text *supra*.

287. *See id.* at 160.

288. Indeed, United States v. Young, 465 F.2d 1096 (9th Cir. 1972), held that error inherent in a pandering instruction will be considered harmless only if it had no effect on the outcome of the case. *Id.* at 1099-1100.

289. 383 U.S. 463 (1966).

290. *Id.* at 465-66 (citation & footnotes omitted).

291. *See id.* at 466-73.

292. *Id.* at 470.

evidence underlying the conviction in an obscenity prosecution. Indeed, this proposition was reiterated in *Smith v. United States*,[293] a case decided in the same term as *Splawn*. Where the issue is one of whether the materials in themselves are obscene, an appellate court will be satisfied if those materials have been introduced into evidence at trial.[294] Hard core pornography presumably "can and does speak for itself."[295] But where the issue is whether the defendant engaged in pandering, *Ginzburg* suggests that a court of appeals must make an independent review of the evidence underlying a charge to the jury on that issue, in order to ascertain whether that evidence was sufficient to warrant such a charge.[296] Once again, one might respond that *Ginzburg* was a federal prosecution, and perhaps different standards ought to apply in cases involving convictions under state law. But such a contention is faulty. *Ginzburg* establishes the general doctrine of pandering, purportedly defining the constitutionally permissible uses to which that

293. 431 U.S. 291, 305-06 (1977).

294. Hamling v. United States, 418 U.S. 84, 104 (1974); Kaplan v. California, 413 U.S. 115, 122 n.5 (1973); Paris Adult Theater I v. Slaton, 413 U.S. 49, 56 (1973); United States v. Dachsteiner, 518 F.2d 20, 23 (9th Cir.), *cert. denied*, 421 U.S. 954 (1975); United States v. Wild, 422 F.2d 34, 35-36 (2d Cir. 1969), *cert. denied*, 402 U.S. 986 (1971); Kahm v. United States, 300 F.2d 78, 84 (5th Cir.), *cert. denied*, 369 U.S. 859 (1962). The rule has been succinctly stated by the Ninth Circuit: "United States v. Hamling [*sic*] . . . supports the proposition that, if the government does rely upon exhibits which meet the *Miller* test and wins, the defendant is not entitled to a reversal for insufficient evidence." United States v. Obscene Magazines, Film & Cards, 541 F.2d 810, 811 (9th Cir. 1976).

295. United States v. Wild, 422 F.2d 34, 36 (2d Cir. 1969), *cert. denied*, 402 U.S. 986 (1971), *quoted in* Paris Adult Theater I v. Slaton, 413 U.S. 49, 56 n.6 (1973). *See also* United States v. Davis, 353 F.2d 614, 615 (2d Cir. 1965), *cert. denied*, 384 U.S. 953 (1966); Kahm v. United States, 300 F.2d 78, 84 (5th Cir.), *cert. denied*, 369 U.S. 859 (1962); United States v. Womack, 294 F.2d 204, 205-06 (D.C. Cir.), *cert. denied*, 365 U.S. 859 (1961).

296. For other cases utilizing the concept of reviewing evidence of pandering in order to test its "sufficiency," see United States v. Pinkus, 551 F.2d 1155, 1159-60 (9th Cir. 1977); United States v. Dachsteiner, 518 F.2d 20, 22-23 (9th Cir.), *cert. denied*, 421 U.S. 954 (1975). In other cases, courts simply engage in independent review of the proofs adduced at trial without characterizing such review as part of their duty to test the sufficiency of the evidence. This independent scrutiny is entirely sensible when one considers the fact that pandering entails a concept of "variable obscenity," of obscenity as "a chameleonic quality of material that changes with time, place and circumstance." Lockhart & McClure, *supra* note 3, at 68. The necessary consequence of such a concept is the subjective determination that materials which might not be obscene in other contexts become obscene because of the manner in which they have been purveyed. In order to test the validity of such a determination by a jury, a court must, *ipso facto*, review the manner of purveyance. Moreover, the need to engage in such painstaking scrutiny of the evidence of pandering might also be derived from the idea that obscenity cases present instances of "constitutional fact" meriting de novo review. *See* notes 637-648 and accompanying text *infra*. For general discussions of the basic concept of variable obscenity, see Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 938-39 (1963); Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 U. PA. L. REV. 834, 847-52 (1964); Lockhart & McClure, *supra* note 3, at 68-88; Schauer, *The Return of Variable Obscenity?*, 28 HASTINGS L.J. 1275, 1277-80 (1977).

doctrine may be put in obscenity prosecutions. There is no indication in the majority's opinion that a different level of review would apply in state cases.

Indeed, a year after *Ginzburg*, the Court confronted a set of state cases in which the pandering issue had been raised. But, after briefly reviewing the facts of the three prosecutions consolidated under the title of *Redrup v. New York*,[297] the Court detected no "evidence of the sort of 'pandering' which [it] found significant in *Ginzburg.*"[298] This case suggested that the relatively rigorous review applied in the latter ruling would also extend to state decisions. The point was emphasized by the Ninth Circuit in *Childs v. Oregon*,[299] a federal habeas corpus proceeding to challenge an obscenity conviction rendered in a state court. There, it was said that the federal court of appeals had a constitutional duty to make a de novo determination of obscenity.[300] Consequently, the Ninth Circuit examined closely the evidence of pandering adduced at trial, and said that such evidence indicated that the conviction was proper.[301] Thus, these decisions do suggest that the *Ginzburg* requirement of an independent appellate review on the sufficiency of the evidence with respect to pandering will apply in appeals from prosecutions in state court.

If this assessment is accurate, then Justice Rehnquist's conclusion in *Splawn* seems improper. He stated that "[q]uestions of what categories of evidence may be admissible and probative are otherwise for the courts of the States to decide"[302] absent a clear-cut infringement of the Constitution. The majority made no attempt to review the proof of pandering in this case to determine whether the instruction to the jury was, in fact, based on sufficient evidence. As a result, *Splawn* creates some doubt about what type of scrutiny the Court will now employ in state obscenity cases involving

297. 386 U.S. 767 (1967). The three cases were *Redrup v. New York, Austin v. Kentucky* and *Gent v. State*. In *Redrup*, the petitioner, a clerk at a New York City newsstand, was prosecuted for selling two books, *Lust Pool* and *Shame Agent*, to a plainclothes patrolman who asked for them by name. *Id.* at 768. In *Austin*, the petitioner was the owner-operator of a retail bookstore. A woman bought two magazines, *High Heels* and *Spree*, from a salesgirl at the store after requesting them specifically. Plenary review of the resulting conviction was denied by the Kentucky Court of Appeals. *Id.* at 768-69 & n.2. *Gent* involved efforts by a prosecuting attorney to enjoin distribution of various allegedly obscene magazines. A state chancery court entered the requested judgment and the Arkansas Supreme Court affirmed its order. *Id.* at 769.

298. *Id.* at 769.

299. 431 F.2d 272 (9th Cir. 1970), *vacated on other grounds*, 401 U.S. 1006 (1971). For a more complete discussion of this case, see notes 375-378 and accompanying text *infra*.

300. 431 F.2d at 275-76 (quoting Lockhart & McClure, *supra* note 3, at 114 & 116). The quoted language refers to the duty of courts in obscenity cases to make a de novo determination of whether or not the materials in question are obscene. *See* note 296 *supra*.

301. 431 F.2d at 277.

302. 431 U.S. at 599.

pandering. It suggests that because such cases emanate from state courts, they are insulated from a rigorous review of the record by federal courts on appeal. If so, *Splawn* marks a new direction in the Court's treatment of the entire issue of pandering.

(2) *Ex Post Facto Issues*

The petitioner in *Splawn* identified two ex post facto issues. One involved the rule of *Bouie v. City of Columbia*,[303] and the other involved the constitutional prohibition against the enactment of retroactive criminal laws. Each of these issues will be discussed in turn.

The *Bouie* problem may be disposed of summarily. *Bouie* established the general rule that where a court gives retrospective effect to its unforeseen expansive interpretation of a narrow and precise criminal statute, such an action violates the requirements of due process. The Court in *Marks v. United States*,[304] an obscenity case, extended the *Bouie* rule to situations in which the broader interpretation is not entirely sudden and unforeseen.[305] The majority in *Splawn* rejected the petitioner's *Bouie* contention, finding that "[n]o such change in the interpretation of the elements of the substantive offense prohibited by California law took place here."[306] This assessment appears accurate. As noted, Splawn's case was originally remanded to the California court in 1974 for reconsideration in light of the 1973 *Miller* decision. In 1976, the California Supreme Court decided the case of *Bloom v. Municipal Court*.[307] It held that section 311(a) of the penal code, which defined "obscene matter,"[308] is constitutional; it did so by incorporating into that statutory language the two examples of hard core pornography given by the Supreme Court in *Miller*.[309] After this ruling, the state court of appeal then reaffirmed Splawn's conviction, presumably relying upon

303. 378 U.S. 347 (1964). *See* notes 167-176 and accompanying text *supra*.

304. 430 U.S. 188 (1977). *See* notes 59-228 and accompanying text *supra*.

305. *See* notes 167-223 and accompanying text *supra*.

306. 431 U.S. at 601.

307. 16 Cal. 3d 71, 545 P.2d 229, 127 Cal. Rptr. 317 (1976).

308. *See* note 36 *supra*.

309. 16 Cal. 3d at 81, 545 P.2d at 235, 127 Cal. Rptr. at 323. *Bloom* was not the first California case to attempt to read the *Miller* standards into section 311(a). In People v. Enskat, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973), *cert. denied*, 418 U.S. 937 (1974), a state appellate court concluded that the statute proscribed only "hard-core pornography" and "graphic description of sexual activity." 33 Cal. App. 3d at 908-09, 109 Cal. Rptr. at 438-39. Subsequently, a three-judge federal court held that this judicial gloss did not meet the specificity requirements of *Miller*. Miranda v. Hicks, 388 F. Supp. 350, 357-60 (C.D. Cal. 1974). On appeal, the Supreme Court vacated this judgment, saying that the lower court committed error in reaching the merits of the case because there was not such a showing of bad faith on the part of state agents enforcing the obscenity statute to require a relaxation of the principle of abstention. Hicks v. Miranda, 422 U.S. 332, 348-52 (1975).

Bloom in doing so. Thus, a judicial interpretation of a criminal statute may have been given retrospective effect in this case, but it was a limiting interpretation, not an expansive one. *Bloom* cured the vagueness inherent in the California law and, in so doing, narrowed rather than extended the scope of that law. Thus, the situation in *Splawn* is distinguishable from both *Bouie* and *Marks*.

The petitioner's claim based on the ex post facto prohibition in the United States Constitution is considerably more troublesome. Certainly, there appeared to be a tenable ex post facto argument. As noted earlier, Splawn was convicted in 1971; section 311(a)(2) was enacted in 1969. Both the majority and Justice Stevens agreed that while the law defining the substantive misdemeanor for which Splawn was convicted was in effect both at the time of his trial and at the time that he committed his offense, section 311(a)(2), which authorized an instruction on pandering, was enacted by the state legislature after Splawn's offense but before his trial.[310] In light of this fact, what the majority had to say on the ex post facto issue is extremely disturbing.

Justice Rehnquist's opinion on this issue can be criticized on several grounds. In response to Splawn's argument that the instructions were given pursuant to a state law enacted after the conduct in question, the majority asserted that section 311(a)(2) does not create any new substantive offense, but merely establishes what evidence is admissible to show lack of "redeeming social importance."[311] While Justice Rehnquist cites the definitive discussion of ex post facto laws given by Justice Chase in the Supreme Court's 1798 decision of *Calder v. Bull*,[312] he ignores the express holding of that case. Justice Chase stated that an ex post facto law consists of any statute that (a) punishes as a crime an act previously committed, which was innocent when done; (b) makes more burdensome the punishment for a crime than that which existed at the time the crime occurred; (c) aggravates retrospectively the nature of a crime or (d) alters the legal rules of evidence so that a defendant may be convicted upon lesser or different evidence than the law required at the time he committed his offense.[313] Justice Rehnquist acknowledged that section 311(a)(2) was enacted after Splawn committed the conduct for which he was convicted; his point seemed to be that a change in procedure governing the admissibility of categories of evidence at

310. *See* 431 U.S. at 600; *id.* at 604-05 n.4 (Stevens, J., dissenting, joined by Brennan, Stewart and Marshall, JJ.).

311. 431 U.S. at 600.

312. 3 U.S. (3 Dall.) 386 (1798).

313. *Id.* at 390. *Accord*, Beazell v. Ohio, 269 U.S. 167, 169 (1925); Malloy v. South Carolina, 237 U.S. 180, 183-84 (1915); Gibson v. Mississippi, 162 U.S. 565, 589-90 (1896); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 325-26 (1867).

trial could never be an ex post facto law because it creates no "new substantive offense." But *Calder* belies such an assumption. Justice Chase defined as an ex post facto law any retroactive statute altering the legal rules of evidence so as to make a conviction depend on evidence differing from what was previously required. Section 311(a)(2) appears to do exactly that: it allows admission of evidence of pandering on the issue of obscenity *vel non*. Moreover, what Justice Rehnquist said in *Splawn* is not entirely consistent with what he said in his opinion for the majority in *Dobbert v. Florida*,[314] the major decision interpreting the ex post facto prohibition handed down by the Court during its 1976-77 term. *Dobbert* was not an obscenity case; it involved various ex post facto challenges to Florida's death penalty statute. In *Dobbert*, Justice Rehnquist not only quoted language indicating that the concept of an ex post facto law encompassed a variety of statutes other than those merely creating new offenses,[315] but he also cited approvingly further language holding that the provision prohibiting such statutes reached changes of modes in procedure affecting matters of substance.[316] In *Splawn*, the statute authorizing inclusion of evidence regarding pandering clearly goes to a substantive issue, namely, whether the materials in question were "utterly without redeeming social importance." This new rule of evidence affects directly the substantive issue in a prosecution under section 311, that of obscenity *vel non*.

Justice Rehnquist seemed to recognize this problem because he then attempted to show that section 311(a)(2) in fact effectuated no change in prior law. He based his conclusion on the assertion by the state appellate court in *Splawn* that the 1967 decision of *People v. Noroff*[317] did not delimit the admissibility of pandering evidence in state obscenity prosecutions.[318] But the appellate court in *Splawn* was mistaken and, as a result, so was Justice Rehnquist.

Noroff also involved a charge that a defendant violated section 311.2 of the state's penal code. A municipal court in Los Angeles dismissed all charges, and its decision was upheld by the appropriate appellate department of the superior court. After a transfer, however, the state court of appeal reversed. That appellate court cited the holding in *Ginzburg v. United*

314. 432 U.S. 282 (1977).

315. *Id.* at 292 (quoting Beazell v. Ohio, 269 U.S. 167, 169-70 (1925)).

316. *Id.* at 293 (quoting Beazell v. Ohio, 269 U.S. 167, 171 (1925)). *Beazell* upheld against an ex post facto challenge an Ohio law that had provided that when two or more persons are indicted for a felony, each should be tried separately on application to the court but that was amended to require joint trial unless good cause was shown for adopting an alternative procedure.

317. 67 Cal. 2d 791, 433 P.2d 479, 63 Cal. Rptr. 575 (1967), *rev'g* 58 Cal. Rptr. 172 (1967).

318. 431 U.S. at 600-01.

States[319] that evidence of pandering may be admissible in obscenity prosecutions. The court of appeal claimed that a similar proposition had been advanced by the California Supreme Court in its 1966 decision in *In re Klor*,[320] in which it was said:

> [T]he central issue in a criminal obscenity trial pivots on the potentially punishable conduct of the defendant rather than upon the allegedly obscene nature of the material. . . . No constitutionally punishable conduct appears in the case of an individual who prepares material for his own use or for such personal satisfaction as its creation affords him.[321]

In sum, the appellate court claimed that it would be a "rare case" where evidence of pandering would not be admissible in a prosecution for dissemination of obscenity.[322] The California Supreme Court reversed. Justice Tobriner, speaking for a majority of six,[323] noted that "[n]othing in *Klor,* of course, suggested the adoption of a 'pandering' concept similar to that elaborated in *Ginzburg*. . . ."[324] He also observed that the indictment against Noroff had included no charge of pandering; nor had the legislature, at that juncture, made pandering a crime. Accordingly, he concluded that "we cannot accept the People's argument . . . that the trial court should have permitted the prosecution to go to the jury with evidence bearing upon the defendant's 'pandering' of the magazine in question."[325] The interpretation of *Noroff* advanced by the state appellate court in *Splawn* thus ignores the fact that the court in the 1967 case rejected both the argument that pandering constitutes a distinct crime *and* the argument that evidence of pandering ought to be admissible. Justice Rehnquist, by following that interpretation, commits a similar error.

There is yet a third problem with Justice Rehnquist's approach. In citing the interpretation of *Noroff* espoused by the state appellate court in *Splawn*, he claimed it was "unnecessary to determine whether if

319. 383 U.S. 463 (1966).

