
Carl A. Auerbach

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**Carl A. Auerbach***

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* Professor of Law, University of Minnesota Law School. The author was of counsel and presented the oral argument for the appellants in the Minnesota Supreme Court, and wishes to acknowledge with thanks the many benefits he received from discussion of the issues in the case with co-counsel Harold J. Soderberg, Thomas E. Harms, and James A. Stein.
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INTRODUCTION

It is surprising that after more than one hundred years of the United States Supreme Court's experience with economic substantive due process cases, major issues concerning the litigation and adjudication of such cases remain unresolved. The nature of these issues, some of which are important for constitutional adjudication generally, is well illustrated in a recent case decided by the Minnesota Supreme Court, Workers' Compensation Insurers Rating Association v. State.¹

¹ No. C7-82-596 (Minn. Feb. 7, 1983) (per curiam).
I. THE FACTS OF THE CASE

For the past ten years, the Minnesota workers' compensation system has provoked controversy and conflict involving Minnesota employers and employees, insurance companies writing workers' compensation insurance in the state, state administrative agencies, and the Minnesota legislature. Unions representing Minnesota workers have claimed that the system does not compensate injured workers adequately or promptly. Minnesota employers have claimed that the level of benefits awarded injured workers results in relatively high insurance rates, which puts them at a competitive disadvantage compared with employers in other states and is a major factor making for a bad business climate in Minnesota. The insurers, caught in the middle of the controversy, take no position on what the scope and size of workers' compensation benefits ought to be. They are, however, concerned that insurance rates established under law be adequate to cover the compensation awards they must pay to injured workers, the expenses they incur in doing so, and a reasonable return for the risks they incur in writing workers' compensation insurance in Minnesota.

Since 1921, workers' compensation insurance rates have been regulated in Minnesota by order of the commissioner of insurance or that office's predecessors, the Department of Commerce and the Compensation Insurance Board.2 On June 1, 1981, the Minnesota legislature enacted a law, commonly referred to as chapter 346,3 which changed the compensation benefits payable to injured workers and the administration and operation of the workers' compensation system.4 For the first

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In 1983 the Minnesota legislature again revised the workers' compensation system. See Act of June 7, 1983, ch. 287, 1983 Minn. Laws 1231; Act of June 7, 1983, ch. 290, 1983 Minn. Laws 1310. The important changes that chapter 290 made in the provisions of chapter 346 will be noted later but the most significant may be mentioned here. Chapter 290 moved up the date of deregulation of workers' compensation insurance rates from January 1, 1986, to January 1, 1984. See ch. 290, § 2, 1983 Minn. Laws at 1311 (amending Minn. Stat. § 79.071 subd. 1 (1982)). Thereafter the commissioner of insurance will have no authority to impose a schedule of such rates, but has been given important duties to monitor the ensuing rate competition. See ch. 290, § 12, 1983 Minn. Laws at 1319 (amending Minn. Stat. § 79.51 subd. 3 (1982)).

Article 2 of chapter 287, which added §§ 176A.01-.11 to the 1982 statute, created a State Compensation Insurance Fund to compete with private insurers in writing workers' compensation insurance in Minnesota. The management and control of the Fund is vested in a board of directors which will appoint a man-
time since the beginning of administrative regulation of workers' compensation insurance rates in Minnesota, the legislature itself fixed rates by mandating a reduction in the schedule of these rates of at least 15% "as a reflection of the impact of" the changes made by chapter 346.5

On June 5, 1981, following a lengthy, contested proceeding, Commissioner of Insurance Michael D. Markman issued an order approving an increase in workers' compensation insurance rates of 11.8%,6 an increase the commissioner found necessary to satisfy the statutory standards that workers' compensation rates not be "excessive, inadequate, or unfairly discriminatory."7 On the same day, in order to effectuate the mandate of section 142, subdivision 1(b) of chapter 346, the commissioner,
without any prior hearing, issued a second order that reduced by 15% the maximum rates applicable to all workers' compensation insurance policies issued or renewed on or after July 1, 1981. The second order wiped out the 11.8% increase previously approved and effected a net reduction in rates of 5%.  

On July 29, 1981, the Workers' Compensation Insurers Rating Association of Minnesota (Rating Association), the membership of which consists of the approximately 265 insurance companies licensed to write workers' compensation insurance in Minnesota, and thirty of the 265 insurers9 instituted a declaratory judgment action in the Minnesota District Court against the commissioner of insurance and the state of Minnesota. The action challenged the constitutionality of section 142, subdivision 1(b) and the commissioner's order effectuating the mandated 15% rate reduction on the ground that the statutory mandate and implementing administrative order violated the insurers' due process rights under both article I, section 7 of the Minnesota Constitution10 and the fourteenth amendment of the United States Constitution.11

The plaintiffs asked the court to declare section 142, subdivision 1(b) of chapter 346 and the commissioner's implementing order unconstitutional. The plaintiffs further requested that the court direct the commissioner to reinstate the schedule of rates in effect prior to the 15% reduction and, after hearing, reduce the rates by the amount the commissioner

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8. The net reduction of 5% is arrived at by the following calculation: the pre-5 June 1981-rate plus the 11.8% increase of that rate yields the new rate prior to the 15% reduction. This figure minus 15% of that new rate equals 95.03% of the original rate, or a net reduction reduction of 4.97%. In short

\[ 1.118 \times (1.118 \times 0.15) = 0.9503 \] (or .0497 less than 1).

9. The Rating Association is an unincorporated association established under the laws of Minnesota. See Minn. Stat. §§ 79.01-23 (1982) (amended in part and repealed in part 1983). All insurers licensed to write workers' compensation insurance in Minnesota were required to be members of the Rating Association. Id. § 79.11 repealed by ch. 290, § 15, 1983 Minn. Laws at 1321. The 30 named plaintiff insurance companies represented the various licensed stock and mutual workers' compensation insurance companies domiciled in Minnesota and elsewhere.

10. The Minnesota Constitution guarantees that no person shall "be deprived of life, liberty or property without due process of law." Minn. Const. art. I, § 7.

11. U. S. Const. amend. XIV, § 1. The Rating Association and the named insurers also challenged the constitutionality of §§ 13 and 14 of Chapter 346, dealing with the implementation of changes in the Minnesota Assigned Risk Plan. This challenge was dismissed without prejudice by stipulation prior to trial.
determined would reflect the actual cost savings to the insurers resulting from the changes made by chapter 346. Finally, if any reductions were made, the insurers were willing to have them made retroactive so as to apply to all policies issued or renewed on or after July 1, 1981, the date when the 15% rate reduction became effective.

In essence, the insurers contended that there was no rational relationship between the expressly stated purpose of chapter 346—to reduce rates by the amount of the actual cost savings to the insurers resulting from the changes made by chapter 346—and the means chosen to effectuate that purpose—the legislatively mandated 15% rate reduction. The changes made by chapter 346, they contended, rationally justified no more than a 5% reduction in rates. The difference between this percentage and the 15% reduction mandated amounted to fifty million dollars annually in premiums.12

The insurers also submitted that the mandated 15% rate reduction violated the due process guarantees of the Minnesota and United States Constitutions because the rates, after the mandated 15% reduction became effective, deprived them as a group, and the thirty named insurers severally, of revenues sufficient to cover their expenses and yield a reasonable profit for the risks incurred in writing workers' compensation insurance in Minnesota.

On August 10, 1981, the plaintiffs moved for a stay of the 15% rate reduction pending the outcome of their action. The motion was denied on September 24, 1981.13 The plaintiffs appealed that denial to the Minnesota Supreme Court, but the court denied the motion on November 30, 1981, and plaintiffs' appeal was dismissed without prejudice on December 4, 1981.

Trial was held beginning on January 11, 1982, and concluding on January 18, 1982. The defendants' motion for summary judgment was denied. Their motion to dismiss, brought after the close of plaintiffs' case-in-chief, was denied on January 18, 1982, but the court did dismiss count III of the complaint, which claimed that plaintiffs' due process rights were violated because the workers' compensation insurance rates resulting from the mandated 15% reduction deprived them of a fair and reasonable rate of return on their investment.

12. A change of 1% in the rates is the equivalent of $5,000,000 in premiums annually.
13. See Memorandum of Judge Joseph P. Summers (attached to Judge Summers's order denying plaintiff's motion) reprinted infra as Appendix I.
On March 2, 1982, the district court issued its order declaring that section 142, subdivision 1(b) of chapter 346 was constitutional and dismissing the plaintiffs' action.\textsuperscript{14} The order also dismissed the Rating Association as a party to the action on the ground that it lacked standing to seek a declaration that a law is unconstitutional. Judgment was entered in accordance with that order on April 1, 1982.

Plaintiffs appealed the district court's judgment to the Minnesota Supreme Court. After hearing oral argument, the court, in a summary opinion dated February 7, 1983, adopted the findings of fact and conclusions of law of the district court and affirmed its order for entry of judgment.\textsuperscript{15} The Rating Association and the insurers decided not to appeal the Minnesota Supreme Court's judgment to the United States Supreme Court.