320. 64 Cal. 2d 816, 415 P.2d 791, 51 Cal Rptr. 903 (1966).

321. *Id.* at 821, 415 P.2d at 794, 51 Cal. Rptr. at 906, *quoted in* People v. Noroff, 58 Cal. Rptr. 172, 177 (1967).

322. People v. Noroff, 58 Cal. Rptr. 172, 177 (1967).

323. Justice Tobriner was joined by Chief Justice Traynor and Justices McComb, Mosk, Peters and Sullivan. Justice Burke dissented, claiming that the majority "flagrantly fails to adopt" the Supreme Court's test for obscenity. 67 Cal. 2d at 797, 433 P.2d at 483, 63 Cal. Rptr. at 579 (Burke, J., dissenting).

324. 67 Cal. 2d at 793 n.4, 433 P.2d at 480 n.4, 63 Cal. Rptr. at 576 n.4. Prior to *Noroff* at least one California court of appeal had expressly adopted and applied the *Ginzburg* doctrine. Landau v. Fording, 245 Cal. App. 2d 820, 824, 830, 54 Cal. Rptr. 177, 179-80, 183 (1966), *aff'd per curiam*, 387 U.S. 456 (1967). The California Supreme Court in *Noroff* explicitly disapproved of that portion of the holding in *Landau*. 67 Cal. 2d at 793, 433 P.2d at 480, 63 Cal. Rptr. at 576. This supports the conclusion that the court meant to reject the pandering concept in toto.

325. 67 Cal. 2d at 793, 433 P.2d at 480, 63 Cal. Rptr. at 576.

§ 311(a)(2) had permitted the introduction of evidence which would have been previously excluded under California law, petitioner would have had a tenable claim under the *Ex Post Facto* Clause of the United States Constitution."[326] The rationale implicit in this holding is that because the state appellate court found that section 311(a)(2) did not alter prior law, no ex post facto problem was presented. But the ex post facto argument was based on a prohibition contained in article one, section ten of the United States Constitution. While the state court's decision on jury instructions and admissibility of evidence might be entitled to deference, even the majority indicated that such a decision would be subject to ultimate constitutional strictures.[327] Why is the same not true with respect to Splawn's ex post facto claim? Indeed, on this point, it is instructive to compare *Splawn* with *Dobbert*.[328] In the latter case, the state supreme court also dismissed an ex post facto claim,[329] but the United States Supreme Court did not find this action decisive. Instead, the majority in *Dobbert* engaged in its own independent analysis in order to determine whether the new Florida death penalty statute was in fact more onerous than the old law. It answered this question negatively, pointing out that under the new statute "[d]eath is not automatic, absent a jury recommendation of mercy, as it was under the old procedure."[330] This conclusion was founded not only on a statement by the Florida Supreme Court in a 1975 case, but also on the Supreme Court's ruling in 1976 that the new Florida statute was unconstitutional, and on the majority's own consideration of the differences between the two laws.[331] Subsidiary ex post facto claims raised by Dobbert were also dealt with by reference to prior United States Supreme Court decisions.[332] Yet, curiously

326. 431 U.S. at 601.

327. *Id.* at 599.

328. Dobbert v. Florida, 432 U.S. 282 (1977). *See* notes 314-16 and accompanying text *supra*.

329. *See* 432 U.S. at 286-87.

330. *Id.* at 295.

331. *Id.* (quoting Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), *cited with approbation in* Proffitt v. Florida, 428 U.S. 242, 249 (1976)).

332. Dobbert presented two other ex post facto claims in addition to the contention that the state's new death penalty statute was more onerous than its predecessor. First, he claimed that at the time he committed the crime in question, first-degree murder, the state lacked any valid death penalty as a result of the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972). *Furman* was applied to the old Florida statute by the state's supreme court in Donaldson v. Sack, 265 So. 2d 499, 501 (Fla. 1972). Dobbert thus contended that any attempt to invoke the penalty of death against him violated the Constitution's ex post facto proscription. The Court found this argument sophistic, relying on Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940), for the proposition that the existence of the invalidated statute served as an "operative fact" affording the petitioner with "fair warning as to the degree of culpability which the State ascribed to the act of murder." 432 U.S. at 297. Second, Dobbert argued that while the new Florida statute provided that anyone sentenced to life imprisonment must serve

enough, Justice Rehnquist, who wrote the majority opinion in *Dobbert*, declined to follow a similar approach in *Splawn*. This fact suggests that the deference to state decisions in considering an ex post facto claim may well be greater in the context of obscenity prosecutions than it is in other criminal law cases. Why this should be so remains a mystery never resolved by the majority in *Splawn*.

(3) *Pandering*

The problems raised in *Splawn* regarding the concept of pandering merit extensive comment, especially since three justices now appear convinced that the pandering doctrine is defunct. To facilitate such comment, the discussion of pandering will be divided into two sections: one on pandering per se and one on pandering and commercial speech.

(a) **Pandering Per Se**

Pandering, according to the Court in *Ginzburg v. United States*,[333] was described as the "commercial exploitation of erotica solely for the sake of their prurient appeal."[334] One question left somewhat unsettled by *Ginzburg* is whether the factor of pandering will cause a work that is not obscene in the abstract to be deemed obscene because of the context in which it was merchandised. The Court in *Ginzburg* assumed, but declined to hold, that the materials involved therein, standing alone, might not be obscene.[335] This suggests that if one markets the Bible in a pruriently exploitative manner, one could be prosecuted for selling it. As the Court in *Memoirs v. Massachusetts*[336] said, "where the purveyor's sole emphasis is on the sexually provocative aspects of his publication, a court could accept his evaluation at its face value."[337] But it would be incorrect to read *Ginzburg* so broadly.

at least twenty-five years before becoming eligible for parole, the prior statute contained no similar provision. Indeed, the Florida Supreme Court had held that this new section could not be given retrospective effect. Lee v. State, 294 So. 2d 305, 307 (Fla. 1974). The petitioner argued that he had thus made out a legitimate ex post facto claim. Language in Lindsey v. Washington, 301 U.S. 397, 400-01 (1937), seemed to support this contention by requiring courts to consider in an ex post facto case the standard of punishment prescribed by statute rather than the sentence actually imposed. But the Court in *Dobbert* distinguished *Lindsey* on its facts and declined to find an ex post facto violation "where the change has had no effect on the defendant in the proceedings of which he complains." Since Dobbert had been sentenced to death, not life imprisonment, his challenge was rejected. 432 U.S. at 300.

333. 383 U.S. 463 (1966).

334. *Id.* at 466. For Chief Justice Warren's definition of the term, see note 26 *supra*.

335. 383 U.S. at 465-66.

336. 383 U.S. 413 (1966).

337. *Id.* at 420. *See also* Mishkin v. New York, 383 U.S. 502, 510 (1966); Ginzburg v. United States, 383 U.S. 463, 472 (1966); Childs v. Oregon, 431 F.2d 272, 276 (9th Cir. 1970), *vacated*, 401 U.S. 1006 (1971); People v. Kuhns, 61 Cal. App. 3d 735, 750, 132 Cal. Rptr. 725, 733 (1976); People v. Burnstad, 32 Cal. App. 3d 560, 566, 108 Cal. Rptr. 247, 251 (1973),

The Court therein said evidence of pandering "was relevant in determining the ultimate question of obscenity and, in the context of this record, serves to resolve all ambiguity and doubt."[338] Later in its opinion, the Court said "[w]e perceive no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test."[339] The net effect of these statements is to suggest that evidence of pandering is just one more item in the jury's calculus of deciding whether a publication possesses a dominant appeal to prurient interest; it is an item that will become decisive only in those close cases where there is genuine doubt. But one interpretation of the quoted sentence is that evidence of pandering is relevant in "close cases" only, and this interpretation seems to have won some adherents.[340]

If this characterization of *Ginzburg* is accurate, one might argue that section 311(a)(2) is overbroad, because it is not limited by its own terms to close cases. Indeed, at least one California court has said that this section need not incorporate the "close cases" caution of *Ginzburg*. Thus, in *People v. Kuhns*,[341] decided in 1976, it was ruled:

> We reject the argument that the statute is overbroad because it fails to include the "close cases" limitation mentioned in one quotation from *Ginzburg* . . . . As noted in *Ginzburg* and the other cases the evidence is generally relevant in determining the question of obscenity, not only on the factor of social importance, but also in relation to the element of appeal to prurient interest . . . . The fact that *Ginzburg* may have been a close case, and that the evidence served to resolve "all ambiguity and doubt" . . . does not indicate that the relevancy, as distinguished from the probative force, is any less in other cases. . . . Moreover, we note that the defendants, in urging that the matter presented is not obscene on its face, are in effect urging that there is some question

overruled, People v. Superior Court (Freeman), 14 Cal. 3d 82, 534 P.2d 393, 120 Cal. Rptr. 697 (1975); State v. J-R Distribs., Inc., 82 Wash. 2d 584, 599, 512 P.2d 1049, 1059 (1973), *cert. denied*, 418 U.S. 949 (1974). Professor Schauer perceives the pandering doctrine as embodying a concept of estoppel: "[i]n other words, having proclaimed his materials to be obscene, or pornographic, or appealing to the prurient interest, or whatever, the distributor is estopped from denying those conclusions in court, or, at the very least, they constitute evidentiary admissions against him." SCHAUER, *supra* note 3, at 83.

338. 383 U.S. at 470. The lower courts in *Ginzburg* also adopted a similar approach. *See* Ginzburg v. United States, 224 F. Supp. 129, 134-35 (E.D. Pa. 1963), *aff'd*, 338 F.2d 12, 14-15 (3d Cir. 1964).

339. 383 U.S. at 474.

340. *See, e.g.*, United States v. Young, 465 F.2d 1096, 1099 (9th Cir. 1972); Childs v. Oregon, 431 F.2d 272, 276 (9th Cir. 1970), *vacated on other grounds*, 401 U.S. 1006 (1971) (citing United States v. Baranov, 418 F.2d 1051, 1053 (9th Cir. 1969)); People v. Mature Enterprises, Inc., 73 Misc. 2d 749, 753, 343 N.Y.S.2d 911, 916 (1973); SCHAUER, *supra* note 3, at 82.

341. 61 Cal. App. 3d 735, 132 Cal. Rptr. 725 (1976).

> as to the nature of the material in question. The danger that the Bible, if improperly exploited, will be considered obscene material is controlled by the necessity of proving the other two elements of the statutory offense. There was no error in rejecting the defendants' instruction concerning a "close case" . . . .[342]

This argument makes a good deal of sense. It distinguishes between the relevance of pandering evidence and the probative force of such evidence, a distinction that may be derived from the *Ginzburg* language quoted earlier.[343] Yet, as was noted, some courts and commentators do not accept such a distinction and would appear to limit *Ginzburg* to close cases. If so, then section 311(a)(2), as construed by *Kuhns*, is unconstitutional.

From Splawn's perspective, this argument may be irrelevant. He apparently conceded that the materials he sold were obscene under the *Miller* standard; moreover, since the *Kuhns* case was decided six months after his conviction had been reaffirmed,[344] the doctrine of that case could not have been applied to him. But the intriguing possibility remains that *Kuhns* may, in fact, have correctly described the effect of *Ginzburg*.

An even more interesting problem is presented by the type of evidence underlying the pandering instruction in *Splawn*. To analyze this problem, it is necessary to consider in some detail what evidence the courts have deemed to be sufficient proof of pandering. In *Ginzburg* itself, the materials in question consisted of three items: a hard cover magazine entitled *Eros*, a bi-weekly newspaper entitled *Liaison* and a pamphlet entitled *The Housewife's Handbook on Selective Promiscuity*.[345] The evidence of pandering consisted primarily of three factors. First, the petitioner had originally sought mailing privileges from the postmasters of the hamlets of Intercourse and Blue Ball, Pennsylvania. He eventually obtained such privileges from the postmaster of Middlesex, New Jersey. The trial court had concluded that this mailing site was selected because of the "salacious appeal" of its name.[346] Second, the petitioner had engaged in indiscriminate mass mail-

342. *Id.* at 751, 132 Cal. Rptr. at 734.

343. *See* notes 337-338 and accompanying text *supra*.

344. *Kuhns* was decided on September 8, 1976. 61 Cal. App. 3d at 735, 132 Cal. Rptr. at 725. Splawn's conviction was affirmed on March 29, 1976. Splawn v. California, 45 U.S.L.W. 3194 (U.S. Sept. 21, 1976).

345. Ginzburg v. United States, 383 U.S. 463, 466-67 (1966). The specified issue of *Eros* contained fifteen articles and photo-essays on sex. The relevant issue of *Liaison* consisted primarily of digests of two articles on sex which had appeared earlier in professional journals and the transcript of an interview with a psychotherapist favoring sexual liberation. The *Handbook* "purports to be a sexual autobiography detailing with complete candor the author's sexual experiences from age 3 to age 36. The text includes, and prefatory and concluding sections of the book elaborate, her views on such subjects as sex education of children, laws regulating private consensual adult sexual practices, and the equality of women in sexual relationships." *Id.* at 467.

346. 383 U.S. at 467-68.

ings; he sent out several million advertising brochures to members of the public in general.[347] Finally, the Court considered the content of the brochures themselves. *Eros* was billed as a "new quarterly devoted to the subjects of Love and Sex" and as "frankly and avowedly concerned with erotica."[348] On the face of the advertisements for *Liaison* appeared the question, "Are you a member of the sexual elite?"[349] The advertising copy indicated that if the addressee fitted within this august group, then he would enjoy *Liaison* because he would be able to "read about love and sex and discuss them without blushing and stammering"; the publication was further described as "Cupid's Chronicle."[350] In addition, promotional brochures for all three of these publications contained slips of paper assuring the addressee a full refund of his remittance "if the book fails to reach you because of U.S. Post Office censorship interference."[351] According to the Court, the cumulative impact of this evidence was to eliminate any doubt about what the purchaser was being asked to buy.[352] The facts in *Ginzburg* may be usefully contrasted with the evidence adduced in *Redrup v. New York*.[353] There, the evidence indicated that various retailers had publicly displayed and sold various allegedly obscene magazines and books; there was no showing of any advertising campaign to inform the public of the availability of these materials.[354] On that basis, the Court simply declined to conclude that there was pandering.[355]

Redrup and *Ginzburg* suggest two opposite extremes. The decisions of lower federal and state courts create a continuum between those extremes, some decisions being very restrictive, others less so. A few examples should illustrate the point. In *United States v. Pellegrino*,[356] the government claimed that the advertisements in question were themselves obscene and constituted pandering. The promotional material in dispute was a brochure advertising a book entitled *Woman: Her Sexual Variations and Functions*, which was described as a "complete photo-guide of female sex response."[357] The twelve-page brochure contained several color photographs depicting female pudenda, purportedly taken from the book itself. Of these

347. *Id.* at 468-70.
348. *Id.* at 469 n.9.
349. *Id.*
350. *Id.*
351. *Id.* at 470.
352. *Id.*
353. 386 U.S. 767 (1967).
354. *See* note 297 *supra*.
355. 386 U.S. at 769. *Accord*, United States v. Baranov, 418 F.2d 1051, 1053 (9th Cir. 1969).
356. 467 F.2d 41 (9th Cir. 1972).
357. *Id.* at 43.

photographs, the Ninth Circuit said "[t]hese illustrations, however, are not presented as the 'feast-your-eyes-on' type of pornographic entertainment . . . . Rather they are presented as illustrating various aspects of the book's claimed contributions to general knowledge respecting the functions and characteristics of female sexual organs."[358] There was also proof of mass mailing to the public in general. In light of this evidence, one might expect that the *Ginzburg* rule would have been applied. Although there was no titillating advertising copy, as was true in the brochures for *Eros* and *Liaison*, there were instead explicit photographs demonstrating the content of the book. Yet the Ninth Circuit concluded:

> However, we do not regard this brochure as pandering as that term is defined or used in *Ginzburg*. The brochure does not proclaim the book to be obscene. In a chaste and self-serving disclaimer it asserts the opposite. While one is not given room for the slightest doubt that enjoying the educational virtue of this work is going to be pretty exciting in an erotic sense, still, the persistent theme of the brochure, running throughout the text, is that the book is worth buying because it imparts knowledge and understanding of matters of importance to all adults.[359]

As for the mass mailings, the court found this policy "wholly consistent" with the publisher's goal of educating all adults about female sexual responses.[360] Thus, *Pellegrino* indicates how much deference a court may accord a "self-serving" disclaimer; it stands in sharp contrast to *Ginzburg*, where the brochures for *Eros* and *Liaison* claimed, respectively, that the relevant publication was "a genuine work of art" and "not a scandal sheet,"[361] but where the Supreme Court discounted such assertions.