II. THE STANDARDS OF JUDICIAL REVIEW

A. THE "RATIONAL BASIS" TEST

The Minnesota Supreme Court and the United States Supreme Court have enunciated essentially the same test for judging the constitutionality of economic legislation challenged under the due process clause. In \textit{Clover Leaf Creamery Co. v. State},\textsuperscript{16} the Minnesota Supreme Court held that "under substantive due process analysis, the means chosen by the challenged legislation . . . must bear a rational relationship to the public purpose sought to be served."\textsuperscript{17} Although it reversed the Minnesota Supreme Court on other grounds, which will be discussed later, the United States Supreme Court, in \textit{Minnesota v. Clover Leaf Creamery Co.},\textsuperscript{18} imposed the same test as had the Minnesota Supreme Court. The standard of review used by the Court was "the familiar 'rational basis' test"\textsuperscript{19}—"whether the legislative classification . . . is rationally related to achievement of the statutory purposes."\textsuperscript{20} Nevertheless, as Justice

\begin{enumerate}
\item \textsuperscript{14} Workers' Compensation Insurers Rating Ass'n v. State, No. 452706 (Dist. Ct. Minn. March 2, 1982) \textit{reprinted infra} as Appendix II (Lynch, J., findings of fact, conclusions of law, and order for judgment).
\item \textsuperscript{15} No. C7-82-596 (Minn. Feb. 7, 1983) (per curiam).
\item \textsuperscript{16} 289 N.W.2d 79 (Minn. 1979), \textit{rev'd sub nom} Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).
\item \textsuperscript{17} \textit{Id.} at 87 n.20 (citing Federal Distillers, Inc. v. State, 304 Minn. 28, 46, 229 N.W.2d 144, 158 (1975)).
\item \textsuperscript{18} 449 U.S. 456 (1981).
\item \textsuperscript{19} \textit{Id.} at 461 (citing Vance v. Bradley, 440 U.S. 93, 97 (1979); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976)).
\item \textsuperscript{20} 449 U.S. at 463. The Court enunciated this standard as applicable under
Powell stated in his dissenting opinion in *Schweiker v. Wilson*, the Supreme Court of the United States "has employed numerous formulations for the 'rational basis' test" and "[m]embers of the Court continue to hold divergent views on the clarity with which a legislative purpose must appear . . . and about the degree of deference afforded the legislature in suiting means to ends."

1. The Supreme Court Justices' "Divergent Views on the Clarity with which a Legislative Purpose Must Appear"

Four recent decisions of the United States Supreme Court illustrate the divergence of the Justices' views on this issue.

a. United States Railroad Retirement Board v. Fritz

Under the original Railroad Retirement Act, enacted in 1937, a person who worked for both railroad and nonrailroad employers and qualified for railroad retirement and social security benefits could receive benefits under both systems with an accompanying "windfall" benefit. The legislative history of the Railroad Retirement Act of 1974, the act that restructured the railroad retirement system, showed that the payment of windfall benefits threatened the system with bankruptcy by the

the equal protection clause, but the standard is the same under the due process clause. The Court observed in *Clover Leaf*: "From our conclusion under equal protection . . . it follows *a fortiori* that the Act does not violate the Fourteenth Amendment's Due Process Clause." *Id.* at 470 n.12.

22. *Id.* at 243 n.4 (1981) (citations omitted).
23. In footnote one of the majority opinion, Justice Rehnquist explained the "windfall" benefit as follows:

Under the old Act, as under the new, an employee who worked 10 years in the railroad business qualified for railroad retirement benefits. If the employee also worked outside the railroad industry for a sufficient enough time to qualify for social security benefits, he qualified for dual benefits. Due to the formula under which those benefits were computed, however, persons who split their employment between railroad and nonrailroad employment received dual benefits in excess of the amount they would have received had they not split their employment. For example, if 10 years of either railroad or nonrailroad employment would produce a monthly benefit of $300, an additional 10 years of the same employment at the same level of creditable compensation would not double that benefit, but would increase it by some lesser amount to say $500. If that 20 years of service had been divided equally between railroad and nonrailroad employment, however, the social security benefit would be $300 and the railroad retirement benefit would also be $300, for a total benefit of $600. The $100 difference in the example constitutes the "windfall" benefit.

*Id.* at 168-69 n.1 (citations omitted).
year 1981. The 1974 Act, therefore, provided that employees who lacked the requisite ten years of railroad employment to qualify for railroad retirement benefits as of January 1, 1975, would not receive any windfall benefits in the future. The Act, however, preserved windfall benefits for (1) persons who had retired and were receiving dual benefits as of January 1, 1975; and (2) employees who qualified for both railroad and social security benefits as of January 1, 1975, but who had not retired as of that date, if they (a) performed some railroad service in 1974, or (b) had a “current connection” with the railroad industry as of December 31, 1974, or their later retirement date, or (c) had completed twenty-five years of railroad service as of December 31, 1974.

The 1974 Act further provided that employees who qualified for railroad retirement benefits as of January 1, 1975, but who lacked a current connection with the railroad industry in 1974 and [also] lacked 25 years of railroad employment, could obtain a lesser amount of windfall benefit if they had qualified for social security benefits as of the year (prior to 1975) they left railroad employment.

Thus, an employee was eligible for the full windfall amount if, as of the changeover date, that employee was not retired, had eleven years of railroad employment and sufficient nonrailroad employment to qualify for social security benefits, and had either worked for the railroad in 1974 or had a current connection with the railroad as of December 31, 1974, or the later retirement date. But an employee was not eligible for the full windfall amount if, as of the changeover date, that em-

24. In footnote three of the majority opinion, Justice Rehnquist explained how this was done:

Congress eliminated future accruals of windfall benefits by establishing a two-tier system for benefits. The first tier is measured by what the social security system would pay on the basis of combined railroad and nonrailroad service, while the second tier is based on railroad service alone. However, both tiers are part of the railroad retirement system, rather than the first tier being placed directly under social security, and the benefits actually paid by social security on the basis of nonrailroad employment are deducted so as to eliminate the windfall benefit.

Id. at 169-70 n.3.

25. The term “current connection” was defined in this context to mean “employment in the railroad industry in 12 of the preceding 30 calendar months.” Id. at 173 n.6 (citing 45 U.S.C. § 231(o) (1976)).


27. 449 U.S. at 172 (quoting 45 U.S.C. § 231b(h) (2) (1976) current version at id. (Supp, 1981)).
ployee was an unretired individual with twenty-four years of railroad service and sufficient nonrailroad service to qualify for social security benefits, unless the employee had neither worked for the railroad in 1974 nor had a current connection with the railroad as of December 31, 1974, or the later retirement date.

An employee not eligible for the full windfall amount would be eligible for reduced windfall benefits if that employee had ten or more years of railroad employment as of the changeover date and qualified for social security benefits prior to, but not after, leaving the railroad industry.

A class action was filed in federal district court charging that the provisions of the 1974 Act as to who would still be entitled to "windfall" benefits were unconstitutional under the equal protection component of the due process clause of the fifth amendment because it was irrational for Congress to distinguish between employees who had more than ten years but less than twenty-five years of railroad employment simply on the basis of whether they had a "current connection" with the railroad industry as of January 1, 1975, or as of their later date of retirement.28

The district court agreed with the plaintiffs and issued a declaratory judgment that those provisions of the 1974 Act were unconstitutional under the equal protection component of the fifth amendment.29 The differentiation based solely on whether an employee was active in the railroad business as of 1974 was held not to be "rationally related" to the congressional purposes of insuring the solvency of the railroad retirement system and protecting vested benefits.30 In United States Railroad Retirement Board v. Fritz,31 the Supreme Court, in an opinion by Justice Rehnquist, reversed the judgment of the district court and held that the challenged provisions of the 1974 Act did not deny the plaintiff class equal protection of the law.32 Justice Brennan filed a dissenting opinion in which Justice Marshall joined.

The majority accepted that in passing the 1974 Act Congress sought "to protect the relative equities of employees and to provide benefits to career railroad employees,"33 and held

29. Id.
30. Id.
32. Id.
33. Id. at 177.
that the challenged provisions of the Act were not a "patently arbitrary or irrational way" to achieve this objective.\(^{34}\)

The classification here is not arbitrary, says appellant, because it is an attempt to protect the relative equities of employees and to provide benefits to career railroad employees. Congress fully protected, for example, the expectations of those employees who had already retired and those unretired employees who had 25 years of railroad employment. Conversely, Congress denied all windfall benefits to those employees who lacked 10 years of railroad employment. Congress additionally provided windfall benefits, in lesser amount, to those employees with 10 years' railroad employment who had qualified for social security benefits at the time they had left railroad employment, regardless of a current connection with the industry in 1974 or on their retirement date.

Thus, the only eligible former railroad employees denied full windfall benefits are those, like appellee, who had no statutory entitlement to dual benefits at the time they left the railroad industry, but thereafter became eligible for dual benefits when they subsequently qualified for social security benefits. Congress could properly conclude that persons who had actually acquired statutory entitlement to windfall benefits while still employed in the railroad industry had a greater equitable claim to those benefits than the members of appellee's class who were no longer in railroad employment when they became eligible for dual benefits. Furthermore, the "current connection" test is not a patently arbitrary means for determining which employees are "career railroaders," particularly since the test has been used by Congress elsewhere as an eligibility requirement for retirement benefits. Congress could assume that those who had a current connection with the railroad industry when the Act was passed in 1974, or who returned to the industry before their retirement, were more likely than those who had left the industry prior to 1974 and who never returned, to be among the class of persons who pursue careers in the railroad industry, the class for whom the Railroad Retirement Act was designed.\(^{35}\)

In his dissenting opinion, Justice Brennan insisted that "equal protection scrutiny under the rational-basis test requires the courts first to deduce the independent objectives of the statute, usually from statements of purpose and other evidence in the statute and legislative history, and second to analyze whether the challenged classification rationally furthers achievement of those objectives."\(^{36}\) The Court should not consider the "flimsy or implausible justifications for the legislative classification, proffered after the fact by Government attorneys."\(^{37}\)

Examining the legislative history of the 1974 Act, Justice Brennan concluded that its purposes clearly were to place the railroad retirement system on a sound financial basis and to

\(^{34}\) Id.

\(^{35}\) Id. at 177-78 (citation omitted).

\(^{36}\) Id. at 187.