In *People v. Mature Enterprises*,[362] a New York trial court was confronted with certain newspaper advertisements for the film "Deep Throat." According to these advertisements, the motion picture was "[t]he very best porn film ever made" and perfectly exemplified how "[i]magination has gone to work in the porno-vineyards."[363] Although there was independent evidence that the film was, indeed, legally obscene, the state trial court said "we do not equate that chest thumping with the circumstances of presentation and dissemination condemned in *Ginzburg*."[364]

358. *Id.* The court thus distinguished the materials at issue from those involved in Miller v. United States, 431 F.2d 655 (9th Cir. 1970), *see* notes 372-374 and accompanying text *infra*.

359. 467 F.2d at 46. The court noted that such a disclaimer would not be accepted where it was "transparently spurious." *Id. See also* United States v. Pinkus, 551 F.2d 1155, 1159-60 (9th Cir. 1977).

360. 467 F.2d at 46.

361. Ginzburg v. United States, 383 U.S. 463, 469 n.9 (1966).

362. 73 Misc. 2d 749, 343 N.Y.S.2d 911 (1973).

363. *Id.* at 754, 343 N.Y.S. 2d at 916.

364. *Id.*

Again, this is a surprisingly libertarian view. Since the material in question was a motion picture being shown in theaters, evidence of mass mailings or postal addresses chosen for their salacious connotations would, predictably, be absent. But the advertising copy in *Mature Enterprises* would seem to be emphasizing prurient appeal as much as that involved in *Ginzburg*. Yet the New York court did not believe so.

United States v. Stewart[365] involved advertisements for a number of books, including *Sex in Marriage, Decision in Denmark, Oral Sex & The Law, The Way Homosexuals Make Love, Sex, Pornography & The Law* and *Sex Freedom*. The brochure in question promised "sex education without censorship," and went on to inform the addressee that

> "we can at last offer to you, as an adult over the age of 21 years, these valuable educational books: Sex and Censorship do not mix! You can't make love with all your clothes on and neither can a book offer complete instruction by omitting or avoiding the proper photos or information! To do less would be to deny each individual the right to read, look, ponder, evaluate and reach his own conclusions on which path to follow to happiness. This is a right Americans have and are fighting and dying for! The right to read, learn and think is ours! Let those who wish to . . . exercise this right!!"[366]

The remainder of the text consisted of descriptions of each book offered for sale, accompanied by illustrative black and white photographs depicting various sexual acts. Each brochure was contained in a sealed inner mailing envelope warning minors and the uninterested not to open it because "[t]he enclosed brochures may photographically or pictorially illustrate pictures of nude women and/or nude men together or separately in erotic situations, sexual embrace or intercourse and may include pertinent text."[367] As in *Pellegrino*, the government claimed the brochure was obscene per se and constituted pandering. The federal district court disagreed, claiming that the "entire thrust" of these advertisements was to "promote the legitimate purpose of sexual education."[368] Moreover, it observed that any pernicious effect caused by the mass mailing of the brochures in question was eliminated by the quoted language on the inner sealed envelopes.[369] Here, too, a court is taking great liberties with the *Ginzburg* doctrine. The cited language in the brochure itself seems to be designed to inform the addressee about the erotic qualities of the books being proffered for sale, not to propagandize the

365. 336 F. Supp. 299 (E.D. Pa. 1971).

366. *Id.* at 300.

367. *Id.* at 301.

368. *Id.* at 303.

369. *Id. See also* State v. Lebevitz, 294 Minn. 424, 430, 202 N.W.2d 648, 652 (1972) (warnings posted outside an adult theater).

cause of sex education. While the quoted statement on the inner envelope may provide a useful warning to the unduly sensitive recipient, it could also be argued that the description given of the contents was meant to arouse the curiosity of the addressee who otherwise might have thrown the solicitation away without opening it.

In *People v. Sarnblad*,[370] a California court of appeal dealt with an obscenity prosecution initiated against the owner of a theater displaying adult films. The name given this establishment was the "Por-No Theater." The court of appeal said "the pandering nature of the name of the theater reasonably implies that one . . . would be aware of the kind of films shown therein."[371] Here is a case where a court goes too far and finds pandering solely because of the name given the place where the materials in question are displayed. There was no evidence of salacious newspaper advertising, or sensationalistic slogans on the theater's marquee or similar affirmative conduct. Without that, there would seem to be no excuse to apply the *Ginzburg* doctrine.

Miller v. United States[372] involved a federal prosecution for distribution of a forty-eight page book entitled *The Name is Bonnie*, consisting entirely of photographs of the same nude model, who was positioned so as " 'to reveal as much as possible of the vulva, perineal and anal area by means of contrived and awkward legs apart poses.' "[373] This book had been

370. 26 Cal. App. 3d 801, 103 Cal. Rptr. 211 (1972).

371. *Id.* at 805, 103 Cal. Rptr. at 213. *See also* Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 404 (D.C. Cir. 1975) (holding that a radio program entitled "Femme Forum" had been pandered based on announcer's response to an offended viewer and the manner in which he presented an advertisement for auto insurance during the course of his broadcast).

372. 431 F.2d 655 (9th Cir. 1970), *vacated on other grounds*, 413 U.S. 913 (1973), *reaffirmed*, 505 F.2d 1247 (9th Cir. 1974).

373. 431 F.2d at 658 (quoting the government's brief). The nature of the poses served to differentiate the photographs in question from the less exploitative, more "artistic" depictions of nudes. *See also* Luros v. United States, 389 F.2d 200, 203 (8th Cir. 1968); United States v. 77 Cartons of Magazines, 300 F. Supp. 851, 854 (N.D. Cal. 1969); United States v. 392 Copies of a Magazine Entitled "Exclusive," 253 F. Supp. 485, 497 (D. Md. 1966), *aff'd*, 373 F.2d 633 (4th Cir.), *rev'd sub nom.* Central Magazine Sales Ltd. v. United States, 389 U.S. 50 (1967); People v. Berger, 185 Colo. 85, 89, 521 P.2d 1244, 1246 (1974). Yet the holding in *Miller* on this point presents some difficulties. As the district court noted in United States v. Pinkus, 333 F. Supp. 928 (C.D. Cal. 1971), *appeal dismissed*, 466 F.2d 1405 (9th Cir. 1972), the materials in *Miller* were substantially similar to equally lurid photos deemed nonobscene by the Supreme Court in a number of per curiam opinions. *See* Bloss v. Dykema, 398 U.S. 278 (1970), *rev'g* 17 Mich. App. 318, 333, 169 N.W.2d 367, 373 (1969); Central Magazine Sales v. United States, 389 U.S. 50 (1967), *rev'g* United States v. 392 Copies of a Magazine Entitled "Exclusive," 373 F.2d 633, 634 (4th Cir. 1967); Potomac News Co. v. United States, 389 U.S. 47 (1967), *rev'g* United States v. 56 Cartons Containing 19,500 Copies of a Magazine Entitled "Hellenic Sun," 373 F.2d 635, 640 (4th Cir. 1967). Thus, the court in *Pinkus* declined to follow the example set by *Miller* on this point. 333 F. Supp. at 930. *See also* United States v. Baranov, 418 F.2d 1051, 1054 (9th Cir. 1969).

advertised by a brochure featuring thirteen sample photographs; these and other promotional materials were mailed indiscriminately, sometimes forwarded only to the "occupant" of a given address. At least 300,000 envelopes containing this brochure were sent out. The Ninth Circuit said of this evidence: "The volume of circulation of this material, the indiscriminate possible market to which it was disseminated, the character of the enclosures all indicate the type of pandering which was held to support the finding of obscenity in *Ginzburg* . . . and distinguishes this case from Redrup v. New York . . . ."[374] What the court of appeals in *Miller* did was focus almost exclusively on the manner of the mass mailings, without considering extensively the content of the brochures. While *Ginzburg* suggests that the manner of mailing is relevant to show pandering, it is, at best, a subsidiary factor that should not be given the inordinate weight the court in *Miller* seemed to accord it.

Childs v. Oregon[375] involved a prosecution for the sale of obscene books. The evidence of pandering consisted of two varieties. The first of these was the cover of the book itself. The front cover depicted, in color, two nude women reclining on a bed and contained the following capitalized quotation: " 'THEY SLASHED EACH OTHER WITH THE SAVAGERY OF PERVERTED DESIRES. "BEAT ME!" SHE CRIED.' "[376] The back cover portrayed the upper half of the body of a woman clad only in a brassiere. Below this photograph was the following caption:

> "Betty was rich and perverted. Her need for another woman's love was so great that she was willing to descend from her upper crust life to the sordidness of a cheap rented room and third rate job . . . just so she could have a lesbian roommate. But when her darling took a liking to men, Betty turned to a savage beast."[377]

The Ninth Circuit asserted that the book was thus deliberately represented as erotically arousing; the cover appealed to prurient interest, rather than to intellectual concerns.[378] Moreover, the court of appeals noted that when the arresting officer asked the petitioner where he kept his "dirtier books," the latter identified a particular rack on which, among others, the volume in

374. 431 F.2d at 659 (citations omitted).

375. 431 F.2d 272 (9th Cir. 1970), *vacated*, 401 U.S. 1006 (1971).

376. 431 F.2d at 276.

377. *Id.*

378. *Id. Childs* presents a problem in this respect. In Books, Inc. v. United States, 358 F.2d 935 (1st Cir. 1966), the court of appeals cited *Ginzburg* for the proposition that "it would be appropriate for the District Court or this Court to take into account the front and back covers of [the book in question] and from them to reach a conclusion that there were pandering and an exploitation of interests in titillation . . . ." *Id.* at 938. On appeal, the Supreme Court reversed in a per curiam ruling. Books, Inc. v. United States, 388 U.S. 449 (1967) (citing Redrup v. New York, 386 U.S. 767 (1967)). This ruling suggests that the use of the pandering doctrine in *Books, Inc.*, and, by implication, in *Childs*, may, at one point, have been unwarranted.

question was displayed and said that the "worst ones" were kept there.[379] The only pandering by the retailer in *Childs* was a statement of where his most objectionable books were located. This is a far cry from the kind of organized exploitation involved in *Ginzburg*; indeed, it seems to be little more than an accurate response to an inquiry from a customer, a response meant to impart information rather than appeal to prurient interest. Moreover, the acts of exploitation in *Childs* seemed to consist of nothing more than presenting on the cover of a book an accurate summary of its contents accompanied by two photographs portraying nudity, but nothing classifiable as "hard core pornography." The remainder of the evidence in *Childs* consisted of the language and depictions on the cover of the book in question, something for which the retailer had no responsibility. In contrast, in *Ginzburg*, the petitioner was the one who published both the materials in question and the advertisements promoting them; he was being prosecuted entirely for his own handiwork.

All these cases present a continuum. *Pellegrino, Mature Enterprises* and *Stewart* represent a set of rulings construing *Ginzburg* so narrowly as to preclude the prosecution from proving pandering in any but the most blatant situations. In contrast, *Sarnblad, Miller* and *Childs* represent a set of rulings where pandering was found on the basis of far less evidence than was adduced in *Ginzburg*. The question might be raised: where does *Splawn* fall within this spectrum? According to Justice Stevens, Splawn, at best, could be accused of having sold the film in question and of having advertised it as being sexually provocative, although not in any offensive manner.[380] The petitioner claimed that the trial judge's instruction to the jury allowed it "to consider motives of commercial exploitation on the part of persons in the chain of distribution other than himself."[381] The majority in *Splawn* admitted the accuracy of this characterization, but nevertheless concluded that *Ginzburg* clearly showed that the instruction in question was permissible.[382] In fact, however, *Ginzburg* demonstrates nothing of the kind. The Court therein did note that "there was abundant evidence to show that each of the accused publications was originated or sold as stock in trade in the sordid business of pandering,"[383] but the originator in that case was the petitioner himself, Ginzburg. In *Splawn*, however, the originator was an unindicted third party whose motives of commercial exploitation were being imputed to the defendant. Quite apart from those motives and whatever evidence may

379. 431 F.2d at 277 n.7.

380. 431 U.S. at 603 (Stevens, J., dissenting, joined by Brennan, Stewart and Marshall, JJ.).

381. *Id.* at 599.

382. *Id.*

383. Ginzburg v. United States, 383 U.S. 463, 467 (1966).

have been adduced about them, there remained only the fact of Splawn's sale and his apparently discreet advertisement, and it is not clear that this conduct, in and of itself, would be sufficient to constitute pandering under *Ginzburg*. In fact, if one were to place the *Splawn* case on the continuum adverted to earlier, it seems to most resemble *Childs v. Oregon*,[384] which appeared to expand the pandering doctrine of *Ginzburg* to encompass a situation where the conduct of the defendant was minimal. If this characterization is accurate, then *Splawn* may well mark a significant extension of the *Ginzburg* doctrine.

(b) Pandering and Commercial Speech

Justice Stevens' dissent in *Splawn* contends that the pandering doctrine of *Ginzburg* did not survive the new rulings on commercial speech, particularly *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.[385] In that decision, the Court struck down a state law which provided that a licensed pharmacist who advertised the prices of prescription drugs was guilty of unprofessional conduct. In the course of the opinion, the Court considered the problem of the extent to which commercial advertising is protected by the First Amendment. As early as 1942, in the case of *Valentine v. Chrestensen*,[386] which upheld a New York law forbidding the circulation of handbills, the Court had said that although the First Amendment would prohibit the banning of all communication by circulars in the public thoroughfares, it imposed "no such restraint on government as respects purely commercial advertising."[387] The Court in *Virginia Pharmacy Board* tacitly overruled *Valentine*, reasoning that consumers in particular and society in general have a strong interest in the free flow of commercial information. Recognizing that advertising serves the twin goals of perpetuating the system of free enterprise and ensuring enlightened public decisionmaking in a democracy, the Court held that commercial speech was subject to the protections afforded by the First Amendment.[388]

What effect does this decision have on *Ginzburg* itself? Curiously enough, the Court in that case was not oblivious to the problem. It said:

> No weight is ascribed to the fact that petitioners have profited from the sale of publications which we have assumed but do not

384. 431 F.2d 272 (9th Cir. 1970), *vacated*, 401 U.S. 1006 (1971). *See* notes 375-379 and accompanying text *supra*.

385. 425 U.S. 748 (1976). *See generally* Note, *The Constitutional Status of Commercial Expression*, 3 HASTINGS CONST. L.Q. 761 (1976).

386. 316 U.S. 52 (1942).

387. *Id.* at 54. *See also* Breard v. Alexandria, 341 U.S. 622, 642 (1951) (upheld ordinance prohibiting door to door solicitation by uninvited peddlers, by pointing out that, as applied to one selling magazine subscriptions, it concerned restraints upon commercial advertising).

388. 425 U.S. at 763-770.

> hold cannot themselves be adjudged obscene in the abstract; to sanction consideration of this fact might indeed induce self-censorship, and offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment. Rather, the fact that each of these publications was created or exploited entirely on the basis of its appeal to prurient interests strengthens the conclusion that the transactions here were sales of illicit merchandise, not sales of constitutionally protected matter.[389]

Thus, the mere fact that the transactions in *Ginzburg* were commercial in nature was deemed irrelevant; the gravamen of the decision was that the pandering in question was a component of a series of transactions constituting the dissemination of obscenity and was itself a useful determinant in ascertaining whether the product being merchandised could, in fact, be labelled obscene. This statement suggests that the pandering doctrine does not rest on any distinction between commercial and noncommercial speech, but is instead premised on the difference between vending that which is illicit and that which is not, between "mere commercialism, in the sense of a sale for profit, and the promotion for such sales by reference to the prurient appeal of the material being sold."[390] In a word, the distinction is one drawn between subcategories of commercial speech. However, in a footnote in *Ginzburg*, the Court added:

> See *Valentine* v. *Chrestensen* . . . where the Court viewed handbills purporting to contain protected expression as merely commercial advertising. Compare that decision with *Jamison* v. *Texas* . . . and *Murdock* v. *Pennsylvania* . . . where speech having the characteristics of advertising was held to be an integral part of religious discussions and hence protected. Material sold solely to produce sexual arousal, like commercial advertising, does not escape regulation because it has been dressed up as speech, or in other contexts might be recognized as speech.[391]

The effect of this footnote is to obscure the problem somewhat. The Court seemed to be drawing an analogy between commercial speech and obscenity; it said that both are subject to regulation, however much one may attempt to disguise them as protected speech. This analogy might have once been

389. Ginzburg v. United States, 383 U.S. 463, 474-75 (1966) (footnotes omitted).

390. People v. Kuhns, 61 Cal. App. 3d 735, 752, 132 Cal. Rptr. 725, 735 (1976).

391. Ginzburg v. United States, 383 U.S. 463, 474 n.17 (1966) (citations omitted). Jamison v. Texas, 318 U.S. 413 (1943), involved a challenge to a municipal ordinance prohibiting street distribution of advertising material. Jamison was convicted for distributing handbills inviting the recipient to a religious gathering and advertising two religious books. The Court said that the city "may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books . . . or because the handbills seek in lawful fashion to promote the raising of funds for religious purposes." *Id.* at 417. In Murdock v. Pennsylvania, 319 U.S. 105 (1943), the Court struck down a statute exacting a fee to canvass or solicit that had been applied to door to door salesmen of sectarian pamphlets. It was found that the law violated the First Amendment's free exercise clause. *Id.* at 114.

helpful in explaining why obscenity can be regulated, but it does not justify the chilling effect resulting from application of the concept of pandering where the advertising in question may not be obscene per se, but may nevertheless be a decisive factor in the jury's determination that what was being advertised is obscene. Moreover, this footnote was appended to the passage where the Court in *Ginzburg* spoke of a publication "created or exploited entirely on the basis of its appeal to prurient interests,"[392] so it is possible to argue that a tacit analogy was being drawn between purely commercial speech and that class of exploitative communication constituting pandering. Thus, while *Ginzburg* did not rely directly on the *Valentine* doctrine, it may have analogized pandering to purely commercial speech in order to justify its decision. Moreover, even if one disagrees and contends that *Ginzburg* differentiated between subcategories of commercial speech, one could still argue that after *Virginia Pharmacy Board* truthful advertising about sexually-oriented materials ought not to be chilled because the advertiser fears that, should he be prosecuted in the future, his commercial speech will be labeled as pandering and may influence a jury's determination of the obscenity of the material being promoted.

Thus, the next question is, assuming that Justice Stevens is right in *Splawn* and that the doctrine of *Virginia Pharmacy Board* ought to apply in obscenity cases, will it preclude further application of the concept of pandering in such cases? There are, in fact, a number of reasons to suggest that it will not.

First, one might raise the contention suggested by the Court as long ago as the *Roth*[393] case that if obscenity per se is not protected by the First Amendment, it makes no difference that such obscenity is cast in the form of commercial speech. This is clearly false; obscene advertising is still speech falling outside the safeguards of the Constitution. But to cast the problem in this fashion raises a tantalizing question: if both the material being advertised and the advertisement itself are claimed to be obscene per se, and the government decides to prosecute solely for the distribution of the latter publication, is there any usefulness left for the doctrine of pandering in such a case? In other words, can advertising pander itself? The question has been raised in only one case: *United States v. Pellegrino*.[394] There it was said:

> Appellant contends that pandering in the *Ginzburg* sense is never relevant to the question of whether advertising in itself is obscene, since advertising does not "pander" itself. *Ginzburg*, it

392. Ginzburg v. United States, 383 U.S. 463, 474 (1966).

393. Roth v. United States, 354 U.S. 476 (1957). *See* notes 3-10 and accompanying text *supra*.

394. 467 F.2d 41 (9th Cir. 1972).

> is argued, did not make pandering a distinct offense. The court there was considering the obscenity of the advertised works themselves in the context of their promotion. Here the question, appellant asserts, is whether the advertising, standing alone, is obscene. The only "context" is the material itself which speaks for itself. There is no occasion to give consideration to other material for the light it can shed on the nature of the material in question.
>
> We agree that in the case of advertising the fact that such material constitutes or includes pandering does not serve the purpose of enlightenment served in *Ginzburg*. We cannot say, however, that the question of pandering is wholly irrelevant. Pandering advertising may well forfeit an otherwise available claim of redeeming social value. Further it may cast light on the question whether the dominant theme of the advertising brochure itself is an appeal to a prurient interest in sex.[395]

This argument is a cogent one. Where the advertising itself is claimed to be obscene, evidence of pandering may still be adduced by considering how the advertisement was formulated, how it was distributed and so on.[396] But since the subject of the prosecution is commercial speech, which a jury must decide is or is not obscene, it is absurd to say such speech cannot be regulated by the state under the *Virginia Pharmacy Board* doctrine when the outcome of the jury's determination will be to ascertain if the First Amendment applies at all to such speech. So in the subcategory of cases where the material alleged to be obscene and pandered is itself commercial speech it would simply be anomalous to apply *Virginia Pharmacy Board* because doing so would frustrate the very purpose of obscenity regulation and give advertisements in this context greater First Amendment protection than other forms of communication. Justice Stevens in *Splawn* does not make such an argument and, indeed, the problem is not presented in *Splawn*. There is no indication that the advertising engaged in by the petitioner in that case was in any way offensive.

But there is a second difficulty that Justice Stevens ignored: does "pandering" advertising fall within any of the exceptions stated in *Virginia*

395. *Id.* at 46.

396. But, while acknowledging the cogency of the argument, one must also admit that it is an extension, albeit a logical one, of the *Ginzburg* doctrine. The Court in *Ginzburg* did not deal with obscene advertisements. The subject of the prosecution was the set of materials being advertised. Nevertheless, as indicated, the kinds of proofs relied upon in *Ginzburg* may be adapted to encompass situations where the obscenity *vel non* of the advertisement itself is at issue. Problems also arise when, as in *Pellegrino*, the advertisement consists of little more than portions of what is being advertised: can an advertisement be held to be obscene per se only if what is being advertised is held to be obscene? At least one court has noted the problem, United States v. Stewart, 336 F. Supp. 299, 301 (E.D. Pa. 1971), but declined to answer it. If the answer is no, interesting res judicata problems may be created should the government fail to win a prosecution for advertisement of the material and then seek to impose liability for distribution of the materials being advertised.

Pharmacy Board? The Court therein noted that some forms of regulation on commercial speech are permissible, particularly where (1) the regulation consists entirely of a mere time, place and manner restriction, (2) the regulation seeks to delimit the dissemination of false or misleading advertising, (3) the regulation is one of commercial advertising that proposes illegal transactions or (4) the regulation arises in the context of the special problems of the electronic broadcast media.[397] In *Splawn*, advertisement through the broadcast media was not at issue. Moreover, as Justice Stevens pointed out, there could be no argument that the petitioner was engaging in deceptive advertising; he merely told the truth about his "shabby business."[398] As an example of commercial speech proposing illegal transactions, the Court cited cases where sexually or racially discriminatory advertisements were at issue,[399] so the extent of this exception may be limited to situations where both the transaction proposed and the commercial speech promoting that transaction are equally prohibitable. If so, pandering may not fall within this exception, unless the state can show that the advertising itself was obscene per se, in which case the situation resembles the one adverted to earlier. Otherwise, the problem remains that one cannot know in obscenity cases if the transaction being proposed is illegal unless one knows that the materials which are the subject of that transaction are obscene. Such a separate judicial determination can be made only after considering all circumstances, including that of the advertising itself, in order to determine whether such commercial speech constitutes pandering. Therefore, the obscenity cases do not quite fit within this exception in *Virginia Pharmacy Board*.

That leaves the problem of time, place and manner restrictions. In the obscenity context, the closest case on the subject is *Rowan v. Post Office Department*,[400] which upheld a federal postal statute allowing the postmas-

397. 425 U.S. at 771-73.

398. 431 U.S. at 604 (Stevens, J., dissenting, joined by Brennan, Stewart and Marshall, JJ.).

399. 425 U.S. at 772-73 (citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rights, 413 U.S. 376 (1973); United States v. Hunter, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972)). *Pittsburgh Press* upheld an ordinance forbidding employees to engage in discriminatory hiring practices and prohibiting others from assisting such employees. The petitioner was a newspaper that had published sex-designated employment advertisements. After noting that the advertisements in question were "classic examples of commercial speech," 413 U.S. at 385, the Court found no First Amendment interest would be served by permitting advertisement of the illegal activity at issue, *id.* at 388-89. In *Hunter*, the Fourth Circuit upheld provisions of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631 (1970), which proscribe the publication of discriminatory notices relating to the sale or rental of a dwelling. The defendant had printed a classified advertisement for an apartment for rent in a "white home." The Court found that the publicity in question was prohibited "only in a commercial context and not in relation to the dissemination of ideas." 459 F.2d at 211.

400. 397 U.S. 728 (1970).

ter general, at the request of one receiving unsolicited pandering advertisements in the mail, to require the sender to strike that individual's name from the mailing list and to refrain from mailing any other such material to that address.[401] The Court found that the interests in commercial speech do not justify invasions of privacy:

> We therefore categorically reject the argument that a vendor has the right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even "good" ideas on the unwilling recipient. That we are often "captives" outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere. . . . The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain.[402]

Rowan is a narrow decision and has been construed narrowly by subsequent cases. In *Erznoznik v. City of Jacksonville*,[403] the Court invalidated a municipal ordinance making it a punishable offense for a motion picture theater to exhibit films containing nudity, when the screen is visible from a public street or place. It rejected an argument based on *Rowan* that the state was protecting the privacy interests of persons on public streets, by pointing out that such persons could readily avert their eyes if they were easily offended.[404] Similarly, in *Pacifica Foundation v. FCC*,[405] the District of Columbia circuit struck down an FCC order[406] prospectively banning the

401. 39 U.S.C. § 3008 (1970). The statute specifically refers to "pandering advertisements." A companion provision respecting "sexually oriented advertisements" also exists. *Id.* § 3010. This provision has been held constitutional by lower federal courts relying on *Rowan*. *See* Universal Specialties, Inc. v. Bount, 331 F. Supp. 52, 53 (C.D. Cal. 1971); Pent-R-Books, Inc. v. United States Postal Serv., 328 F. Supp. 297, 307 (E.D.N.Y. 1971). *See generally* Note, *Federal Pandering Advertisements Statute*, 32 OHIO ST. L.J. 149 (1971).

402. 397 U.S. at 738. The Court noted that Congress gave this power to the homeowner "not only to protect privacy but to avoid possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a governmental official." *Id.* at 737. This language comports with the statement in Redrup v. New York, 386 U.S. 767 (1967), *see* notes 290-91 and accompanying text *supra*, expressing the sentiment that a state has a legitimate interest in preventing "an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." *Id.* at 769.

403. 422 U.S. 205 (1975).

404. *Id.* at 212. Thus, the Court indicated that the interest in privacy was sufficiently important to create a legitimate state interest in preventing invasion of it. *Id.* (citing Redrup v. New York, 386 U.S. 767, 769 (1967)). *See* note 402 *supra*. The Court also observed that "[t]he Jacksonville ordinance discriminates among movies solely on the basis of content. Its effect is to deter drive-in theaters from showing movies containing any nudity, however innocent or even educational. This discrimination cannot be justified as a means of preventing significant intrusions on privacy." 422 U.S. at 211-12 (footnotes omitted).

405. 556 F.2d 9 (D.C. Cir. 1977).

406. Pacifica Foundation, 56 F.C.C.2d 94 (1975).

broadcast, whenever children are in the audience, of language which "depicts sexual or excretory activities and organs, specifically seven patently offensive words."[407] Judge Tamm's opinion for the court rejected any invasion of privacy claim, saying the offended listener could always turn off the radio.[408] In his concurrence, Chief Judge Bazelon found that privacy interests were involved, but distinguished *Rowan* by observing that those interests are reduced whenever one opens up one's home by turning on the radio, and that the statute in *Rowan* enabled the homeowner to decide not to receive any further communications, while the FCC order vested the power of decision in a governmental official.[409] So, at least with respect to pandering sent to the home, some regulation is permissible in the interests of upholding a right of privacy, so long as the ultimate arbiter is the addressee, rather than an agent of the government. However, since *Erznoznik* the Court has recognized that some time, place and manner restrictions furthering a legitimate governmental interest are permissible. Thus, in *Young v. American Mini Theaters, Inc.*,[410] which upheld a Detroit zoning ordinance providing, *inter alia*, that no two adult theaters could be situated within 1,000 feet of one another, a plurality of the justices on the Court distinguished *Erznoznik* by pointing out that in the earlier case, the city attempted to regulate films solely on the basis of content, while in *Young*, Detroit was interested in regulating secondary effects of showing adult films, namely, the deterioration of residential neighborhoods and the proliferation of urban crime.[411] Moreover, the plurality opinion in *Young*, which was written by Justice Stevens,[412] had the following things to say about commercial speech and obscenity:

407. 556 F.2d at 10-11. The seven words in question, "shit," "piss," "fuck," "cunt," "cocksucker," "motherfucker" and "tits," were utilized in a comic monologue by George Carlin aired by station WBAI in New York; it was this broadcast that prompted the Commission's order. The authority for promulgating such an order was said to be located in 18 U.S.C. § 1464 (1970), which provides "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned more than two years, or both." *See generally* Note, *Filthy Words, The FCC and the First Amendment*, 61 VA. L. REV. 579 (1975).

408. 556 F.2d at 17 (opinion of Tamm, J.). Judge Tamm concluded that the FCC's order not only violated its duty to avoid censorship of radio communications under 47 U.S.C. § 326 (1970), but also was unconstitutionally vague and overbroad. 556 F.2d at 18.

409. 556 F.2d at 27-28 (Bazelon, C.J., concurring). Thus, Chief Judge Bazelon only emphasized a point elucidated in *Rowan*. *See* note 402 *supra*.

410. 427 U.S. 50 (1976). *See generally* Clor, *Public Morality and Free Expression: The Judicial Search for Principles of Reconciliation*, 28 HASTINGS L.J. 1305, 1309-11 (1977); Friedman, *Zoning "Adult" Movies: The Potential Impact of Young v. American Mini Theaters*, 28 HASTINGS L.J. 1293, 1293-1304 (1977); Schauer, *The Return of Variable Obscenity?*, 28 HASTINGS L.J. 1275, 1286-90 (1977); Note, *Young v. American Mini Theaters, Inc.: Creating Levels of Protected Speech*, 4 HASTINGS CONST. L.Q. 321, 327-57 (1977).

411. 427 U.S. at 71 n.34.

412. Justice Stevens was joined by Chief Justice Burger, and Justices White and Rehnquist.

> We have recently held that the First Amendment affords some protection to commercial speech. We have also made it clear, however, that the content of a particular advertisement may determine the extent of its protection. A public rapid transit system may accept some advertisements and reject others. A state statute may permit highway billboards to advertise businesses located in the neighborhood but not elsewhere, and regulatory commissions may prohibit businessmen from making statements which, though literally true, are potentially deceptive. The measure of constitutional protection to be afforded commercial speech will surely be governed largely by the content of the communication.
>
> More directly in point are opinions dealing with the question whether the First Amendment prohibits the State and Federal Governments from wholly suppressing sexually oriented materials on the basis of their "obscene character." In *Ginsberg v. New York*, 390 U.S. 629 [1968], the Court upheld a conviction for selling to a minor magazines which were concededly not "obscene" if shown to adults. Indeed, the members of the Court who would accord the greatest protection to such materials have repeatedly indicated that the State could prohibit the distribution or exhibition of such materials to juveniles and unconsenting adults. Surely the First Amendment does not foreclose any such prohibition, yet it is equally clear that any prohibition must rest squarely on an appraisal of the content of material otherwise within a constitutionally protected area.[413]

Young provides a perfect rationale for distinguishing pandering from other forms of commercial speech. The plurality states that advertising may be regulated on the basis of content. It then notes that one example of legitimate differential treatment because of content is comprised of sexually-oriented materials that would not be legally obscene in the context of their dissemination to consenting adults.

How do these cases apply to *Splawn*? There is no indication that the petitioner in *Splawn* mailed so-called pandering advertisements to individuals at their residences, so quite possibly the fundamental privacy interest of *Rowan* is not involved in this case. Even if one assumed otherwise, however, *Rowan* could be distinguished in the same manner utilized by Chief Judge Bazelon in *Pacifica Foundation*: the individual homeowner is not the one seeking to curtail or restrict the dissemination of such advertising. It is the state that is making the decision, and because of that, individual

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Justice Powell concurred in the judgment and in portions of the opinion; he concluded that the Detroit zoning ordinance was a legitimate time, place and manner restriction. 427 U.S. at 73-84 (Powell, J., concurring). Justice Stewart dissented, saying that the statute impermissibly effectuated a regulation on the basis of content. *Id.* at 84-88 (Stewart, J., dissenting, joined by Brennan, Marshall and Blackmun, JJ.) Justice Blackmun also dissented, finding the ordinance vague. *Id.* at 88-96 (Blackmun, J., dissenting, joined by Brennan, Stewart and Marshall, JJ.).

413. 427 U.S. at 68-70 (footnotes omitted).

privacy interests would not appear to be a source from which a time, place or manner restriction could be derived. If Splawn's commercial speech consisted of public advertising (*e.g.*, signs in a window fronting upon a public thoroughfare), *Erznoznik* would seem to suggest that such speech could not be regulated on the basis of content, unless it consisted of representations of hard core pornography. Since Splawn's advertising was characterized as being accurate and inoffensive, it would seem to be fully protected by the First Amendment. However, as indicated earlier, *Erznoznik* has been qualified somewhat by the plurality opinion in *Young*. Under the logic of that decision, Splawn's commercial speech could be regulated on the basis of content, even though not obscene per se. In order to make such a determination, however, one would have to know what Splawn's advertisement consisted of, how it was presented to the public and who was exposed to it. By failing to make such a detailed analysis, the majority in *Splawn* slights the *Virginia Pharmacy Board* doctrine, while the dissent in *Splawn* blithely ignores the qualifications and exceptions inherent in that doctrine. Thus, when Justice Stevens asserts that *Ginzburg* did not survive *Virginia Pharmacy Board*, he neglected to consider the full import of the latter case, the precedential effect of apparently still valid decisions such as *Rowan* and the ramifications of his own plurality opinion in *Young*.