\(^{37}\) Id. at 184.
protect "the vested earned benefits of retirees who had already qualified for them.".. Because the challenged provisions created a classification "which deprives some retirees of vested dual benefits that they had earned prior to 1974," the classification "is not only rationally unrelated to the congressional purpose; it is inimical to it."39

Justice Rehnquist replied to Justice Brennan's argument that the Court was bound by the legislature's actual purposes in determining the Act's constitutionality:

Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision," Flemming v. Nestor, 363 U.S., at 612, because this Court has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line-drawing. The "task of classifying persons for... benefits... inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line," Mathews v. Diaz, 426 U.S. 67, 83-84 (1976), and the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.40

Concurring, Justice Stevens stated that he disagreed with the Court's view that "merely a 'conceivable' or a 'plausible' explanation for the unequal treatment" would justify it constitutionally.41 At the same time, he disagreed with Justice Brennan:

I do not, however, share Justice Brennan's conclusion that every statutory classification must further... the 'actual purpose' of the legislature. Actual purpose is sometimes unknown. Moreover, undue emphasis on actual motivation may result in identically worded statutes being held valid in one State and invalid in a neighboring State. I therefore believe that we must discover a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature. If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect. If, however, the adverse impact may reasonably be viewed as an acceptable cost of achieving a larger goal, an impartial lawmaker could rationally decide that that cost should be incurred.42

Justice Stevens viewed the actual purposes of Congress as (1) protecting the solvency of the entire railroad retirement system, (2) preserving benefits that had already vested, and (3)

38. Id. at 186.
39. Id. Justice Brennan also argued that the challenged provisions were not rational even in light of the alternative purposes said to justify them by the majority. See id. at 193-97.
40. Id. at 179.
41. Id. at 180.
42. Id. at 180-81 (citation omitted).
increasing the level of payments to beneficiaries whose rights were not otherwise changed. In light of these objectives, he concluded that it was rational for Congress to reduce the vested benefits of some employees in order to improve the solvency of the entire program while simultaneously increasing the benefits of others and, in deciding which vested benefits to reduce, to favor annuitants whose railroad service was more recent than that of disfavored annuitants who had an equal or greater quantum of employment.

b. Minnesota v. Clover Leaf Creamery Co.

In *Minnesota v. Clover Leaf Creamery Co.*, the United States Supreme Court reversed the Minnesota Supreme Court’s judgment that a Minnesota law banning nonrefillable plastic milk containers but not nonrefillable paper milk containers was unconstitutional under the equal protection and due process clauses of the federal Constitution because the law established “a classification which is not rationally related to a legitimate state interest.” The Court also held that the challenged Act did not violate the commerce clause, an issue raised by Clover Leaf but not passed on by the Minnesota Supreme Court.

The statute itself set out its purpose: to discourage the use of nonreturnable, nonrefillable milk containers and encourage the use of returnable, reusable milk containers in order to ease solid waste disposal problems, conserve energy, and promote resource conservation. Despite the statutory statement of

43. *Id.* at 181.
44. *Id.* at 181-82.
47. Clover Leaf Creamery Co. v. State, 289 N.W.2d 79, 81 (Minn. 1979), rev’d sub nom. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981). In the Minnesota Supreme Court, Clover Leaf did not contend that chapter 268 violated the due process clause or equal protection guarantee of the Minnesota Constitution. *See* 289 N.W.2d at 81. The Minnesota Supreme Court decided the case solely on federal constitutional grounds. *See id.* The plaintiffs in the *Rating Association* case contended that § 142 subdivision 1(b) of chapter 346 violated the due process clauses of the Minnesota and federal Constitutions.
49. Ch. 268, § 1, 1977 Minn. Laws at 440.
purpose, however, the state district court found that the "actual basis" for the Act was "to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry"—an illegitimate state purpose.50 The Minnesota Supreme Court overruled the district court on this point. It found that the purpose of the Act was "to promote the state interests of encouraging the reuse and recycling of materials and reducing the amount and type of material entering the solid waste stream"—a legitimate state purpose.51

In the United States Supreme Court, Clover Leaf renewed its argument that the actual purpose of the Act was to "isolate from interstate competition the interests of certain segments of the local dairy and pulpwood industries."52 The Court rejected this argument and accepted the Minnesota Supreme Court's contrary determination, that the articulated purpose of the Act was its actual purpose. "In equal protection analysis," Justice Brennan wrote, "this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they 'could not have been a goal of the legislation.'"53 The Act's legislative history, according to the Court, supported the Minnesota Supreme Court's conclusion as to the principal purposes of the Act.54

Justice Powell dissented on the ground that the Court should not have decided the commerce clause issue but should have remanded the case "with instructions to consider specifically whether the statute discriminated impermissibly against interstate commerce."55 For this purpose, he would have required the Minnesota Supreme Court to determine whether the statute was intended to promote its stated purpose or the "ac-

50. See 449 U.S. at 460 (citation omitted).
51. 289 N.W.2d at 82.
52. 449 U.S. at 463 n.7 (quoting Brief for Respondents at 23, Clover Leaf).
53. 449 U.S. at 463 n.7 (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975)). Justice Brennan added:
   The contrary evidence cited by respondents . . . is easily understood, in context, as economic defense of an Act genuinely proposed for environmental reasons. We will not invalidate a state statute under the Equal Protection Clause merely because some legislators sought to obtain votes for the measure on the basis of its beneficial side effects on state industry.
54. 449 U.S. at 463 n.7.
55. 449 U.S. at 477.
Justice Powell agreed, however, that it "was entirely appropriate for [the Minnesota Supreme Court] to accept, for purposes of equal protection analysis, the purpose expressed in the statute." There is no reason to suppose that Justice Powell would not have accepted "the purpose expressed in the statute" for due process analysis as well. Commerce clause analysis, according to Justice Powell, is different: "Under the Commerce Clause, a court is empowered to disregard a legislature's statement of purpose if it considers it a pretext."

c. Schweiker v. Wilson

The Supplementary Security Income (SSI) program, a part of the Social Security Act, provides a subsistence allowance to the nation's needy, aged (sixty-five or older), blind, and disabled persons. Residents of public institutions are generally excluded from eligibility for full SSI payments, but "comfort allowances" of twenty-five dollars per month are provided to otherwise eligible persons who reside in public institutions that receive Medicaid funds for their care. This small stipend is intended to enable the institutionalized needy to purchase small comfort items not supplied by the institution.

The SSI scheme was challenged in a class action representing all residents of public mental institutions between the ages of twenty-one and sixty-five. This group is ineligible for Medicaid support and so is not provided with "comfort allowances."

The federal district court held that the exclusion of this group from "comfort allowance" payments was unconstitutional on the ground that it violated the equal protection component of the fifth amendment's due process clause because the classification did not have a "substantial relation" to the "primary purpose" of the legislation.

In Schweiker v. Wilson, by a five-to-four vote, the Supreme Court reversed the judgment of the district court. Justice Blackmun wrote the majority opinion, joined by Chief Justice Burger and Justices Stewart, White, and Rehnquist. Justice Powell wrote a dissenting opinion, joined by Justices Brennan, Marshall, and Stevens.

56. Id. at 475.
57. Id. at 476.
58. Id. at 476 n.2.
60. 450 U.S. at 229-30.
Justice Blackmun restated the rational basis test to incorporate his view of what legislative purpose is constitutionally significant:

"[T]he pertinent inquiry is whether the classification employed in § 1611(e)(1)(B) advances legislative goals in a rational fashion. . . . Although this rational standard is "not a toothless one," Mathews v. Lucas, 427 U.S. 495, 510 (1976), it does not allow us to substitute our personal notions of good policy for those of Congress . . . . As long as the classificatory scheme chosen by Congress rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred."

Justice Blackmun found sufficient indication in the "sparse" legislative record that "the decision to incorporate the Medicaid eligibility standards into the SSI scheme must be considered Congress' deliberate, considered choice." Accordingly, "we decline to regard such deliberate action as the result of inadvertence or ignorance." He proceeded:

Having found the adoption of the Medicaid standards intentional, we deem it logical to infer from Congress' deliberate action an intent to further the same subsidiary purpose that lies behind the Medicaid exclusion, which, as no party denies, was adopted because Congress believed the States to have a "traditional" responsibility to care for those institutionalized in public mental institutions. The Secretary, emphasizing the then-existing congressional desire to economize the disbursement of federal funds, argues that the decision to limit distribution of the monthly stipend to inmates of public institutions who are receiving Medicaid funds "is rationally related to the legitimate legislative desire to avoid spending federal resources on behalf of individuals whose care and treatment are, being fully provided for by state and local government units" and "may be said to implement a congressional policy choice to provide supplemental financial assistance for only those residents of public institutions who already receive significant federal support in the form of Medicaid coverage." Brief for Appellant 27-28. We cannot say that the belief that the States should continue to have the primary responsibility for making this small "comfort money" allowance available to those residing in state-run institutions is an irrational basis for withholding from them federal general welfare funds.

Justice Blackmun then added:

This Court has granted a "strong presumption of constitutionality" to legislation conferring monetary benefits, Mathews v. De Castro, 429 U.S. [181, 185 (1976)], because it believes that Congress should have discretion in deciding how to expend necessarily limited resources. Awarding this type of benefits inevitably involves the kind of line-drawing that will leave some comparably needy person outside the favored circle. We cannot say that it was irrational of Congress, in view

62. 450 U.S. at 234-35 (emphasis added).
63. Id. at 235.
64. Id. at 236 (citation omitted).
65. Id. at 236-37 (citations omitted).
of budgetary constraints, to decide that it is the Medicaid recipients in public institutions that are the most needy and the most deserving of the small monthly supplement.\footnote{66}{Id. at 238-39 (citations omitted).}

Justice Powell dissented strongly from the majority's approach to the issue of legislative purpose. He wrote:

> [A]n important touchstone for equal protection review of statutes is how readily a policy can be discerned which the legislature intended to serve. . . . When a legitimate purpose for a statute appears in the legislative history or is implicit in the statutory scheme itself, a court has some assurance that the legislature has made a conscious policy choice. Our democratic system requires that legislation intended to serve a discernible purpose receive the most respectful deference. . . . Yet, the question of whether a statutory classification discriminates arbitrarily cannot be divorced from whether it was enacted to serve an identifiable purpose. When a legislative purpose can be suggested only by the ingenuity of a government lawyer litigating the constitutionality of a statute, a reviewing court may be presented not so much with a legislative policy choice as its absence.