Finally, one could note a third objection to Justice Stevens' broad assertion. The commercial speech cases decided in 1976 by the Supreme Court have all dealt with attempts by a state to suppress or criminalize certain types of advertising. The Court in *Virginia Pharmacy Board* underscored this point: "What is at issue is whether a state may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions, we conclude that the answer to this one is in the negative."[414] But the pandering doctrine of *Ginzburg* achieves no similar suppression. Pandering is not a separate crime;[415] it is merely an item of evidence which a jury in a criminal prosecution may or may not rely on. It is difficult to conclude that an evidentiary rule is the sort

414. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 773 (1976).

415. *See* Hamling v. United States, 418 U.S. 87, 130 (1974); United States v. Thevis, 484 F.2d 1149, 1152 (5th Cir. 1973), *cert. denied*, 418 U.S. 932 (1974); United States v. Levy, 331 F.Supp. 712, 713 (D. Conn. 1971); Milky Way Prod. Inc. v. Leary, 305 F.Supp. 288, 294 (S.D.N.Y. 1969), *aff'd sub nom.* New York Feed Co. v. Leary, 397 U.S. 98 (1970). Accordingly, pandering need not be charged in an indictment in order to be included in instructions to a jury. Hamling v. United States, 418 U.S. 87, 130 (1974); United States v. Wasserman, 504 F.2d 1012, 1016 (5th Cir. 1974); United States v. Ratner, 502 F.2d 1300, 1301-02 (5th Cir. 1974); United States v. Palladino, 475 F.2d 65, 70-71 (1st Cir.), *vacated on other grounds*, 413 U.S. 916 (1973); United States v. Gundlach, 345 F.Supp. 709, 713 (M.D. Pa. 1972).

of regulation of advertising that the Court in *Virginia Pharmacy Board* meant to find is precluded by the First Amendment. Undoubtedly, the *Ginzburg* doctrine does have an indirect chilling effect on commercial advertising, especially in light of some of the lower court decisions applying that doctrine. But the state has never said that pandering advertising not itself alleged to be obscene is subject either to a criminal sanction or to outright suppression. So Justice Stevens glossed over a rather crucial problem: is the extent of regulation effected by the evidentiary rule developed by *Ginzburg* serious enough to trigger the protective mechanisms announced in *Virginia Pharmacy Board?*[416]

As indicated earlier, *Splawn* raises a host of fascinating questions and problems which have not been dealt with in any meaningful fashion. But in light of the sharp division of the Court on the issue of whether pandering is protected commercial speech, it is probably fair to say that this case will provide a useful starting point for further developments in this area.

4. *Community Standards in a Federal Prosecution*: Smith v. United States

In *Smith v. United States*,[417] the Court considered the effect of a state obscenity statute on the determination of "contemporary community standards" in the context of a federal prosecution for the mailing of lewd and indecent materials in violation of section 1461 of Title eighteen of the United States Code.[418] *Smith* held that states could not legislatively define such standards, especially in cases involving federal law. The Court cited *Hamling v. United States*[419] as authority for the proposition that "community standards simply provide the measure against which the jury decides the questions of appeal to prurient interest and patent offensiveness";[420] it

416. There is another problem implicit in this case. One of Splawn's contentions for examination by the Supreme Court was: "In obscenity prosecution of retail bookstore owner not shown to have had any connection with creator or publisher of material in question, is it constitutional to instruct jury that financial motives of creator of material could be considered as evidence that material was obscene?" Splawn v. California, 45 U.S.L.W. 3194 (U.S. Sep. 21, 1976). Splawn was clearly arguing that the motives of the originator ought not to be imputed to him. But, assuming he had argued that the statute in question infringed the First Amendment commercial speech rights of the originator, would such a claim have been cognizable? Possibly not. The Court in Bates v. State Bar of Arizona, 97 S. Ct. 2691 (1977), indicated that the overbreadth doctrine did not apply in the context of "professional advertising." *Id.* at 2707-08. So to the extent that Splawn might have wished to raise an overbreadth claim, he may well not have been able to do so, at least with respect to a commercial speech contention. Nevertheless, the language in *Bates* concerning professional advertsing may indicate that overbreadth claims may still be possible in cases involving the advertisement of sexually-oriented materials.

417. 431 U.S. 291 (1977).

418. 18 U.S.C. § 1461 (1970).

419. 418 U.S. 87 (1974). *See* notes 47-53 and accompanying text *supra*.

420. 431 U.S. at 302.

therefore ruled that the standards utilized by jurors must be applied "in accordance with their own understanding of the tolerance of the average person in their community."[421] The ruling rendered in *Smith* is interesting for two reasons. Not only does it disclose some of the ambiguities inherent in the concept of "community standards," but it also raises some troubling questions regarding the effect of a narrow definition of this term on the First Amendment rights of national publishers of allegedly obscene materials who are prosecuted in federal courts.

a. The Decision

Jerry Lee Smith was indicted in a federal district court located in the southern district of Iowa for transmitting allegedly obscene magazines and films through the mail in violation of section 1461. The offenses charged were said to have occurred between February and October of 1974, and the trial occurred in 1975. Up to 1974, Iowa law classified as a misdemeanor the sale[422] or deposit in any post office within the state of "lewd, indecent, lascivious, or filthy" books, pamphlets and photographs.[423] In 1973, however, the Iowa Supreme Court in *State v. Wedelstedt*[424] relied on the United States Supreme Court's decision in *Miller* and held that this law was unconstitutionally vague.[425] The state court refused to correct this deficiency by judicial construction, saying "[i]f changes in the law are desirable from a policy, administrative or practical standpoint, it is for the legislature to enact them, not for the court to incorporate them by interpretation."[426] A response to this mandate went into effect on July 1, 1974. Not only did the Iowa legislature abrogate the statutes declared invalid in *Wedelstedt*, it also enacted a new set of provisions which defined "obscene material" and criminalized the dissemination of such materials to minors, but not to adults.[427] Subsequently, in 1976, Iowa completely revamped its criminal code. The new provisions, which became effective on January 1, 1978, prohibited the knowing sale or offer of obscene materials to any person, including an adult.[428]

At his trial, Smith submitted six questions for purposes of voir dire. Of the five rejected by the presiding judge, one made inquiry into a venire-

421. *Id.* at 305.

422. IOWA CODE ANN. § 725.5 (West Supp. 1977) (repealed effective Jan. 1, 1978).

423. IOWA CODE ANN. § 725.6 (West Supp. 1977) (repealed effective Jan. 1, 1978).

424. 213 N.W.2d 652 (Iowa 1973).

425. *Id.* at 656. *See also* State *ex rel.* Faches v. N.D.D., Inc., 228 N.W.2d 191, 193 (Iowa 1975) (state cannot enjoin exhibit of films under a statute concerning the use of premises "for the purposes of lewdness" where "lewdness" is never defined).

426. 213 N.W.2d at 656-57.

427. IOWA CODE ANN. § 725.2 (West Supp. 1977) (repealed effective Jan. 1, 1978).

428. IOWA CODE ANN. § 2804 (West Spec. Pamph. 1978).

man's knowledge of contemporary community standards respecting sex and nudity in the southern district of Iowa, two others probed a potential juror's knowledge and comprehension of those standards and the final two dealt with individual knowledge of Iowa law on the subject.[429] The latter two queries were requested because Smith contended that the statute that became effective in July of 1974 constituted the controlling community standard and that, under that standard, he was not criminally liable because he had only made intrastate sales to "adult book stores" from which juveniles were presumably barred.[430] Consequently, at trial, Smith introduced into evidence the text of the 1974 state law as part of his defense. Nevertheless, the jury found him guilty on all counts after being instructed by the presiding judge that contemporary community standards consisted of those accepted in fact by the community as a whole. The district judge also found that section 1461 neither incorporated nor depended upon the laws of the states, and that jurors could rely on their own knowledge of the standards prevailing within the appropriate community.[431] The United States Court of Appeals for the Eighth Circuit affirmed the conviction, but noted that although offense to contemporary standards was a federal question determinable by the jury in a federal prosecution, it would be proper to admit evidence of state law as was done by the district court for the purpose of enabling jurors to make that determination.[432]

In an opinion by Justice Blackmun, which was joined by Chief Justice Burger and Justices White, Powell and Rehnquist, the Supreme Court essentially agreed with the judgment of the Eighth Circuit. Initially, the Court explored the meaning of the term "contemporary community standards." Relying on *Miller v. California*,[433] it noted that what appeals to a prurient interest or what is patently offensive is a question of fact to be measured by the standards of the community.[434] Justice Blackmun then quoted *Hamling v. United States*,[435] one of the Court's prior rulings on section 1461, for the proposition that:

> A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law.[436]

429. 431 U.S. at 296-97.
430. *Id.* at 295-96.
431. *Id.* at 303-04.
432. *Id.* at 299.
433. 413 U.S. 15 (1973).
434. 431 U.S. at 302.
435. 418 U.S. 87 (1974). *See* notes 47-53 and accompanying text *supra*.
436. 418 U.S. at 104-05 (citing Schulz v. Pennsylvania R.R., 350 U.S. 523, 525-26 (1956); Stone v. New York, Chicago & St. Louis R.R., 344 U.S. 407, 409 (1953)). *Schulz* was a Jones

He thus concluded that it would be just as inappropriate for a legislature to define these community standards as "to attempt to freeze a jury to one definition of reasonableness."[437] While a state may place some geographical limits on those standards, as well as specify the types of conduct it deems necessary to regulate, it may not conclusively define such standards for the purposes of an obscenity trial.[438] Justice Blackmun asserted that the community standard to be applied in a section 1461 prosecution is a matter of federal law;[439] thus, while a relevant state statute could not be given conclusive effect, it could be admitted into evidence at a federal trial in order to provide proof "of the mores of the community whose legislative body enacted the law. It is quite appropriate, therefore, for the jury to be told of the law and to give such weight to the expression of the State's policy on distribution as the jury feels it deserves."[440] The fact that the mailings in question were wholly intrastate was said to be immaterial to the disposition of this issue. The Court simply noted that it had traditionally acknowledged the constitutional power of Congress to exclude obscenity from the mails regardless of whether the materials so excluded traversed state boundaries.[441]

The Court also rejected petitioner's counterarguments on this issue. It claimed that its ruling that standards expressed in state laws could not govern in federal prosecutions in no way nullified the legislative efforts of the states. Thus, Justice Blackmun reasoned that "the State's right to abolish all regulation of obscene material [if it so wished] does not create a correlative right to force the Federal Government to allow the mails or the channels of interstate or foreign commerce to be used for the purpose of sending obscene material into the permissive State."[442] Furthermore, he remarked that the 1974 decision of the Iowa legislature to regulate only the distribution of obscenity to minors did not necessarily signify that dissemi-

Act, 46 U.S.C. § 688 (1970), case involving the question of whether there was sufficient evidence to go to the jury on the issue of whether the respondent employer had failed to provide a safe place to work for the decedent employee. *Stone* was a Federal Employers' Liability Act, 45 U.S.C. § 51-60 (1970), case involving issues of negligence and causation; the petitioner claimed he had suffered an injury while removing worn cross-ties on the respondent's railroad line.

437. 431 U.S. at 302.

438. *Id.* at 302-03.

439. *Id.* at 303.

440. *Id.* at 308.

441. *Id.* at 305.

442. *Id.* at 307. He rejected the contention that Stanley v. Georgia, 394 U.S. 557 (1969), which upheld the right of a person to possess obscene material in the privacy of his home, mandated a contrary conclusion. *Id.* In doing so, Justice Blackmun followed a number of prior cases decided by the Court which had similarly declined to extend the principles of *Stanley*. *See* note 90 *supra*.

nation of such materials to adults was condoned. The legislature may have been convinced that the limited resources available to prosecutors should be expended on matters deemed to have a greater priority than the enforcement of obscenity laws, or it may have believed that the gap it had created would be filled by appropriate federal statutes such as section 1461, or it may also have deemed it easier to penalize over the counter retail sales to minors rather than the mailing of materials to private residences or it may simply have refrained from restricting the dissemination of obscenity to adults in 1974 because it required more time to study how such distribution should be efficaciously regulated.[443] For these reasons, the Court refrained from concluding that the 1974 legislation represented any judgment of policy on the part of the state's lawmakers.

Thus, the majority in *Smith* reiterated the rule that "contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community."[444] Such applications were reviewable solely in order to ensure that jurors (a) did not rely exclusively on either their subjective reactions to the evidence admitted at trial or the reactions of an overly sensitive or overly jaded minority, (b) found obscene only that type of conduct that fell within the ambit of the substantive examples mentioned in *Miller*[445] and adopted in *Hamling*,[446] with respect to section 1461 prosecutions, (c) found obscene only those materials lacking serious literary, artistic, political or scientific value, a determination said to be "particularly amenable" to appellate review and (d) based their verdict on sufficient evidence.[447]

Two other issues raised by the petitioner were dismissed summarily. Justice Blackmun found that the trial judge had not abused his discretion in denying the petitioner's proposed voir dire questions because the particular inquiries requested would not have elicited useful information regarding a potential juror's qualifications to apply contemporary community standards in an objective manner.[448] Finally, the Court found that, as construed in *Hamling*, section 1461 was not unconstitutionally vague.[449] This latter ruling merely restated a conclusion that the Court had consistently been expressing for two decades.[450]

443. 431 U.S. at 306.
444. *Id.* at 305.
445. Miller v. California, 413 U.S. 15, 25 (1973). *See* note 37 *supra*.
446. Hamling v. United States, 418 U.S. 87, 114 (1974).
447. 431 U.S. at 305-06.
448. *Id.* at 308.
449. *Id.* at 308-09.
450. *See* Hamling v. United States, 418 U.S. 87, 114 (1974); United States v. Reidel, 402 U.S. 351, 354 (1971); Roth v. United States, 354 U.S. 476, 490-91 (1957).

In a separate concurrence, Justice Powell emphasized the narrow ground of the Court's decision. For him, the case involved only two issues: whether Congress intended to incorporate state obscenity laws into the federal statutes and whether the concept of "community standards" follows changes in state statutes. In regard to the first question, he agreed with the majority that the record of legislative debates underlying the enactment of section 1461 evinced no intent to adopt the rules set forth in relevant local legislation.[451] As for the second question, he simply echoed the view of Justice Blackmun that changes in state law are relevant, but never controlling.[452] Justice Brennan, joined by Justices Stewart and Marshall, issued a brief dissent that merely reiterated the view they had expressed elsewhere that section 1461 is unconstitutionally vague and overbroad.[453]

Justice Stevens' dissent was considerably more elaborate. Although he admitted that the majority opinion represented a "logical extension" of precedent,[454] he claimed that a federal statute defining a criminal offense could only be enforced with reference to national, not local, standards. In so doing, he followed the view expressed by Justice Harlan in *Manual Enterprises, Inc. v. Day*[455] that the proper test under a federal obscenity statute "reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency."[456] The majority in *Miller* had repudiated this thesis, claiming that no national standard could ever be legislatively defined.[457] Acknowledging this contention, Justice Stevens then responded that it provides "a reason for questioning the suitability of criminal prosecution as the mechanism for regulating the distribution of erotic material."[458] Moreover, he noted acerbically that defining local community standards in terms of "concrete descriptive criteria" is also an arduous task, especially when the locality in question is a "culturally diverse" state, like New York or California.[459]

Justice Stevens then proceeded to list the objectionable aspects of the local community standards concept. First, he noted that the geographic boundaries of a local community are never defined with precision but rather

451. 431 U.S. at 310 (Powell, J., concurring).

452. *Id.*

453. *Id.* at 310-11 (Brennan, J., dissenting, joined by Stewart and Marshall, JJ.) (citing Millican v. United States, 418 U.S. 947, 948 (1974) (Brennan, J., dissenting, joined by Stewart and Marshall, JJ.)).

454. 431 U.S. at 311 (Stevens, J., dissenting).

455. 370 U.S. 478 (1962). *See* note 11 and accompanying text *supra*.

456. 370 U.S. at 488 (opinion of Harlan, J., joined by Stewart, J.).

457. 413 U.S. at 31-34.

458. 431 U.S. at 313 (Stevens, J., dissenting).

459. *Id.* at 313-14.

"appear subject to elastic adjustment to suit the needs of the prosecutor."[460] Second, he found that whereas application of a national standard would have yielded a "substantial body of evidence and decisional law" concerning its content, no such fund of precedent can be established under a system of local community standards, which are "necessarily dependent on the perceptions of the individuals who happen to compose the jury in a given case."[461] Third, he warned that,

> an opinion held by a large majority of a group concerning a neutral and objective subject has a significant impact in distorting the perceptions of group members who would normally take a different position. Since obscenity is by no means a neutral subject, and since the ascertainment of a community standard is such a subjective task, the expression of individual jurors' sentiments will inevitably influence the perceptions of other jurors, particularly those who would normally be in the minority.[462]

Thus, a given juror's reaction in a private setting to allegedly obscene materials might differ significantly from his or her reaction in a social context. Fourth, Justice Stevens noted that because an appellate record never discloses the actual standards applied by a jury, effective review of a criminal conviction for violating obscenity laws is thereby precluded.[463] Finally, he simply asserted that because of the subjectivity underlying a jury's determination of obscenity, "the line between communications which 'offend' and those which do not is too blurred to identify criminal conduct. It is also too blurred to delimit the protections of the First Amendment."[464]

As an alternative, Justice Stevens urged a non-criminal approach to the regulation of obscenity, stating that while all protected communications are not equally immune from regulation under the First Amendment, criminal prosecutions are an unacceptable method of abating what is essentially a public nuisance.[465] He would acknowledge that regulation of speech could take into account "obvious differences in subject matter." Thus, sexually-oriented materials could be regulated in a manner in which political

460. *Id.* at 314-15.

461. *Id.* at 315.

462. *Id. See generally* Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments*, in GROUP DYNAMICS 189-200 (D. Cartwright ed. 1960); Rosenblatt & Rosenblatt, *Six-Member Juries in Criminal Cases: Legal and Psychological Considerations*, 47 ST. JOHN'S L. REV. 615, 631-32 (1973).

463. 431 U.S. at 315-16 (Stevens, J., dissenting).

464. *Id.* at 316.

465. *Id.* at 318. For other suggestions that hard core pornography might best be limited by nuisance laws, see Loewy, *A Better Test for Obscenity: Better for the States—Better for Libertarians*, 28 HASTINGS L.J. 1315 (1977); Rendleman, *Civilizing Pornography: The Case for an Exclusive Obscenity Nuisance Statute*, 44 U. CHI. L. REV. 509 (1977). *See generally* Note, *Restricting the Public Display of Offensive Materials: The Use and Effectiveness of Public and Private Nuisance Actions*, 10 U.S.F. L. REV. 232 (1975).

comment could not.[466] But that regulation could not depend upon the opinions or sensibilities of laymen and judges. Justice Stevens noted that there was some legitimate controversy about the beneficial or therapeutic value of pornographic magazines and films;[467] he would therefore "rely on the capacity of the free marketplace of ideas to distinguish that which is useful or beautiful from that which is ugly or worthless."[468] Because Smith sent the materials in question to those who requested them and because these materials were mailed in sealed envelopes and thus did not constitute a nuisance to "unwilling third parties," Justice Stevens would have reversed his conviction.[469]

b. Analysis

In order better to analyze the Court's decision in *Smith*, the consideration of that case will be bisected. The first section that follows will consider the extent to which the Court's ruling marks a departure from the definitions and procedural rules utilized in prior cases. The second section will treat the broader policy questions and their ramifications raised by Justice Stevens' dissent.

466. 431 U.S. at 318-19 (Stevens, J., dissenting). This appears to comport with the views expressed in his plurality opinion in Young v. American Mini Theaters, Inc., 427 U.S. 50, 69-70 (1976). *See* notes 410-13 and accompanying text *supra*.

467. *Compare, e.g.*, COMM'N ON OBSCENITY & PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 53 (1970) ("[o]n the positive side, explicit sexual materials are sought as a source of entertainment and information by substantial numbers of American adults. At times, these materials also appear to serve to increase and facilitate constructive communication about sexual matters within marriage.") *with* W. BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 215 (1976) ("censorship, in trying to maintain the moral distinction between the non-obscene and the obscene, has the effect of maintaining the distinction between the human and the base, and therefore . . . between art and trash. A people that is told by the law, with the support of the learned professions, that it is not improper to satisfy its taste for pornography will come to understand sexual relations in the language of pornography and will lose sight of the moral setting in which human sexual relations exist. Such a people will have no taste for moral questions, and, therefore, no taste for the great art which deals with these questions. It will prefer *Fanny Hill* to *The Red and the Black*, ultimately because it is taught that there is no reason not to.") *and* Sparrow, *Freedom of Expression: Too Much of a Good Thing?*, 46 AM. SCHOLAR 165, 178 (1977) ("I should say that the unrestricted circulation in the bookshops and on the bookstalls of grossly indecent and sadistic books and magazines . . . coupled with the knowledge that these things are permitted by the law of the land, would make a difference in the way the general public regards the indecent and the inhumane, particularly in the area of sex and violence. People would unconsciously redefine these concepts, and alter their attitude toward the things they stand for: accepted standards of decency and humanity would themselves be modified; things that today disgust us by their indecency would no longer seem indecent, things that today horrify us by their brutality would no longer seem brutal, or not so shockingly brutal as they do now"). *See generally* SCHAUER, *supra* note 3, at 58-64.

468. 431 U.S. at 321 (Stevens, J., dissenting).

469. *Id.*

(1) Consistency with Prior Law

The first question that needs to be asked about "contemporary community standards" is: what is the geographic scope of the community referred to in that phrase? After the decision in *Miller v. California*,[470] a number of legislatures enacted laws defining the applicable community as the state itself;[471] thus, in prosecutions under the various obscenity statutes of those states, these definitions of the appropriate community would, of course, control. There is nothing questionable in this approach; indeed, the majority in *Smith* refers to such a technique with approval.[472] Similarly, even absent such a precise statutory requirement, the Court in *Miller* indicated that an instruction by the presiding judge in a state prosecution advising the jury to apply the contemporary community standards of the forum state is not reversible error.[473] By analogy, where state law is silent, a jury could presumably be instructed to apply the standards of a geographic subdivision of a state, such as a county or a township; as Professor Schauer has noted, "[t]he standard to be applied should be based upon the balancing of the competing factors of workability of the standard, on the one hand, and the overall effect on First Amendment values, on the other."[474] Indeed, the Supreme Court has even gone so far as to approve instructions where the jury was told to "apply 'community standards' without specifying what 'community.' "[475] Thus, in local prosecutions where there is no controlling state law, presiding judges are accorded a considerable degree of discretion in particularizing the geographic scope of the relevant community.

The issue is more problematic in the context of federal obscenity prosecutions. As noted earlier,[476] two justices in *Manual Enterprises, Inc. v. Day*[477] contended that in such prosecutions a "national standard of decency" governs,[478] and many lower federal courts adopted this position.[479] In *Hamling v. United States*,[480] however, a majority of the Court, in

470. 413 U.S. 15 (1973).

471. *See, e.g.*, CONN. GEN. STAT. § 53a-193-(a)(3) (1974); MASS. GEN. LAWS ch. 272 § 31 (1972), *amended*, ch. 430 § 12 (1974); N.C. GEN. STAT. § 14-190.1(b)(2) (Cum. Supp. 1977); OR. REV. STAT. § 167.087(2)(b) (1974); S.D. COMPILED LAWS ANN. § 22-24-27(1) (1977 Supp.); TENN. CODE ANN. § 39-3010(G) (1977 Supp.); VT. STAT. ANN. tit.13 § 2801(B) (1977 Supp.).

472. 431 U.S. at 303.

473. 413 U.S. at 31.

474. SCHAUER, *supra* note 3, at 125.

475. Jenkins v. Georgia, 418 U.S. 153, 157 (1974). *See* notes 54-58 and accompanying text *supra*.

476. *See* note 11 and accompanying text *supra*.

477. 370 U.S. 478 (1962).

478. *Id.* at 488.

479. *See* cases cited note 16 *supra*.

480. 418 U.S. 87 (1974). *See* notes 47-53 and accompanying text *supra*.

a case involving section 1461, found that national standards were not controlling in federal actions to enforce obscenity laws. Instead, it held that local community standards would govern.[481] The geographic scope of the term "community" was said to be the judicial district from which the members of the jury were drawn.[482] To this observation, however, the Court added the following caveat: "But this is not to say that a district court would not be at liberty to admit evidence of standards existing in some place outside of this particular district, if it felt such evidence would assist the jurors in the resolution of the issues which they were to decide."[483] Thus, in fact, *Hamling* does not mandate the application of any standard fixed with reference to a given locality. Instead, the primary criterion proffered for admitting evidence from which a jury may derive a community standard is whether or not the jury will in fact be assisted in fulfilling its function by such an admission.[484]

The decisions of lower federal courts during the years after *Miller* have predictably reached disparate results on this problem. One approach has been to limit the relevant community solely to the judicial district in which the case is tried. The formative decision in this respect was *United States v. Groner*,[485] decided by the Fifth Circuit in 1973. That case involved a prosecution under section 1462 of Title eighteen of the United States Code,[486] which proscribes the distribution of obscene materials in interstate commerce. The Fifth Circuit noted that under the Jury Selection and Service Act of 1968, litigants in federal court are entitled to "a fair cross section of *the community* in the district or division wherein the court convenes."[487] Based on this observation, the court of appeals rejected any attempt to define the community in federal obscenity cases as the entire nation:

> For the trial of obscenity cases under federal law "the community" should logically embrace that area from which the jury is drawn and selected. According to the Jury Act federal juries are generally drawn from a division within a district or from the district at large. Depending upon the population involved these districts vary greatly in geographical area. In a few cases a district is as large as a state; but in metropolitan areas the boundaries of a

481. 418 U.S. at 105.

482. *Id.* at 105-06.

483. *Id.* at 106.

484. For general discussions of the concept of community standards after *Miller*, see SCHAUER, *supra* note 3, at 120-131; Shugrue, *An Atlas for Obscenity: Exploring Community Standards*, 7 CREIGHTON L. REV. 157 (1974); Comment, *Pornography, the Local Option*, 26 BAYLOR L. REV. 97 (1974); Comment, *Obscenity: Determined by Whose Standards?*, 26 U. FLA. L. REV. 324 (1974).

485. 479 F.2d 577 (5th Cir.), *vacated on other grounds*, 414 U.S. 969 (1973).

486. *See* note 273 *supra*.

487. 479 F.2d at 583 (quoting 28 U.S.C. § 1861 (1970) (emphasis by the court)).

> district may be comparatively small, though in such districts the population is varied and large. It does not seem reasonable or sensible to require a jury in federal criminal obscenity cases drawn from a single district or division to assess the thinking of the average person of the community, to consider the common conscience of the community, or the present-day standards of the community if the word "community" is to include all of the people within the boundaries of this vast nation North, South, East and West.[488]

In *United States v. One Reel of 35mm Color Motion Picture Film Entitled "Sinderella," Sherpix, Inc.*,[489] the Second Circuit dealt with a judgment of forfeiture pursuant to section 1305 of Title nineteen of the United States Code,[490] which prohibits importation into the United States of "obscene or immoral" materials, rendered by a federal judge sitting without a jury. The court defined the relevant community in the following fashion:

> A jury in this case would have been selected from members of communities in the Eastern District of New York, i.e., Brooklyn, Long Island and Staten Island. In theory they would be supposed to know how an "average person" would apply "contemporary community standards" to whether *Sinderella* appealed to their "prurient interest." The Judge was vested with this same power and burden. His task was to gauge the reaction of the community when, as and if it viewed the film which he saw. The community could not extend beyond the ken of the jury and, in this case, the Judge. Thus the narrowing geographic standards of *Miller* have been met. In fact the Judge at the opening of the trial quite understandably inquired: "How am I to judge national standards?" Naturally he could not possibly do this. Even State standards or city-wide standards would have been too broad.[491]

The result in "*Sinderella*" had been anticipated by a New York district court in *United States v. Various Articles of Obscene Merchandise, Schedule No. 896*,[492] another suit involving section 1305. There, it was stated unconditionally that the "patent offensiveness" and "prurient interest" elements of the tripartite *Miller* test for obscenity would be determined with reference to the standards prevalent in the southern district of New York.[493] All these cases preceded the Court's decision in *Hamling*. All of

488. *Id.* at 583.

489. 491 F.2d 956 (2d Cir. 1974).

490. 19 U.S.C. § 1305 (1970): "All persons are prohibited from importing into the United States from any foreign country . . . any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material or any cast, instrument, or other article which is obscene or immoral. . . ." *See generally* Comment, *Government Seizures of Imported Obscene Matter: Section 305 of the Tariff Act of 1930 and Recent Supreme Court Obscenity Decisions*, 13 COLUM. J. TRANSNAT'L L. 114 (1974).

491. 491 F.2d at 958.

492. 363 F. Supp. 165 (S.D.N.Y. 1973).

493. *Id.* at 167.

them do what *Hamling* does not, that is, find that community standards must be defined with respect to a fixed geographic area. Presumably, courts following these cases would deny judges in federal prosecutions the privilege of admitting evidence of standards outside the relevant judicial district, a technique that *Hamling* leaves to the discretion of individual judges.

One may well ask whether or not these restrictive decisions survive *Hamling*, with its more expansive approach. The *Groner* case was vacated on appeal by the Supreme Court for reconsideration in light of *Miller*.[494] On remand,[495] the Fifth Circuit did not reappraise its position on the geographic scope of the relevant community, so presumably its prior discussion on that point would still be controlling, since *Miller* would not impair the result reached therein. This decision on remand antedated *Hamling*, so the court of appeals did not have the benefit of the Supreme Court's teachings in that latter case. However, three months after *Hamling* was handed down, the Fifth Circuit in *United States v. Ratner*[496] cited both decisions in *Groner* with approval, so perhaps the restrictive geographical approach taken in the first of those decisions is still controlling law within that circuit. In contrast, the Second Circuit has never reconsidered *"Sinderella"* in light of *Hamling*. The one pertinent decision by a New York district court on the subject is *United States v. Various Articles of Obscene Merchandise*,[497] decided in 1976, wherein *"Sinderella"* was said to typify the position that "a federal court may invoke the community standards of the district in which it sits and from which it draws a jury."[498] Thus, *"Sinderella,"* with its severely circumscribed geographic limitation, may still govern in the Second Circuit.

A strikingly different approach to the problem of defining the geographic scope of the relevant community was taken by the First Circuit in *United States v. Palladino*,[499] decided after *Miller* but before *Hamling*. There, it was said that community standards under *Miller* meant national, not local, standards. *Palladino* involved a prosecution under section 1461; the First Circuit observed that in footnote seven of *United States v. Twelve 200-ft Reels of Super 8mm Film*,[500] the Supreme Court had said that the

494. Groner v. United States, 414 U.S. 969 (1973).

495. United States v. Groner, 494 F.2d 499 (5th Cir. 1974).

496. 502 F.2d 1300, 1301 (5th Cir. 1974).

497. 433 F. Supp. 1132 (S.D.N.Y. 1976), *rev'd*, 562 F.2d 185 (2d Cir. 1977).

498. 433 F. Supp. at 1137. On appeal in *Obscene Merchandise*, the Second Circuit elected to apply the standards of the judicial district in which the items in question were seized and in which prosecution had been initiated. United States v. Various Articles of Obscene Merchandise, 562 F.2d 185, 190 (2d Cir. 1977). It thus acted consistently with *"Sinderella"*.

499. 490 F.2d 499 (1st Cir. 1974).

500. 413 U.S. 123, 130 n.7 (1973).

standards of *Miller* would be interpolated into federal obscenity legislation, but it remarked that the Court in that footnote had cited the pages of *Miller* describing the elements of obscenity, not the pages discussing community standards.[501] Because of this lack of any "explicit holding" by the Supreme Court, the First Circuit felt free to devise its own approach to the problem.[502] Moreover, Chief Judge Coffin's opinion in *Palladino* expressed the view that the Constitution mandated this approach:

> Since [section 1461] proscribes the deposit for mailing, conveying in the mails, and delivery of obscene materials, were a state standard to govern the level of tolerance, guilt or innocence could easily turn on the choice to prosecute in the state of mailing, the state of delivery, or a state through which the material passed. This would open the possibility of senders of identical materials from the same state to be found guilty or not, depending on the course of transit or state of delivery of their materials. The vice of selective prosecution would also be present, as well as the anomalous situation of having prosecution under a national law depend upon the laws of the least permissive states. None of these eventualities would promote the uniform application normally attributed to federal legislation.[503]

Not surprisingly, the petitioner in *Hamling* cited *Palladino* in support of the proposition that section 1461 prosecutions are governed by national community standards.[504] The Supreme Court rejected this proposition,[505] but did not overrule *Palladino* insofar as it was inconsistent with the result in *Hamling*. Nor has the First Circuit reconsidered the matter; indeed, in light of *Hamling*'s insistence that community standards should not be determined with reference to a definition of the term "community" that substitutes some smaller locality for the nation as a whole, it might well be possible for a court of appeals to require that the federal district courts under it must "assist" jurors by admitting evidence of so many different local standards throughout the nation that the result, in fact if not in name, would be the application of a national standard. Such a technique would violate the spirit, but not necessarily the letter of *Hamling*, so the option selected by the First Circuit in *Palladino* may not have been entirely foreclosed by subsequent rulings. Nevertheless, in the main post-*Hamling* case to reconsider the validity of *Palladino*'s advocacy of national standards, the Sixth Circuit

501. 490 F.2d at 502.