In my view, the Court should receive with some skepticism \textit{post hoc} hypotheses about legislative purpose, unsupported by the legislative history. When no indication of legislative purpose appears other than the current position of the Secretary, the Court should require that the classification bear a "fair and substantial relation" to the asserted purpose. See \textit{F.S. Royster Guano Co. v. Virginia}, 253 U.S. 412, 415 (1920). This marginally more demanding scrutiny indirectly would test the plausibility of the tendered purpose, and preserve equal protection review as something more than "a mere tautological recognition of the fact that Congress did what it intended to do." [\textit{United States Railroad Retirement Board v. Fritz}, 449 U.S. 166, 180 (1980) (Stevens, J., concurring in the judgment).]\footnote{67}{Id. at 243-45 (citations omitted).}

Justice Powell also expressed his dissatisfaction with some of the views about legislative purpose expressed in prior cases:

> Some of our cases suggest that the actual purpose of a statute is irrelevant, \textit{Flemming v. Nestor}, 363 U.S. 603, 612 (1960), and that the statute must be upheld "if any state of facts reasonably may be conceived to justify" its discrimination, \textit{McGowan v. Maryland}, 366 U.S. 420, 426 (1961). Although these cases preserve an important caution, they do not describe the importance of actual legislative purpose in our analysis. We recognize that a legislative body rarely acts with a single mind and that compromises blur purpose. Therefore, it is appropriate to accord some deference to the executive's view of legislative intent, as similarly we accord deference to the consistent construction of a statute by the administrative agency charged with its enforcement. \textit{E.g., Udall v. Tallman}, 380 U.S. 1, 16 (1965). \textit{Ascertainment of actual purpose to the extent feasible, however, remains an essential step in equal protection}.\footnote{68}{Id. at 244 n.6 (emphasis added).}

Applying his approach to the challenged provision, Justice Powell concluded:
Neither the structure of [the provision] nor its legislative history identifies or even suggests any policy plausibly intended to be served by denying appellees the small SSI allowance. . . . The structure of the statute offers no guidance as to purpose because [the provision] is drawn in reference to the policies of Medicaid rather than to the policies of SSI. By mechanically applying the criteria developed for Medicaid, Congress appears to have avoided considering what criteria would be appropriate for deciding in which public institutions a person can reside and still be eligible for some SSI payment. The importation of eligibility criteria from one statute to another creates significant risks that irrational distinctions will be made between equally needy people.  

He rejected the government's argument that "Congress rationally could make the judgment that the States should bear the responsibility for . . . providing treatment and minimal care."  

Justice Powell maintained:

There is no logical link . . . between these two responsibilities. . . . Residence in a public mental institution, as opposed to residence in a state medical hospital or a private mental hospital, bears no relation to any policy of the SSI program. . . . If SSI pays a cash benefit relating to personal needs other than maintenance and medical care, it is irrelevant whether the State or the Federal Government is paying for the maintenance and medical care; the patients' need remains the same, the likelihood that the policies of SSI will be fulfilled remains the same.  

Justice Powell concluded "that Congress had no rational reason for refusing to pay a comfort allowance to [the challengers], while paying it to numerous otherwise identically situated disabled indigents."  

"This unexplained difference in treatment must have been a legislative oversight. I therefore dissent."  

d. Kassel v. Consolidated Freightways Corp.  

In Kassel v. Consolidated Freightways Corp., the Supreme Court invalidated an Iowa statute which generally prohibited the use of sixty-five-foot double-trailer trucks within its borders. Most truck combinations were restricted by the statute to fifty-five feet in length, but double-trailer trucks, mobile homes, trucks carrying vehicles such as tractors and other farm equipment, and single-trailer trucks hauling livestock could be as long as sixty feet. The statute also permitted Iowa cities abutting the state line to adopt, by local ordinance, the

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69. Id. at 245 (citations omitted).  
70. Id. at 246.  
71. Id. at 246-47 (emphasis deleted).  
72. Id. at 247.  
73. Id.  
length limitations of the adjoining state. If a city exercised this option, otherwise oversized trucks were permitted within the city limits and in nearby commercial zones. Finally, Iowa truck manufacturers could obtain permits to ship trucks as large as seventy feet outside the state, and permits were also available to move oversized mobile homes from points within Iowa or deliver them to Iowa residents.\footnote{Id. at 665-66.}

Iowa defended the law as a reasonable safety measure.\footnote{Id. at 667.} But the Supreme Court held that it unconstitutionally burdened interstate commerce.\footnote{Id. at 669.} No majority opinion supported the six-to-three decision. Justice Powell wrote a plurality opinion, joined by Justices White, Blackmun, and Stevens. Justice Brennan wrote a concurring opinion, in which Justice Marshall joined. Justice Rehnquist wrote the dissenting opinion, joined by Chief Justice Burger and Justice Stewart.

Justice Powell accepted that the purpose of the statute was to promote safety, as Iowa claimed, but went on to say:

But the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack. Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause.\footnote{Id. at 670.}

In his concurring opinion, Justice Brennan disagreed with Justice Powell's view of the purpose of the Iowa statute. He was convinced that Iowa's actual reason for banning sixty-five-foot doubles had nothing to do with safety: "Rather, Iowa sought to discourage interstate truck traffic on Iowa's highways."\footnote{Id. at 681-82 (citation omitted).} For this conclusion, Justice Brennan relied on "the record and the legislative history of the Iowa regulation."\footnote{Id. at 683.} The record, according to Justice Brennan, disclosed "the obvious fact that the safety characteristics of 65-foot doubles did not provide the motivation for either legislators or Governor in maintaining the regulation."\footnote{Id. at 685.} Rather, the actual purpose of

\footnote{Id. at 681. The "record" relied upon by Justice Brennan included the following facts recounted by Justice Powell:}

In 1974, the legislature passed a bill that would have permitted 65-foot doubles in the State. . . . Governor Ray vetoed the bill. He said:

I find sympathy with those who are doing business in our state and whose enterprises could gain from increased cargo carrying ability by trucks. However, with this bill, the Legislature has pursued a course that would benefit only a few Iowa-based companies while
the Iowa legislature was “protectionist in nature” and thus “impermissible under the Commerce Clause.”

Dissenting, Justice Rehnquist agreed with the plurality opinion that highway safety was the actual purpose of the Iowa law banning sixty-five-foot doubles. He rejected Justice Brennan’s view that "the Court should consider only the purpose the Iowa legislators actually sought to achieve by the length limit, and not the purposes advanced by Iowa’s lawyers in defense of the statute." He maintained that Justice Brennan’s argument “has been consistently rejected by the Court in other contexts” and that Justice Brennan could “cite no authority for the proposition that possible legislative purposes suggested by a State’s lawyers should not be considered in Commerce Clause cases.” Justice Rehnquist advanced the following reasons for rejecting Justice Brennan’s view:

[I]t assumes that individual legislators are motivated by one discernible “actual” purpose, and ignores the fact that different legislators may vote for a single piece of legislation for widely different reasons. . . . How, for example, would a court adhering to the views expressed in the opinion concurring in the judgment approach a statute, the legislative history of which indicated that 10 votes were based on safety considerations, 10 votes were based on protectionism, and the statute passed by a vote of 40-20? What would the actual purpose of the legislature have been in that case? This Court has wisely “never insisted that a legislative body articulate its reasons for enacting a statute.”

providing a great advantage for out-of-state trucking firms and competitors at the expense of our Iowa citizens.”

Id. at 677 (citation omitted).

Governor Ray further commented that “if we have thousands more trucks crossing our state, there will be millions of additional miles driven in Iowa and that does create a genuine concern for safety.” Id. at 677 n.23 (citation omitted).

After the veto, the “border cities exemption” was immediately enacted and signed by the Governor. Id. at 677.

The parochial restrictions in the mobile home provision were enacted after Governor Ray vetoed a bill that would have permitted the interstate shipment of all mobile homes through Iowa. Governor Ray commented, in his veto message: “This bill . . . would make Iowa a bridge state as these oversized units are moved into Iowa after being manufactured in another state and sold in a third. None of this activity would be of particular economic benefit to Iowa.” Id. at 666-67 n.7.

Justice Powell inferred from this legislative history that “the deference traditionally accorded a State’s safety judgment is not warranted.” Id. at 678 (citation omitted). This was “not enough” according to Justice Brennan. Id. at 665 n.5.

82. Id. at 685 (emphasis deleted).
83. Id. at 702 (emphasis in original) (citing United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 187-88 (1980) and Michael M. v. Superior Court of Sonoma County, 405 U.S. 464, 469-70 (1981)).
84. 450 U.S. at 702.
85. Id.
86. Id. at 702-03 (emphasis deleted) (citations omitted) (quoting United
Justice Rehnquist agreed with the position taken by Justice Powell in *Clover Leaf*, that the Court's approach to the determination of legislative purpose might be different in commerce clause cases than in equal protection cases. But he did not agree with Justice Powell that the purpose expressed in a statute should control in equal protection cases. He would only go so far:

It may be more reasonable to suppose that proffered purposes of a statute, whether advanced by a legislature or *post hoc* by lawyers, cloak impermissible aims in Commerce Clause cases than in equal protection cases. Statutes generally favor one group at the expense of another, and the Equal Protection Clause was not designed to proscribe this in the way that the Commerce Clause was designed to prevent local barriers to interstate commerce. Thus even if my Brother Brennan's arguments were supportable in Commerce Clause cases, that analysis would not carry over of its own force into the realm of equal protection generally.

"But," he added, "even in the Commerce Clause area, [Justice Brennan's] arguments are unpersuasive."  

### e. Implications of the Four Cases for the Rating Association Case

In considering the *Rating Association* case, it is clear beyond any doubt that the actual purpose of the legislatively mandated 15% reduction in workers' compensation insurance rates was to reflect the cost savings to the insurers resulting from the changes made by chapter 346. The title to chapter 346

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88. 450 U.S. at 703 n.13.

89. *Id.* (citations omitted).
declared one of its purposes to be "mandating an insurance rate reduction by an amount reflecting cost savings due to benefit and administrative changes" made by the statute.\textsuperscript{90} Section 142, subdivision 1 required the commissioner of insurance to issue an order "reducing the schedule of rates . . . to reflect the actual savings which will result from" the statute.\textsuperscript{91} The commissioner was authorized to issue this order without following the contested case procedures that would otherwise have been required.\textsuperscript{92} Indeed, the statute authorized the commissioner to issue the order without any prior hearing.\textsuperscript{93} Finally, section 142, subdivision 1(b) required the commissioner to issue an order reducing insurance rates by at least 15% "as a reflection of the impact of changes [made by chapter 346] in the benefits payable pursuant to chapter 176 and in the administration and operation of the Minnesota workers' compensation system."\textsuperscript{94}

I share Professor Gerald Gunther's opinion that the constitutionality of legislation challenged under the equal protection or due process clause should be judged in the light "of legislative purposes that have substantial basis in actuality, not merely in conjecture."\textsuperscript{95} This standard does not necessarily exclude purposes proffered for the first time during the course of litigation by lawyers seeking to uphold the constitutionality of legislation. But it would call for closer scrutiny than that implicit in the views of Chief Justice Warren\textsuperscript{96} and Justice Rehnquist.

It might have been argued that the constitutionality of the mandated rate reduction did not depend solely upon whether the reduction was rationally related to its actual purpose but that it was constitutional if it was rationally related to another "plausible" legislative purpose—namely, to fix workers' compensation insurance rates at, but not below, the minimum rates within the constitutional zone of reasonableness. In his memorandum denying the insurers' motion for a stay, Minnesota District Court Judge Summers made this argument, writing that even "[a]ssuming for the purpose of argument that the legisla-

\textsuperscript{90} Ch. 346, 1981 Minn. Laws at 1611.
\textsuperscript{91} Ch. 346, § 142 subd. 1, 1981 Minn. Laws at 1690.
\textsuperscript{93} See id.
\textsuperscript{94} Ch. 346, § 142 subd. 1(b), 1981 Minn. Laws at 1690.
\textsuperscript{96} See supra note 86; text accompanying notes 83-86.
ture acted in error in requiring a 15% rate cut, there is no evidence that any individual insurer will now be forced to do business in Minnesota at a loss ratio which would amount to a confiscation."\(^9\) But the attorney general, representing the state of Minnesota and the commissioner of insurance, never made this argument. Indeed, the Rating Association and the thirty insurers tried to present data and testimony in the district court to show that the existing rates were at levels below the constitutional zone of reasonableness and, for this reason, violated the due process guarantees of the Minnesota and United States Constitutions. As we shall see, the attorney general objected to the introduction of this evidence and the objection was sustained by the district court and the Minnesota Supreme Court.

In any case, none of the four United States Supreme Court cases examined required the Minnesota courts to test the validity of the mandated 15% rate reduction by its relation to any purpose other than that expressly articulated in the language of chapter 346. Justice Rehnquist began his opinion in Fritz by emphasizing that the "plain language" of the 1974 Act's section containing the challenged provisions "marks the beginning and end of our inquiry."\(^9\) In his dissenting opinion, Justice Brennan correctly pointed out that the "plain language" of the section in question "can tell us only what the classification is; it can tell us nothing about the purpose of the classification, let alone the relationship between the classification and that purpose."\(^9\) Fritz, then, extends only to a case in which the plain language of the statute tells us nothing about the legislative purpose. In such a case, the majority opinion holds that the Court is not bound to test the rationality of the statute by the purpose that may appear from a study of the Act's legislative history, but may uphold the constitutionality of the statute if it is rational in light of some other plausible purpose suggested by the statute's defenders, or even by the Court itself. One cannot assume that the majority in Fritz would have reached out for some purpose other than Congress's actual purpose in order to uphold the statute if its plain language had revealed Congress's actual purpose. In the absence of such plain language, the Court may not wish to be bound by legislative history. As Justice Stevens argued in his concurring opinion, the

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\(^9\) See Appendix I, infra, at 668.


\(^9\) Id. at 186-87.
"actual purpose" of the legislature in such a case may be unknown, even after studying the legislative history.\textsuperscript{100} Or, the legislative history may reveal conflicting purposes.

Furthermore, the \textit{Rating Association} case was clearly not the kind of case assumed by Chief Justice Warren in \textit{United States v. O'Brien}.\textsuperscript{101} In \textit{O'Brien}, Chief Justice Warren assumed that a statute might be held unconstitutional if tested by the legislature's actual purpose, but then the legislature might reenact precisely the same statute without more ado and make clear it was seeking to effectuate some other purpose to which the statute had a rational relationship.\textsuperscript{102} This was \textit{Fritz} and it seems fruitless for a court to declare a statute unconstitutional in such a case. But if the mandated 15\% rate reduction had been declared unconstitutional because it bore no reasonable relationship to the cost savings effectuated by chapter 346, the Minnesota legislature could not, without more ado, reenact the same reduction by saying its purpose was to bring workers' compensation insurance rates down to, but not below, the minimum rates within the constitutional zone of reasonableness. The Minnesota legislature would not have known whether a 15\% reduction would or would not accomplish this alternative purpose. It would have had to investigate and study the matter afresh and only then could it have decided whether to reenact section 142, subdivision 1(b). It would have been sheer coincidence if the legislature again came up with the 15\% figure, even assuming that some reduction in rates proved to be warranted by the suggested alternative purpose.

Finally, \textit{Fritz}, as well as the cases on which Justice Rehnquist primarily relied in \textit{Fritz}, \textit{Dandridge v. Williams},\textsuperscript{103} and \textit{Jefferson v. Hackney},\textsuperscript{104} involved the allocation of benefits. The Court is more likely to assume a more deferential stance, and look for any sustaining legislative purpose, in testing the rationality of governmental allocation of benefits than in testing the rationality of governmental imposition of burdens or obliga-

\begin{footnotesize}
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  \item[100.] \textit{Id.} at 180.
  \item[101.] 391 U.S. 367 (1968).
  \item[102.] \textit{See id.} at 384, \textit{supra} note 86. I do not think it can generally be assumed, as Chief Justice Warren did in \textit{O'Brien}, that if a statute otherwise valid on its face was nullified because of its articulated purpose, it would always be reenacted and accompanied by a "wiser" statement of purpose. Confronted with the Supreme Court declaring a statutory provision unconstitutional because of its "actual purpose," support for the provision might erode.
  \item[103.] 397 U.S. 471 (1970).
  \item[104.] 406 U.S. 535 (1972).
\end{itemize}
\end{footnotesize}
tions. The Rating Association case, of course, fell into the latter category.

Clover Leaf supports the position that the constitutionality of the mandated 15% rate reduction should have been determined solely in light of its articulated actual purpose. There were no circumstances which could have forced the courts to conclude that the purpose expressed in section 142, subdivision 1(b) of chapter 346 could not have been its goal.

Nevertheless, the actual purpose of the Act in Clover Leaf, as viewed by the Minnesota and United States Supreme Courts, helped to sustain the Act’s constitutionality; the alternative purpose suggested by Clover Leaf was an illegitimate purpose that would have led to the Act’s invalidation under the commerce clause. We do not know for certain what the Clover Leaf majority would have done if the situation had been reversed and the purpose found by the courts to be the actual legislative purpose would have led to the Act’s invalidation while a plausible alternative purpose suggested by the Act’s proponents would have led to upholding its constitutionality. Clover Leaf, therefore, did not settle the controversy between Justice Rehnquist and Justice Brennan in Fritz.

Schweiker v. Wilson also supports the position that the constitutionality of the mandated 15% rate reduction should have been determined solely in light of its articulated purpose. Four Justices joined Justice Powell’s dissenting opinion in Schweiker, that “[a]scertainment of actual purpose to the extent feasible . . . remains an essential step in equal protection.” Even according to Justice Blackmun and the majority, the rational basis test must be applied in light of a “reasonable and identifiable governmental objective,” which Justice Blackmun found in the “sparse” legislative history. The only “reasonable and identifiable governmental objective” in the Rating Association case was that expressly articulated in the text of the statute.

In Kassel v. Consolidated Freightways Corp., the Iowa truck limits case, all the Justices applied the rational basis test in light of the “actual purpose” of the Iowa legislature. The four Justices in the plurality, however, disagreed with the con-

107. Id. at 244 n.6.
108. Id. at 235.
109. Id.
curring Justices as to what was the "actual purpose." The dissenting Justices tested the Iowa statute in light of the "actual purpose" assumed by the plurality, even though Justice Rehnquist argued that the Court could consider possible legislative purposes suggested by a state's lawyers, if those purposes would validate the statute. This argument was not the basis of his dissenting opinion, however. He merely contended that even if the Court agreed with Justice Brennan that Iowa's "actual purpose" was parochialism, it could still consider the purpose suggested by Iowa's lawyers—safety. But he regarded safety as the actual purpose.