502. *Id.*

503. *Id.* at 503. *Accord*, United States v. One Reel of Film, 481 F.2d 206, 210 (1st Cir. 1973) (Coffin, J., concurring). Of course, the First Circuit had always applied national standards in federal obscenity prosecutions. *See* note 11 *supra*.

504. Hamling v. United States, 418 U.S. 87, 104 (1974).

505. *See id.* at 105-06.

concluded without hesitation that the Supreme Court had "rejected" the position of the First Circuit.[506]

A third approach consists of attempts by courts to take *Hamling* at its word and apply a flexible approach not tied to geographical considerations. As the Ninth Circuit has admitted, implementation of the *Hamling* test "tends to result in application of 'local' attitudes because of the limited area from which the jury is drawn, but this does not make the obscenity standard any more a geographic one than tests involving 'the propensities of a "reasonable" person in other areas of the law.' "[507] On closer examination, however, as the test of *Hamling* has been applied, it does appear to result in the conjunction of the concept of "community" with a fixed locality. For example, in *United States v. Dachsteiner*,[508] a section 1461 prosecution, the Ninth Circuit said:

> Because the jurors in this case resided in the Northern District of California, they will draw upon their knowledge which may be representative of that area. Neither *Miller* nor *Hamling*, however, requires the trial court to define the relevant community in metes and bounds. . . . Likewise, in deciding whether the district court committed prejudicial error, we need not define the relevant community in precise geographical terms.[509]

Similarly, in *United States v. Marks*,[510] the Sixth Circuit held that under *Hamling* it would be permissible for a district judge to define the term "community" by the "precise political-geographic boundary of the Eastern District of Kentucky" from which the jury had been drawn, even though that same judge had allowed testimony during trial with respect to community standards prevalent in Cincinnati, Ohio.[511] In *United States v. Miscellaneous Pornographic Magazines*,[512] an Illinois district court gave *Hamling* a pragmatic reading. In that case, after a first trial resulted in a hung jury, the parties submitted the evidence adduced at that proceeding to a judge sitting without a jury. He concluded that while *Hamling* permitted admission of evidence from varying localities, he would be bound by the standards of the city of Chicago, where all members of the jury in the first trial had resided, simply because the evidence adduced at that first trial did not take into account the standards of communities other than Chicago.[513] In

506. Marks v. United States, 520 F.2d 913, 922 (6th Cir. 1975), *rev'd on other grounds*, 430 U.S. 188 (1977). *See also* United States v. Miller, 505 F.2d 1247, 1247-48 (9th Cir. 1974).

507. United States v. Cutting, 538 F.2d 835, 841 (9th Cir. 1976).

508. 518 F.2d 20 (9th Cir.), *cert. denied*, 421 U.S. 954 (1975).

509. *Id.* at 22.

510. 520 F.2d 913 (6th Cir. 1975), *rev'd on other grounds*, 430 U.S. 188 (1977). For a discussion of other issues raised by this case, see notes 95-166 and accompanying text *supra*.

511. 520 F.2d at 919.

512. 400 F. Supp. 353 (N.D. Ill. 1975).

513. *Id.* at 354.

terms of the results reached, these cases do not differ significantly from restrictive decisions like *Groner* or "*Sinderella*." In *Dachsteiner*, while the Ninth Circuit purported not to define the geographical scope of the relevant community, it acknowledged, as a practical matter, that the standards in fact applied would undoubtedly be those of the judicial district from which the jury was drawn. In *Marks*, the trial judge actually admitted evidence relating to standards of localities falling outside the relevant judicial district, but in his instructions to the jurors, he defined the appropriate "community" as the eastern district of Kentucky. It is difficult to reconcile this practice with the assumption implicit in *Hamling* and explicit in *Smith* that the determination of community standards is a jury function and the judge's role is to "assist" the jurors in fulfilling their duty. In fact, however, there is some confusion on this point, and the practice condoned in *Marks* has been approved elsewhere, most prominently by the Tenth Circuit in *United States v. Friedman*.[514] The court there held that "[a] consideration of the application of national or local standards should be initially made by the trial court in addition to the determination of what such standards may be."[515] But apart from the difficulties concerning the division of responsibility between judge and jury in federal prosecutions, the result arrived at in *Marks* is one which binds community standards inextricably to the metes and bounds of the judicial district in which the prosecution is tried. Similarly, the court in *Miscellaneous Pornographic Magazines* presumably could have adduced evidence of standards outside Chicago to assist its determination; instead, it confined its considerations to the criteria that would have been applied by a jury and assumed that these criteria would have been those of the judicial district in which the jurors resided. Thus, although in theory *Hamling* permits a flexible non-localized approach, in practice it has been relied on to support conclusions like those reached in *Groner* and *"Sinderella"* that the governing standards are those existing within the forum's judicial district.

Perhaps the leading case contrary to this trend is *United States v. Danley*,[516] decided by the Ninth Circuit in 1975. There, in a prosecution under section 1462,[517] a trial court situated in Oregon admitted into evidence not only the standards prevalent in that state, but also the standards prevalent in states in which the various recipients of the allegedly obscene materials resided. The Ninth Circuit upheld this practice, saying,

514. 488 F.2d 1141 (10th Cir. 1973).
515. *Id.* at 1142.
516. 523 F.2d 369 (9th Cir. 1975), *cert. denied*, 424 U.S. 929 (1976).
517. *See* note 273 *supra*.

> In judging the community standard, the court, dealing as it was with laws regulating the mails and interstate commerce, properly considered the community as embracing more than the State of Oregon. While under *Miller v. California* . . . taken in conjunction with *United States v. 12 200-ft. Reels of Film* . . . it is permissible in federal prosecution to define the state as a community, it is clear from *Hamling v. United States* . . . that consideration may be given to standards without the state.[518]

Danley represents a rare effort to apply *Hamling* literally, and simultaneously exposes a weakness in the approach utilized by the Court in *Hamling*. If the publication in question is one like *Hustler*, which presumably is subscribed to by residents of all fifty states, then the standards of those states ought to be admissible in a federal prosecution. The result of so doing, however, would be to confront the jury with the task of considering conflicting concepts of obscenity held by different portions of this nation, one of the very problems that repudiation of the national standard in *Hamling* was supposed to have resolved. With this prospect in mind, it is no surprise that courts construing *Hamling* often do what the Court in that case abjured: they substitute for the nation as a whole some smaller, circumscribed locality.

A fourth approach to defining the geographical scope of the relevant community is a functional one, depending upon the nature of the conduct being proscribed by the applicable federal obscenity law. Section 1461 provides a perfect illustration of the problem. Prior to 1958, section 1461 by its terms prohibited only the deposit into the mails of obscene materials.[519] On the basis of this language, the Tenth Circuit in 1953 held, in the case of *United States v. Ross*,[520] that prosecution for violation of section 1461 could be initiated only at the place where the item in question was deposited for mailing; it was said that "[t]hat act [of admission into the mails] is complete when the deposit is made and is not a continuing act. It does not involve a use of the mails."[521] In response to this ruling, Congress in 1958 amended section 1461 to prohibit the knowing use of the mails for the mailing, carriage in the mails, delivery, or causing of delivery to a place directed by the sender, of obscene materials.[522] Moreover, prosecution

518. 523 F.2d at 370 (citations omitted). *Cf.* United States v. Harding, 507 F.2d 294, 297 (10th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975) (noted that in *Hamling* the Court had not said that a juror is constitutionally limited to considering local standards); United States v. Miller, 505 F.2d 1247, 1248 (9th Cir. 1974) (noted that the Court in *Hamling* accepted the use of contemporary community standards "without defining the geographical limits of that community"); United States Mfg. & Dist. Corp. v. City of Great Falls, 169 Mont. 298, 304, 546 P.2d 522, 525-26 (1976) (quoted *Danley* approvingly in regard to construction of state obscenity statute).

519. *See* SCHAUER, *supra* note 3, at 174.

520. 205 F.2d 619 (10th Cir. 1953).

521. *Id.* at 621. *See also* United States v. Comerford, 25 F. 902, 903 (W.D. Tex. 1885).

522. Pub. L. No. 85-796, § 1, 72 Stat. 962 (1958).

under 1461 was made subject to the venue provisions of section 3237(a) of Title eighteen of the United States Code:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed. Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.[523]

From the beginning, courts had held that section 3237(a) did not violate the guarantees of the Sixth Amendment.[524] But even though it was not constitutionally infirm, it might produce difficulties when construed in conjunction with supervisory rules developed by the Supreme Court, particularly Federal Rule of Criminal Procedure 21(b), which authorizes a transfer of venue if the offense for which an individual is indicted occurred in more than one district and if the transferring court is convinced that a change of venue is necessary "for the convenience of the parties and in the interests of justice."[525] The two leading section 1461 cases decided prior to *Miller* that dealt with the problems raised by section 3237(a) and Rule 21(b)

523. 18 U.S.C. § 3237(a) (1970). *See generally* Note, *Multi-Venue and the Obscenity Statutes*, 115 U. PA. L. REV. 399 (1967).

524. *See, e.g.*, Reed Enterprises v. Clark, 278 F. Supp. 372, 380 (D.D.C. 1967), *aff'd*, 390 U.S. 457 (1968); United States v. Frew, 187 F. Supp. 500, 507 (E.D. Mich. 1960); Toscano v. Olesen, 184 F. Supp. 296, 297 (S.D. Cal. 1960).

525. FED. R. CRIM. P. 21(b). The "interests of justice" encompass many factors. *See, e.g.*, United States v. Olen, 183 F. Supp. 212, 219-20 (S.D.N.Y. 1960) (in securities fraud case, court took into account the fact that most of the transactions occurred out of state, that the defendants had family contacts in the proposed transferee district, that the potential witnesses resided in that district and that defendants were in "financial straits"); United States v. White, 95 F. Supp. 544, 550 (D. Neb. 1951) (the term must be defined not on "the basis of any inflexible and universally applicable rule, but must be resolved in each case upon its peculiar facts and in its own setting, with the mature balancing of the factors pointing in divergent directions. The interests of the government, no less than those of the defendant, must be carefully regarded"); United States v. Erie Basin Metal Prods. Co., 79 F. Supp. 880, 885 (D. Md. 1948) (term must take into account "the rights of the accused, the Government, and the public, that is to say, the promotion of a speedy and at the same time a fair trial, with appropriate consideration for the curtailment of unnecessary expense or prolongation of litigation, and in this connection the relative cost to the parties, their possible embarassment [sic] by reason of absence from their homes and places of business for extended periods of time, the relative cost and hardship through removal of books and records into another jurisdiction, as against non-removal"); United States v. National City Lines, 7 F.R.D. 393, 397 (C.D. Cal. 1947) (the term "implies conditions which assist, or are in aid of or in the furtherance of, justice. Both call for the doing of things which bring about the type of justice which results when law is correctly applied and administered. They import the exercise of discretion which considers both the interests of the defendant and those of society").

are *United States v. West Coast News Co.*[526] and *United States v. Luros*.[527] In *West Coast*, the defendants were charged with mailing obscene materials from Fresno, California to businesses located in the western judicial district of Michigan, the locality where the government initiated its prosecution. They filed a motion to have the case transferred to the southern district of California pursuant to Rule 21(b). The court found that under the 1958 amendments, a section 1461 prosecution could legitimately be brought in the district in which the books in question were delivered.[528] It also found that the applicable community standards were those of the western district of Michigan. Implicit in its disposition of the issue was the assumption that even had a transfer been granted, a California jury would have had to apply the standards of Michigan.[529] In *Luros*, the court was primarily concerned with whether to grant a transfer from the southern district of Iowa, where allegedly obscene items were delivered, to California, from which the government claimed they were sent. On the choice of forum problem, the court simply ruled:

> Use of the mails or interstate commerce may involve acts in several states as part of the same offense. Congress may make such use a continuing offense. Where, as in this case, a continuing offense is charged, the defendant may be prosecuted in the district of deposit, in the district of delivery, or in any district through which the obscene material passed.[530]

As a consequence of this conclusion, the court in *Luros* ruled that the venue provisions of section 3237(a) take precedence over the discretionary power granted by Rule 21(b) to a district court to transfer the site of trial.[531]

A choice of law rule like that espoused in *Luros* presents few difficulties when federal courts in any district apply a uniform national standard.

526. 30 F.R.D. 13 (W.D. Mich. 1962).

527. 243 F. Supp. 160 (N.D. Iowa 1965), *rev'd on other grounds*, 389 F.2d 200 (8th Cir. 1968).

528. 30 F.R.D. at 19.

529. *Id.* at 19-20.

530. 243 F. Supp. at 167-68 (citing Travis v. United States, 364 U.S. 631, 637 (1961) (involving failure to file an affidavit required by the Taft-Hartley Act; venue lies wherever such failure occurred); United States v. Cores, 356 U.S. 405, 409 (1958) (involving an alien crewman who stays in the country longer than the duration prescribed by his conditional landing permit; prosecution may be initiated wherever the crewman was found, not just where his permit expired). *Accord*, Gold v. United States, 378 F.2d 588, 594 (9th Cir. 1967); United States v. Levy, 331 F. Supp. 712, 713 (D. Conn. 1971); Reed Enterprises v. Clark, 278 F. Supp. 372, 378 (D.D.C. 1967), *aff'd*, 390 U.S. 457 (1968); United States v. Sidelko, 248 F. Supp. 813, 815 (M.D. Pa. 1965).

531. 243 F. Supp. at 177-78. *Cf.* United States v. National City Lines, 334 U.S. 573, 588 (1948) (legislative history of section twelve of the Clayton Act showed a congressional intent to deprive a court of its discretionary power to effect transfer pursuant to the forum non conveniens principles of 28 U.S.C. § 1404(a) (1970)).

But after *Miller* and *Hamling*, the problem of which of many possible community standards should govern became a genuine one. Predictably, it has led to confused results. In *United States v. Germain*,[532] a section 1461 prosecution was initiated in the southern district of Ohio where the materials in question were delivered; pursuant to Rule 21(b), the defendants requested a transfer of venue to the central district of California, where they resided. Noting that were transfer made, jurors in California would be compelled to apply Ohio community standards, the court denied this request, reasoning that residents of the southern district of Ohio would be "in a uniquely better position" to apply the standards of their own community.[533]

In *United States v. Elkins*,[534] there had already been a 21(b) transfer from the northern district of Iowa to the central district of California, both of which were permissible forums for prosecution under Section 3237(a). The California district court said that on a change of venue, the law of the transferor district should apply; thus, in this case the governing community standard would be that of the northern district of Iowa.[535] The court recognized that under *Hamling*, out-of-state standards could be admitted into evidence but it held:

> The Court concludes that a jury selected from the residents of this District could not determine the contemporary community standards of the Northern District of Iowa by reason of its members not possessing the knowledge of a juror in Iowa of the community standards in which the Iowa juror resides, necessary in deciding what conclusion the average person, applying the contemporary community standards of Iowa, would reach based on the facts adduced in the instant case . . . . This Court concludes that it was not the intention of the Supreme Court or Congress, as indicated by the current case and statutory law, that a District Court Judge or jury in the Central District of California should decide the standards of obscenity to be deemed the contemporary community standards of any and all States in the Union from which these cases may be transferred on motions for change of venue resulting from the fact that the allegedly obscene material was made or published in this District.[536]

Accordingly, the court dismissed the indictment.[537]

Instead of appealing this dismissal to the Ninth Circuit, the government sought a reindictment in the northern district of Iowa. Once again, the petitioners countered with a Rule 21(b) request for transfer to the central district of California; once again, an Iowa district judge granted this request.