Even if we accept the arguments made by Justice Rehnquist against Justice Brennan's actual purpose theory, those reasons do not apply to the hypothetical situation assumed in the Rating Association case for the reasons set forth in the above discussion of Fritz, on which Justice Rehnquist relied. As noted earlier, there can be no doubt that the actual purpose of the Minnesota legislature in mandating the 15% rate reduction was to reflect the cost savings effected by chapter 346. Again, it should be recalled that the attorney general suggested no other legislative purpose by which to test the constitutionality of the mandated reduction.

2. The Degree of Deference Accorded the Legislature in Suiting Means to Ends

As Professor Gunther has written, the United States Supreme Court in passing on the constitutionality of economic regulation under the due process clause has engaged in "minimal scrutiny in theory and virtually none in fact." This "hands off" approach has been employed by the Court not only when legislative ends have been challenged as unconstitutional but also when the means chosen by the legislature to effectuate a legitimate end have been challenged on the ground that they have no "real and substantial relation" to that end. As a result, no statutory economic regulation has been nullified on substantive due process grounds since 1937.

111. See supra text accompanying notes 78-82.
112. See supra text accompanying notes 83-89.
113. Gunther, supra note 95, at 3.
114. This is the theoretically operative standard formulated by the Court in Nebbia v. New York, 291 U.S. 502, 525 (1934).
115. Only one statutory economic regulation has been invalidated on equal protection grounds since 1937. See Morey v. Doud, 354 U.S. 457 (1957). This decision was overruled in City of New Orleans v. Dukes, 427 U.S. 297 (1976).
The legitimacy of the end sought by chapter 346—to reduce rates by the amount of the cost savings to the insurers resulting from that statute—was not disputed in the Rating Association case. Rather, the insurers contended that the mandated 15% rate reduction had no "rational," "reasonable," or "fair" relation to the actual cost savings occasioned by chapter 346 and therefore was "arbitrary" and violative of due process. The Rating Association and the insurers maintained that the minimal, virtually nonexistent, review accorded the usual legislative choice of means for economic regulation was not warranted in testing the validity of the legislatively mandated 15% rate reduction. A number of reasons support this contention and indicate why the Rating Association case was an unusual economic due process case. The Supreme Court's recent decision in Plyler v. Doe seems to say that the degree of deference with which the Court will apply the "rationality test" in reviewing a state legislative judgment will depend upon the particular circumstances of the case. The particular circumstances of the Rating Association case did not warrant a high degree of judicial deference to the legislatively mandated 15% rate reduction.

The "hands-off" policy of the United States Supreme Court in economic due process cases is due to the Court's unwillingness to "strike down . . . laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." In seeking to invalidate the mandated 15% rate reduction, how-

116. Nothing turns, theoretically or practically, on any purported distinction among "rational," "arbitrary," "reasonable," and "fair." The dictionary defines "rational" as "agreeable to reason" and gives "reasonable" as a synonym. Webster's New International Dictionary 2066 (unabridged 2d ed. 1946). "Reasonable" is defined as "just"; "fair-minded"; "equitable." Id. at 2074. "Arbitrary" is the Latin equivalent of "unreasonable" or "irrational" and denotes an unreasoning decisiveness. Id. at 138.

The "numerous formulations" of the rational basis test to which Justice Powell referred essentially impose a standard of reasonableness between means and ends. In a recent case, for example, Justice Brennan, speaking for the Court, stated that in applying the deferential standard of review under the equal protection clause, the Justices "seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose." Plyler v. Doe, 457 U.S. 202, 216 (1982). In a recent case declaring § 103 of chapter 346 unconstitutional under the equal protection guarantees of the Minnesota and United States Constitutions, the Minnesota Supreme Court accepted this standard. See Nelson v. Peterson, 313 N.W.2d 580, 581 (Minn. 1981). The test under substantive due process would be the same as under equal protection.


118. See id. See also Zobel v. Williams, 457 U.S. 55 (1982).

ever, the insurers were not asking the courts to impose their own views of wise economic or social policy upon the Minnesota legislature. Nor were the insurers seeking to deprive the Minnesota legislature of effective means to accomplish the objective of chapter 346. The insurers requested that, upon declaring the mandated 15% rate reduction unconstitutional, the Minnesota Supreme Court direct the commissioner of insurance to reinstate the preexisting schedule of rates until the commissioner held a hearing. After the hearing, the commissioner could reduce the rates by an amount determined to reflect the actual cost savings to the insurers resulting from the changes made by chapter 346 and could make the reduction retroactive so as to apply to all policies issued or renewed on or after July 1, 1981, the date when the mandated reduction became effective.

The insurers asked the Minnesota courts to determine whether the actual cost savings to the insurers resulting from the changes made by chapter 346 reasonably justified a reduction of 15% in the workers' compensation insurance rates. They argued that because the legislature's judgment that the changes justified such a reduction was a particular, quantitative—not policy—judgment, it was not entitled to the degree of deference usually accorded by the courts to the legislature's choice of means to effectuate its purposes. An examination of Clover Leaf, the cases cited therein, and the other cases in which the United States Supreme Court has deferred to legislative wisdom about economic or social policy reveals that none involved complex, quantitative judgments by the legislature, and especially, as in the Rating Association case, judgments about relatively small percentage differences in rate levels that amount to very significant sums to those affected. The five cases cited in Clover Leaf will be examined first.

Vance v. Bradley120 upheld a federal law requiring retirement at age sixty of federal employees covered by the Foreign Service retirement system but not of civil service employees serving overseas under similar conditions and facing comparable hardships. The Court emphasized that the judgment that the Foreign Service needed a sixty-year age limit more than other departments of the federal government was a policy decision for Congress, not the courts, to make.121 City of New Orle-

120. 440 U.S. 93 (1979).
121. See id. at 102, 106-07.
ans v. Dukes\(^{122}\) sustained a 1972 New Orleans ordinance barring pushcart food vendors from the French Quarter, but exempting those vendors (two in number) "who have continuously operated the same business . . . for eight or more years prior to January 1, 1972."\(^{123}\) To have invalidated the ordinance would have thwarted the legislative policy embodied in the grandfather clause. The Court noted that "rational distinctions may be made with substantially less than mathematical exactitude,"\(^{124}\) adding that "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines."\(^{125}\) The phrase "substantially less than mathematical exactitude" was used by the Court metaphorically when the issue was "the wisdom or desirability of legislative policy," and not a complex, quantitative judgment such as that made in mandating a 15% rate reduction. *Day-Brite Lighting, Inc. v. Missouri*,\(^{126}\) another case cited in *Clover Leaf*, upheld a state law requiring employers to give their employees four hours off from work with full pay in order to vote. Again, invalidation of the law would have negated state policy. In this context, the Court explained:

The judgment of the legislature that time out for voting should cost the employee nothing may be a debatable one. It is indeed conceded by the opposition to be such. But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision.\(^{127}\)

*Henderson Co. v. Thompson*\(^{128}\) sustained a Texas statute and implementing administrative order prohibiting the use of sweet natural gas (as opposed to sour gas, which contains hydrogen sulphide) for the manufacture of carbon black. This was done because both sweet and sour natural gas could be used to manufacture carbon black but only sweet gas could be used for fuel and light. *United States v. Carolene Products Co.*\(^{129}\) upheld a federal prohibition of the interstate shipment of skimmed milk mixed with nonmilk fats.

All the other great cases usually cited to demonstrate that economic regulation merits "only the mildest review under the

\(^{122}\) 427 U.S. 297 (1976).
\(^{123}\) Id. at 298.
\(^{124}\) 427 U.S. at 303.
\(^{125}\) Id. (citation omitted).
\(^{126}\) 342 U.S. 421 (1952).
\(^{127}\) Id. at 425.
\(^{128}\) 300 U.S. 258 (1937).
\(^{129}\) 304 U.S. 144 (1938).
Fourteenth Amendment" also involved broad legislative policies and not the particular, complex, quantitative judgment needed to fix the level of rates. *Lindsley v. National Carbonic Gas Co.* upheld a New York law prohibiting the owner of a property’s surface from pumping water, gas, or oil from wells on that property penetrating the rock, but not from those that did not, and from pumping for the purpose of collecting and selling the gas apart from the water, but not for other purposes. The Supreme Court sustained a New York law providing for the administrative fixing of minimum and maximum retail prices for milk in *Nebbia v. New York,* a state minimum wage law for women in *West Coast Hotel Co. v. Parrish,* and a state law limiting the fees or compensation of private employment agencies in *Olsen v. Nebraska.* *Lincoln Federal Labor Union v. Northwestern Iron Metal Co.* upheld state “right to work” laws requiring that employment decisions not be based on union membership. *Ferguson v. Skrupa* sustained a Kansas law prohibiting anyone from engaging in the business of debt adjusting except as an incident to the lawful practice of law. An Oklahoma law that made it unlawful for an optician to fit or duplicate lenses without a prescription from an ophthalmologist or optometrist was upheld in *Williamson v. Lee Optical, Inc.* Finally, *Brotherhood of Locomotive Firemen v. Chicago, Rock Island & Pacific Railroad Co.* sustained an Arkansas law requiring “full crews” on railroads.

Similarly, the crucial distinction between *Clover Leaf* and the *Rating Association* case is that invalidation of the means employed by the Minnesota legislature in *Clover Leaf* would have prevented the Minnesota legislature from effectuating a number of important policies. It would have prevented the Minnesota legislature from banning nonreturnable plastic milk containers without at the same time banning nonreturnable paperboard containers and thereby would have prevented the legislature from experimenting with a step-by-step approach to the solution of Minnesota’s waste disposal and energy conservation problems. It would have prevented the Minnesota legis-

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131. 220 U.S. 61 (1911).
133. 300 U.S. 379 (1937).
134. 313 U.S. 236 (1941).
135. 335 U.S. 525 (1949).
lature from banning the introduction of a new plastic nonreturnable milk container that, once entrenched, would have made it extremely difficult, politically, to ban all nonreturnable milk containers. It would have prevented the legislature from acting so as to avoid a sudden, simultaneous ban on paperboard as well as plastic nonreturnable containers, a ban which would have severely dislocated the existing paperboard container and milk industries. invalidation of the chosen means also would have prevented the legislature from acting so as to conserve energy by banning plastic containers, made from nonrenewable resources (oil and gas), but not, for the time being, paperboard containers, made from a renewable resource (pulpwood). It would have prevented the legislature from taking a first step to help ease the state's solid waste disposal problem.

In sum, none of these economic due process cases in which the United States Supreme Court engaged in only the mildest, if any, review involved quantitative judgments. They involved challenges to the validity either of legislative ends or of substantive policies inherent in the means selected to achieve those ends. A declaration of unconstitutionality would have frustrated legislative objectives and left "ungoverned and ungovernable conduct which many people find objectionable." Because of the nature of the insurers' request for relief, a declaration of unconstitutionality in the Rating Association case would not have had this effect. For these reasons, the insurers maintained that the degree of deference accorded by the courts to the legislative judgment in the usual economic due process case was not warranted in their case.

Finally, a decision by the courts to engage in "minimal scrutiny in theory and virtually none in fact" in response to a challenge that the legislatively mandated 15% rate reduction bore no reasonable relationship to the actual cost savings to the insurers effectuated by chapter 346 would produce the anomalous result that the courts would scrutinize rate fixing by the more expert administrative agency more carefully than they would rate fixing by the less expert legislature.

If interested persons petitioned the commissioner of insurance to modify the existing schedule of rates in light of benefit changes, there had to be a hearing on the petition conducted in

140. Gunther, supra note 95, at 8.
accordance with the contested case procedures set forth in the Minnesota Administrative Procedure Act.¹⁴¹ The commissioner's decision had to be based on "substantial evidence"¹⁴² and was subject to judicial review.¹⁴³ Surely if the Minnesota legislature had left it to the commissioner of insurance to determine, after a contested case proceeding, the amount by which rates should be reduced to reflect the actual cost savings to the insurers resulting from the changes made by chapter 346 and then had passed a statute reducing rates by a greater amount than the commissioner fixed, the courts would not have


¹⁴³. Minn. Stat. § 79.073 (1982), amended by Act of June 1, 1983, ch. 247, § 38, 1983 Minn. Laws 852, 859, repealed effective 1 January 1994 by ch. 290, § 15, 1983 Minn. Laws at 1321. Prior to deregulation, there were alternative ways in which rates might be fixed. The commissioner of insurance was directed under Minn. Stat. § 79.075 (1980), repealed by ch. 290, § 15, 1983 Minn. Laws at 1321, to establish, by rule, a formula by which the schedule of rates could be automatically adjusted to reflect benefit changes that had been mandated by operation of law subsequent to the most recent change in the state-wide schedule of rates. If such a formula was established, the contested case procedures need not have been followed. But § 79.075 provided that at each rate hearing following an automatic adjustment, the commissioner had to review the adjustment to assure that the schedule of rates adopted subsequent to the adjustment was not excessive, inadequate, or unfairly discriminatory. If it was found that the resulting rates were excessive, inadequate, or unfairly discriminatory, the commissioner was directed to order appropriate remedial action.

Section 11 of chapter 346 added a new subdivision 1a to § 79.071 to provide another alternative. In the event of changes in the workers' compensation law justifying a reduction in the schedule of rates, or if the commissioner of insurance determined that the loss experience of the insurers indicated a change in the existing schedule of rates, the commissioner had the discretion to order a change in the schedule of rates with or without a prior hearing. Any hearing for this purpose was not subject to the contested case procedures otherwise required. See ch. 346, § 11, 1981 Minn. Laws at 1617 (amending Minn. Stat. § 79.071 (1980)). But a subsequent petition for modification of the rates would have been subject to these procedures and the propriety of the commissioner's prior adjustment of the schedule of rates could have been raised in such a subsequent proceeding.

Neither of these alternatives was ever used by the commissioner of insurance, except in the Rating Association case, in which the insurance commissioner, pursuant to § 11 of chapter 346, issued his order implementing the mandated 15% rate reduction without a prior hearing.

Neither § 11 of chapter 346 (codified at Minn. Stat. § 79.071 subd. 1a (1982), amended by ch. 290, § 3, 1983 Minn. Laws at 1311, repealed effective 1 January 1994 by id. § 15), nor Minn. Stat. § 79.075 (1980), repealed by ch. 290, § 145, 1983 Minn. Laws at 1321, did away with the requirement that the commissioner's order be based on substantial evidence or that it be subject to judicial review. Because the legislature itself mandated the 15% rate reduction, the substantial evidence test would not have been applicable in review of the commissioner's order implementing the mandate. Only its constitutionality could have been attacked.
showed great deference to the legislative judgment. The authority of the legislature to take such action is not questioned, but, as Professor Henry W. Biklé wrote in a pioneering article, "the obvious distinction between the quasi-judicial proceedings of [an administrative agency] and the investigations possible before committees of [the legislature] naturally raises a presumption in favor of the correctness of the determinations of the [agency]." There is no difference insofar as the degree of deference to which the legislative judgment is entitled between the case supposed and the Rating Association case, in which the legislature took the matter out of the hands of the commissioner of insurance and mandated a 15% rate reduction. As Professor Paul A. Freund has said, the great deference due a legislative judgment is justified "insofar as the legislature does indeed indulge in a generalization when it acts; but to the extent that the legislature particularizes it approaches the judicial arena" and it "should be so judged on review."

B. A MORE DEMANDING TEST UNDER THE MINNESOTA CONSTITUTION?

The insurers asked the Minnesota courts to declare the legislatively-mandated 15% rate reduction invalid under the due process clause of the Minnesota Constitution as well as under the federal due process clause. All the Justices of the United States Supreme Court agreed in Clover Leaf that a "state court may, of course, apply a more stringent standard of review as a matter of state law under the State's equivalent to the Equal Protection or Due Process Clauses." There are conflicting statements in the cases decided by the Minnesota Supreme Court as to whether it will apply a more stringent standard of review under the Minnesota Constitution than under the United States Constitution. In Thompson v. Estate of Petroff, for example, the court held unconstitutional the provision of the Minnesota survival statute allowing suit against the estate of a deceased person who committed a negligent act but not an intentional tort, on the ground that it violated the

147. Id. at 461 n.6. See also id. at 477-85 (Stevens, J., dissenting).
148. 319 N.W.2d 400 (Minn. 1982).
equal protection guarantee of the Minnesota Constitution. The court did not expressly find the provision unconstitutional under the United States Constitution but commented that "since we regard the rational basis test as the same under both [the Minnesota and the United States Constitutions], we believe that the statute also could be found defective under the federal Constitution." On the other hand, in *Wegan v. Village of Lexington*, in which the court held it was a denial of equal protection under both the federal and state constitutions for the Minnesota Dram Shop Act to exempt sellers of 3.2 beer from its relatively short notice-of-claim and statute of limitation provisions, the court stated that "[a]lthough we hold the classifications violate the United States and Minnesota Constitutions, we also conclude that even if the classifications passed constitutional muster under the federal constitution, they would still be defective under our state constitution."

The special circumstances of the *Rating Association* case called for a more stringent interpretation of the due process clause of the Minnesota Constitution than of the United States Constitution. Unlike a decision of the United States Supreme Court, the judgment of the Minnesota Supreme Court would have had no effect beyond the boundaries of Minnesota. The need for a uniform rule throughout the country was not present in this case. Nor, as indicated above, would a more stringent standard of review leading to the invalidation of the mandated 15% rate reduction have frustrated the legislative objective of reducing rates by the amount of the actual cost savings to the insurers resulting from chapter 346. Despite these considerations, the insurers did not press the Minnesota courts to employ a stricter standard of review under the due process clause of the Minnesota Constitution than the United States Supreme Court has held to be proper under the due process clause of the fourteenth amendment. The insurers feared that pressing

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149. The Minnesota Constitution does not contain an equal protection clause like that found in the fourteenth amendment to the Federal Constitution. But the Minnesota Supreme Court has fashioned an equal protection guarantee on the basis of article I, § 2, article X, § 1, and article XII, § 1 of the Minnesota Constitution.

150. 319 N.W.2d at 406 n.10. The Minnesota Supreme Court has taken the same position with respect to the due process clause. See, e.g., *State v. Schiffs*, 243 Minn. 533, 69 N.W.2d 89 (1955); *State v. Northwest Airlines, Inc.*, 213 Minn. 395, 7 N.W.2d 691 (1942), aff'd 322 U.S. 292 (1944).

151. 309 N.W.2d 273 (Minn. 1981).

152. *Id.* at 281 n.14. The Minnesota Supreme Court has taken the same position in cases other than those involving economic due process or equal protection. See, e.g., *O'Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn. 1979).
such a claim might be construed as an admission of the case's weakness under federal due process—an admission the insurers thought was not only unwarranted but possibly prejudicial to their case under the Minnesota Constitution.

III. APPLICATION OF THE STANDARDS OF JUDICIAL REVIEW

A. THE TRIAL OF LEGISLATIVE FACTS

1. In Applying the Rational Basis Test, Must the Courts Consider Only the Legislative Facts before the Legislature at the Time It Acted?