532. 411 F. Supp. 719 (S.D. Ohio 1975).
533. *Id.* at 729.
534. 396 F. Supp. 314 (C.D. Cal. 1975).
535. *Id.* at 317-18.
536. *Id.* at 318.
537. *Id.*

This time, however, the government appealed that action to the Eighth Circuit, contending that the normal rules affecting transfers under Rule 21(b) do not apply to obscenity prosecutions. The court of appeals, in *United States v. McManus*,[538] agreed. The court noted that because the government brought the indictment in Iowa, only an Iowa jury applying Iowa standards could make a determination of obscenity.[539] It further said that this conclusion was unimpaired by Rule 21(b), because Congress had, in passing section 3237(a), deprived courts of their discretionary power to transfer postal obscenity cases to other districts, and that there was ample evidence that Congress intended "to allow the district to which allegedly obscene matter is mailed, the recipient district, to institute the prosecution and to judge the character of the material under local standards."[540] After citing *Luros* to support this assertion in regard to the intent of Congress, the Eighth Circuit pointed out that because *Hamling* mandated the utilization of local standards, those extant in the northern district of Iowa would govern; it tempered this observation, however, with the remark that a showing of "intentional overreaching" by the government might overcome the federal prosecutor's choice of forum, and thus his choice of the relevant community, in postal obscenity cases.[541]

A similar choice of law was expressed by the Fifth Circuit in *United States v. Slepicoff*,[542] where the teachings of *Hamling* and the language of section 3237(a) were said to yield the conclusion that:

> it is logical to try a defendant who is charged with a violation of § 1461 in the district to which he allegedly mailed obscene materials. Appellant's choice to do business throughout the nation limited his right to be tried in the locality where he lives and bases his operations.[543]

The one court that has attempted to provide a plausible rationale for its choice of an applicable community standard is *United States v. Various Articles of Obscene Merchandise*,[544] decided by a federal court located in the southern district of New York. This was not a section 1461 prosecution, but was instead an action brought pursuant to section 1305(a) of Title nineteen of the United States Code, prohibiting the importation from foreign countries of obscene materials.[545] The material in question, a German erotic magazine sent by first class mail, was seized by a customs agent in New

538. 535 F.2d 460 (8th Cir. 1976), *cert. denied*, 429 U.S. 1052 (1977).
539. *Id.* at 463.
540. *Id.*
541. *Id.* at 464.
542. 524 F.2d 1244 (5th Cir. 1975).
543. *Id.* at 1249.
544. 433 F. Supp. 1132 (S.D.N.Y. 1976), *rev'd*, 562 F.2d 185 (2d Cir. 1977).
545. 18 U.S.C. § 1305(a) (1970).

York City, but was addressed to the petitioner's place of residence in Lancaster, Pennsylvania. District Judge Frankel concluded that the controlling standard would be that of the locality to which the seized item was addressed.[546] In support of this conclusion, he commented:

> This approach is in harmony with the prevailing principle in conflict of laws jurisprudence mandating that the controlling law be taken from the jurisdiction which has the most significant contacts with the allegedly wrongful act. . . . For purposes of 19 U.S.C. § 1305(a), that jurisdiction is surely the recipient's community, not the port where a customs official happens to open sealed mail and expose its assertedly obscene contents. . . . To be sure, the multiple venue provisions of some of the federal obscenity statutes complicate the problem of choosing the appropriate standard or standards, especially when applied to a multi-state distributor . . . but such difficulties are not acute under 19 U.S.C. § 1305(a) and, moreover, cannot be invoked to justify the application of a standard that the Constitution does not permit.[547]

Of course, the consequence of such an approach was that a New York jury would have to apply the standards of Lancaster, Pennsylvania. But Judge Frankel rejected this possibility, saying *Hamling*'s requirement of local standards would be contradicted if one were "to have people from one community purport to go by the sentiments of another."[548] The only option, then, was to refer disputes of this nature to the district of the claimant's residence. Judge Frankel found that "the choice of venue must be given to the recipient of the questioned mail,"[549] and because the standards of

546. 433 F. Supp. at 1138.

547. *Id.* n.10 (citations omitted). On appeal, the Second Circuit held that the applicable community standards could be those of the place where the items in question were seized. United States v. Various Articles of Obscene Merchandise, 562 F.2d 185, 190 (2d Cir. 1977). In doing so, it noted both that expert testimony on the standards of the addressee's residence might be difficult to procure, *id.* at 189, and that the alleged standards adduced by the claimant, namely, those of the Lancaster Mayor's Committee on Pornography were entitled to no great deference, *id.* at 187 n.3. The gravamen of the court's holding, however, appeared to be based on the premises that the statute did not by its terms authorize trial at the addressee's residence, and that customs regulations are different in kind from domestic postal regulations. *Id.* at 188-89. But even the Second Circuit admitted that:

> no judge or jury can be expected to determine "community standards" with respect to [the item in question]. . . . The best that anyone can do is to give his or her personal reaction to it. No juror or judge armed with a copy of [the item] will have the opportunity to rush up and down the streets of his community asking friends and neighbors how they feel about it. Nor should they rudely seek insights into community *mores* by asking others what their intimate sexual practices may be. Yet the fiction remains that a jury is somehow capable of reflecting or determining "community standards." This is so probably because there is simply no better method for applying this test.

Id. at 189-90 (footnote omitted). *See also* United States v. 2,200 Paperback Books, 565 F.2d 566, 570 (9th Cir. 1977).

548. 433 F. Supp. at 1138.

549. *Id.* n.11.

Lancaster were more libertarian than those of New York City, the petitioner would undoubtedly require the government to initiate its prosecution in Pennsylvania.

All of these cases represent efforts by courts to define the geographic scope of the relevant community by considering the nature of the underlying violation being alleged; these courts are consciously attempting to relate the character of the offense that is the subject of a federal grand jury's indictment to the manner in which community standards to be applied in a subsequent trial are selected. In the instance of section 1461, the 1958 amendments created a continuing offense, one which could therefore be prosecuted at any locality the purportedly obscene item in question passed through in its course through the national postal system. When this aspect of section 1461 is coupled with the liberal transfer provisions of Rule 21(b), the result is an anomaly like the *Elkins* case. The court in *Elkins* simply assumed that the standards of the transferor district governed, said that jurors in the transferee district could never become adequately cognizant of those standards and dismissed the indictment. Yet the only support cited for the conclusion that the law of the transferor district must control was the general rule on change of venue in civil cases,[550] as established by the Supreme Court in *Van Dusen v. Barrack*.[551] Yet *Elkins* involved a *criminal* proceeding; the "law" in question was not necessarily statutory, but instead consisted of community standards, which could be proven by the usual methods of expert testimony, statistical surveys and so on. In fact, under *Hamling*, the court in *Elkins*, because California was a possible forum, could have permitted application of the standards of the central district of California as well as admitted evidence of Iowa standards. The same approach was possible in *Germain* and *McManus* where, respectively, evidence of Ohio and Iowa standards could have been supplemented with evidence of California standards. This is not an impossible task and, as the Ninth Circuit's decision in *United States v. Danley*[552] suggests, it is a technique that thoroughly comports with the mandate of *Hamling*. Indeed, it

550. United States v. Elkins, 396 F. Supp. 314, 317-18 (C.D. Cal. 1975).

551. 376 U.S. 612 (1964). Applying the *Van Dusen* doctrine to a case like *Elkins* is especially anomalous because *Van Dusen* involved a state-created right. In *Van Dusen*, a number of wrongful death actions were initiated in Pennsylvania by the survivors of various passengers killed in an airliner crash which occurred in Massachusetts. The defendant sought to transfer the proceedings from Pennsylvania to Massachusetts; the latter, but not the former, state had a monetary limit on the amount recoverable in wrongful death actions. The Court therefore held that, in order to avoid prejudice, the transferee state would have to apply the law of the transferor state. *Id.* at 639. But *Elkins* presents no issue of an attempt to prejudice a state-created right; rather, it concerns a rule of evidence to be applied in federal criminal prosecutions.

552. 523 F.2d 369 (9th Cir. 1975), *cert. denied*, 424 U.S. 929 (1976).

would seem to be a technique well suited to avoid the possible abuse inherent in a penal scheme that enables a federal prosecutor to forum shop for the community with the most restrictive standards as the place in which an indictment will be sought.

There nevertheless remains the conflicts of laws problem adverted to by Judge Frankel in the *Obscene Merchandise* case. He resolved the problem by the rather crude method of the "most-significant contacts" test developed by the New York Court of Appeals in *Babcock v. Jackson*,[553] and altogether ignored the fact that decisions by that court subsequent to *Babcock* have obscured the scope of its holding.[554] He also ignored the fact that *Hamling* does permit judges to allow jurors to consider standards of communities outside their vicinage.[555] A New York jury would have had little difficulty in ascertaining the standards of Lancaster, which, as summarized by Judge Frankel, were "that nothing is to be outlawed as obscene that is (1) viewed by an adult in private and (2) not offered or purveyed to children."[556] A jury could, under *Hamling*, have utilized this foreign standard in its determination of obscenity; as for the need to reconcile the

553. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). Professor Schauer has suggested a similar approach. *See* SCHAUER, *supra* note 3, at 129; Schauer, *Obscenity and Conflict of Laws*, 77 W. VA. L. REV. 377, 398 (1975).

554. *See, e.g.*, Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972) (guest statute case involving Ontario passenger and New York driver; held applicable law is that of the situs unless a contrary approach would advance the relevant substantive law purposes of the jurisdictions involved); Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969) (guest statute case involving a New York driver and passenger killed in Michigan; held that application of Michigan law would frustrate interests of New York); Miller v. Miller, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968) (liability limitation case involving death of a New York passenger in an auto being driven in Maine by a resident of that state who later moved to New York; held that Maine lacked any interest in proceedings and the expectations of the parties were not seriously implicated); Farber v. Smolack, 20 N.Y.2d 198, 229 N.E.2d 36, 282 N.Y.S.2d 248 (1967) (New York residents killed in North Carolina; held that because the situs of injury was the "merest lateral chance," law of the forum controlled); Long v. Pan Am. World Airways, Inc., 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965) (action for the death of Pennsylvanians killed in a Maryland airline crash deemed to be governed by laws of Pennsylvania, which had the greater interest in the outcome); Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965) (as in *Babcock*, a guest statute case involving two New Yorkers killed in Colorado; held, unlike *Babcock*, law of the situs of the accident controls; overruled by *Tooker*); Oltarsh v. Aetna Ins. Co., 15 N.Y.2d 111, 204 N.E.2d 622, 256 N.Y.S.2d 577 (1965) (tort case involving New Yorker injured in Puerto Rico who sued in New York, relying on Puerto Rican law; held, Puerto Rican interest controlled as long as its law did not violate New York's public policy). As a result of these decisions, one commentator has said "[a] New York lawyer with a guest statute case has more need of a ouija board . . . than a copy of Shepard's citations." Rosenberg, *Two Views of Kell v. Henderson*, 67 COLUM. L. REV. 459, 460 (1967).

555. United States v. Various Articles of Obscene Merchandise, 433 F. Supp. 1132, 1137 (S.D.N.Y. 1976) (citing Hamling v. United States, 418 U.S. 87, 106 (1974)).

556. *Id.* at 1136.

tension between that standard and the less liberalized mores of the southern district of New York, it would appear to be a natural consequence flowing from the decision in *Hamling* to allow into evidence anything likely to assist the jurors. Thus, while all the decisions applying a functional approach eventually elected to implement the standards of one judicial district or another, one may well ask whether the fact that violations of obscenity statutes like section 1461 represent continuing offenses prosecutable in a variety of localities requires judges to be more amenable to the approach suggested in *Hamling* and endorsed in *Danley*. This would be accomplished by allowing juries to consider evidence of the standards not only of the community of the forum but also those of the other communities where a prosecution could have been initiated.

The point of this lengthy excursus concerning the various ways courts have defined the geographic scope of the community whose standards are to be applied in a federal obscenity prosecution is to suggest a factor which the Court in *Smith* glossed over. In cases like *Danley* in which the relevant standards are deemed to include those of communities located outside the forum state, the laws of the forum state can never be controlling, because the standards of that state form only a portion of the jury's decisional calculus on the issue of obscenity. Indeed, to the extent that the *Danley* approach represents the optimal method of relating the concept of community standards to the nature of the offense that triggers a prosecution entailing the necessity of defining those very standards, it might well be argued that for the reason given above, all section 1461 prosecutions involve situations where the law of a single state can never govern. If so, this thesis would provide a much narrower ground for achieving the same result arrived at by the Court in *Smith*. But, in fact, this broad generalization overstates the case. First, it does not grapple with the problems raised by cases like *Smith*, in which all the alleged offenses occurred entirely within one state. Second, it does not deal with the difficulties presented by cases like *Groner* or "*Sinderella*," in which a given circuit has appeared to adopt the rule that the relevant standards can only be those of the judicial district in which the case is tried. Third, it does not take into account the fact that, in reality, even those courts purporting to apply the *Hamling* rule or the functional approach often, as a practical matter, define the relevant community as that from which the jurors are drawn. To the extent that *Smith* holds that state law can never be controlling on the issue of community standards in that subcategory of section 1461 prosecutions like *Danley* where evidence of out-of-state communities is admitted and utilized, it is only restating the obvious. Whether the same can be said for its holding with respect to those subcategories of section 1461 prosecutions where evidence of standards

outside the forum state is either not admitted or could not be admitted requires a close analysis of the rationale proffered by the majority.

Justice Blackmun points out that neither the language nor the history of section 1461 indicate that Congress intended to incorporate state law.[557] This is correct. Section 1461 represents the current version of a law enacted by Congress in 1865 and amended at various junctures during the next ninety-five years.[558] Some of the debates underlying the enactment of the 1958 amendments discussed earlier do suggest that members of Congress intended that one reason for allowing prosecutions under section 1461 to be initiated in the locality where allegedly obscene matter is delivered was because there is no one better qualified to "judge the effect of such vicious and low activity than the people of the community who have been harmed by the dissemination of such filth."[559] This deference to local values does not evince any proclivity to incorporate local legislation, however.[560] Reliance on legislative history in the interpretation of the meaning of federal obscenity statutes has, however, never really been a salient feature of recent court decisions; as the Fifth Circuit has noted, "these statutes avoid due process vagueness difficulties due to authoritative judicial construction."[561] Thus, for instance, in *United States v. Twelve 200-ft. Reels of Super 8mm Film*,[562] the Court ruled that the materials regulated by federal obscenity laws were limited to those examples specified in the *Miller* decision.[563] This construction was not based on any perception of congressional intent, but rather on the Court's self-imposed duty to construe federal laws so as to avoid, whenever possible, a finding of constitutional infirmity.[564] Thus, the

557. 431 U.S. at 304 n.10.

558. For the history of the statute, *see* Manual Enterprises, Inc. v. Day, 370 U.S. 478, 500-11 (1962) (Brennan, J., concurring, joined by Warren, C.J., and Douglas, J.); SCHAUER, *supra* note 3, at 168-72; Cairns, Paul & Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009, 1010-11 n.2 (1962); Paul, *The Post Office and Non-Mailability of Obscenity: An Historical Note*, 8 U.C.L.A. L. REV. 44, 51-57 (1961).

559. 104 CONG. REC. 8994 (1958) (remarks of Rep. Feighan).

560. Moreover, statements by the original enactors belie any suggestion that local standards were to prevail:

> If there be a trial in this country or anywhere else of an obscene character—of that character that a report of it would corrupt the morals of the youth and the morals of the country generally—then I do not think that the United States should provide the means to circulate that kind of literature in whatever paper or in whatever book it may be published.

44 CONG. REC. 696 (1876) (remarks of Rep. Cannon).

561. United States v. Wasserman, 504 F.2d 1012, 1015 n.10 (5th Cir. 1974).

562. 413 U.S. 123 (1973).

563. *Id.* at 130 n.7.

564. *See* United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971) (opinion of White, J.) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

Court was the institution primarily entrusted with the judgment of deciding whether or not federal postal obscenity statutes should subsume the standards expressed in local legislation.

The *Smith* majority appeared to recognize this point because it went on to state:

> The regulation of the mails is a matter of particular federal concern, and the nationwide character of the postal system argues in favor of a nationally uniform construction of § 1461. The Constitution itself recognizes this fact, in the specific grant to Congress of power over the postal system. Art. I, § 8, cl. 7. Obscenity in general has been a matter of both national and local concern. To the extent that local concern is relevant, however, the jurors' application of contemporary community standards fully satisfies that interest. Finally, to the extent that the state law and federal law conflict, traditional principles of federal supremacy require us to follow the federal policy. See *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943); *United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947); *De Sylva* v. *Ballantine*, 351 U.S. 570 (1956); *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580 (1973) . . . . We therefore decline petitioner's invitation to adopt state law relating to distribution for purposes of the federal statute regulating use of the mails.[565]

Justice Blackmun's analysis is somewhat disingenuous. No one disputes the constitutional power of Congress to regulate the postal system. The issue in *Smith* does not involve the state's capacity to interfere with that power, however, but rather the state's capacity to regulate obscenity within its own boundaries. The Court admits that such regulation is a legitimate "local" concern, but says that that concern is adequately protected by the contemporary community standards rule. If by "local" the Court means "of the vicinage," this ipse dixit is probably accurate. But this whole paragraph deals with the problem of resolving a conflict between state and federal interests. It is not apparent that application by jurors of contemporary community standards will, in fact, further state regulatory policies, especially since *Smith* asserts that state legislatures cannot define the content of those standards, but only their geographic scope or the kinds of conduct that will trigger a criminal prosecution in which they will be utilized.[566] Thus, the true basis of the Court's disposition of this issue is its perception of the requirements of the supremacy clause.

In order to test the validity of that perception, it is necessary to consider the holdings of the cases cited by the Court. *Clearfield Trust Co. v. United States*[567] involved the issue of whether or not an action based on the express

565. 431 U.S. at 304 n.10 (citations omitted).
566. *See id.* at 302-03.
567. 318 U.S. 363 (1943).