Whether the legislative means bear a fair or reasonable relationship to the legislative ends is, as the Minnesota Supreme Court stated in *Clover Leaf*,153 “dependent upon facts”154—legislative facts. In this respect, the United States Supreme Court did not disagree with the Minnesota Supreme Court when it reversed the state court in *Clover Leaf*. Whether the mandated 15% rate reduction bore a fair or reasonable relationship to the actual cost savings to the insurers flowing from chapter 346 also depended upon legislative facts—the general impact that changes made by chapter 346 would have on the amounts that all insurers would have to pay injured workers in Minnesota and the amount, if any, by which these changes would reduce insurers' other costs. Resolution of the issue as to whether the resulting rates deprived the insurers of a fair return on their investment also depended upon legislative facts—facts as to the general impact these rates would have on the financial condition of the workers' compensation insurance industry as a whole. The facts bore on “questions of law and policy”155 and had relevance to “the enactment of a legislative body.”156

In his opinion for the majority in *Clover Leaf*, Justice Brennan, in a passage that is far from clear, seemed to say that in applying the rational basis test the courts must consider only the legislative facts before the legislature at the time it acted. Justice Brennan wrote:

> Although parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational, *United States v. Carolene Products Co.*, 304 U.S. 144, 153-154

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154. Id. at 82.

155. MINN. R. EVID. 201 advisory committee comment.

156. FED. R. EVID. 201 advisory committee note.
(1938), they cannot prevail so long as "it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable." Id., at 154. Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken.\textsuperscript{157}

In a footnote to this passage, Justice Brennan added that the majority expressed "no view whether the District Court could have dismissed this case on the pleadings or granted summary judgment for the State on the basis of the legislative history, without hearing respondents' evidence."\textsuperscript{158} It is clear from these passages that Justice Brennan did not hold that the case could have been disposed of "on the basis of the legislative history, without hearing [Clover Leaf's] evidence." Furthermore, Justice Brennan did not say that the evidence Clover Leaf could introduce in support of its claim, or the evidence of which the Court might take judicial notice, was restricted to evidence the legislature considered at the time it acted. In saying that if there was evidence before the legislature reasonably supporting the legislation, Clover Leaf could "not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken,"\textsuperscript{159} Justice Brennan may have only intended to indicate the standard by which the Court would evaluate any evidence introduced. As Clover Leaf demonstrates, there is also no reason to think that the Justice's views would be different if the constitutional issue were one of economic due process rather than equal protection. Carolene Products was itself a case of economic due process.

Justice Brennan returned to this issue in his concurring opinion in Kassel v. Consolidated Freightways Corp.,\textsuperscript{160} in which Iowa truck limits were invalidated under the commerce clause:

Both the opinion of my Brother Powell and the opinion of my Brother Rehnquist are predicated upon the supposition that the constitutionality of a state regulation is determined by the factual record created by the State's lawyers in trial court. But that supposition cannot be correct, for it would make the constitutionality of state laws and regulations depend on the vagaries of litigation rather than on the judgments made by the State's lawmakers.

In considering a Commerce Clause challenge to a state regulation, the judicial task is to balance the burden imposed on commerce

\textsuperscript{157} 449 U.S. at 464 (citation omitted) (brackets the Court's).
\textsuperscript{158} Id. at 464 n.8 (citing Vance v. Bradley, 440 U.S. 93, 109-112 (1979); Bayside Fish Flour Co. v. Gentry, 297 U.S. 422 (1936)).
\textsuperscript{159} Id. at 464.
\textsuperscript{160} 450 U.S. 662 (1981).
against the local benefits sought to be achieved by the State's lawmakers. . . . In determining those benefits, a court should focus ultimately on the regulatory purposes identified by the lawmakers and on the evidence before or available to them that might have supported their judgment. See generally Minnesota v. Clover Leaf Creamery Co. . . . Since the court must confine its analysis to the purposes the lawmakers had for maintaining the regulation, the only relevant evidence concerns whether the lawmakers could rationally have believed that the challenged regulation would foster those purposes. . . . It is not the function of the court to decide whether in fact the regulation promotes its intended purpose, so long as an examination of the evidence before or available to the lawmaker indicates that the regulation is not wholly irrational in light of its purposes.161

Justice Brennan emphasized that "courts are not empowered to second-guess the empirical judgments of lawmakers concerning the utility of legislation."162

These passages indicate more clearly than those in Clover Leaf that Justice Brennan would judge the constitutionality of legislation on the basis of the evidence "before or available to the lawmaker."163 Such evidence would certainly be restricted to evidence in existence at the time the legislature acted, although Justice Brennan seems to be saying it would not be restricted to the evidence actually "before" the legislature but would include evidence "available" to the legislature, even, presumably, if the "available" evidence did not actually come to its attention.

Justice Brennan offered one principal reason against determining "the constitutionality of a state regulation . . . by the factual record created . . . in trial court"164—namely, that it would make constitutionality "depend on the vagaries of litigation rather than on the judgments made by the State's lawmakers."165 Oregon Supreme Court Justice Hans A. Linde, in his frontal attack upon the rational basis test, advanced additional justifications for the position that legislation should be judged by its rationality at the time enacted and not at the time challenged.166 He argued that the premise of constitutional review should be responsible lawmaking and that on this premise, "the purpose against which the rationality of the means is

161. Id. at 680-81 (citations omitted) (emphasis in original).
162. Id. at 679.
163. Id. at 680.
164. Id. at 680.
165. Id.
166. See Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197 (1976). Justice Linde would dispense altogether with the concept of substantive due process and confine the due process clause to ensuring the legitimacy of the way laws are made.
tested must obviously be the purpose intended at the time of enactment.”

As indicated above, I do not disagree with this view, but Justice Linde goes on to maintain that it “would make little sense to accuse past legislators of irrationality because the facts on which they acted have subsequently changed.” Furthermore, “if the reasonableness of a law on present facts is subject to continuing review regardless of its original rationality, then no decision ever settles that a law is constitutional on this score.”

A law might be constitutional at one time and place and not in another time and place. In sum, the rational basis test should call for the review of the “one-time reasonableness of lawmakers” and not “the continuing reasonableness of laws.”

It is true, as Justice Linde maintains, that “at its best, the legislative process is a far cry from the deliberative search for agreed ends and the informed assessment of means.” There is no constitutional requirement that the legislature set forth findings of legislative fact in every piece of legislation. Nor, I would add, is there a constitutional requirement that a legislature conduct hearings and build a record when it passes a law. Those eventually challenging the constitutionality of legislation may not have had the opportunity, or availed themselves of the opportunity, to present to the legislature certain legislative facts bearing upon the constitutionality of the legislative action. They may not have realized how the law would affect them; they may not have had the means or the inclination to be represented before the legislature. No constitutional doctrine requires those challenging legislative action to have participated in the legislative process as a condition of making their challenge. To deny them the opportunity to present any material legislative facts would deny them the only effective means they have to raise the constitutional issue.

If Justice Linde is correct in saying that the rationality of the individual legislators who voted for the challenged legislation is at issue when the legislation is attacked on due process grounds, then Felix Cohen would indeed have been correct

167. Id. at 216. The “premise” Justice Linde has in mind is that the constitutional rule promulgated by the Court “is one with which the government should have complied, or should know how to comply with in the future.” Id. at 222.
168. Id. at 216-17.
169. Id. at 218.
170. Id. at 218-22.
171. Id. at 222.
172. Id. at 224.
when he wrote that this constitutional standard would make "of our courts lunacy commissions sitting in judgment upon the mental capacity of legislators and, occasionally, of judicial brethren." 173

The reasonableness of legislation, not that of legislators, is and ought to be the constitutional issue. The reasonableness of the means chosen by the legislature to effectuate a legitimate end may depend not only upon legislative facts that were brought to the legislature's attention at the time it acted but also upon legislative facts in existence at that time that were not brought to its attention and legislative facts that came into existence afterwards because of changed conditions. Legislative facts assumed by the legislature to be true may also be shown to be false. So long as the notion of substantive due process is not entirely abandoned, those challenging legislative action should be able to adduce any legislative facts that support their claim or dispute the validity of the legislative facts relied upon by the legislature. This position could help to validate, as well as invalidate, legislation.

To hold that only the legislative facts before the legislature at the time it acted may be taken into consideration by a court in determining the constitutionality of legislation would have the strange result of barring use of the "Brandeis brief." The legislative facts that Mr. Brandeis set forth in his famous brief in support of Oregon's law fixing a maximum ten-hour working day for women 174 and those that the social scientists submitted to show the deleterious effects on black children of state-imposed school segregation, 175 brought to the attention and consideration of the courts legislative facts that were not before the state legislatures when they acted. Indeed, in the School Segregation Cases, 176 the Court said, in citing the work of the social scientists, "whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding [the deleterious effect of school segregation] is amply supported by modern authority." 177 In the numerous cases in which it has taken judicial notice of legislative facts, the Court has never limited itself to noticing only those facts that were

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176. Id.
177. Id. at 494 (citing Plessy v. Ferguson, 163 U.S. 537 (1896)).
before the legislature when it acted.\textsuperscript{178}

Furthermore, there is nothing incongruous, as Justice Linde maintains, in the notion that legislation may have been reasonable at the time it was enacted but became unreasonable because circumstances changed thereafter. Moreover, legislation as applied in one context may be constitutional, but unconstitutional as applied in another context. As Professor Kenneth Karst has pointed out, "[o]ne principal justification for giving the independent review of legislation to the judiciary lies in the ability of a court to weigh constitutional claims on the basis of experience which was not available when the legislature acted."\textsuperscript{179} If legislation is such that its reasonableness may vary from time to time and from place to place, its implementation should be entrusted to an administrative agency.

It must be realized, too, that it would be impossible for the courts in most states to adopt Justice Brennan's position, because in most states no information exists as to what legislative facts were before the legislature or available to it.\textsuperscript{180} Justice Brennan was able to rely on the legislative history of the environmental statute under attack in \textit{Clover Leaf} only because Minnesota began, in 1974, to make available to the public tape recordings of the standing committee hearings and floor sessions of both houses of its legislature. Lawyers then began to purchase these tapes and make transcripts from them for use in litigation.\textsuperscript{181} If the \textit{Rating Association} case had arisen

\begin{footnotesize}
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\item \textsuperscript{178} See, e.g., Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973) (\textit{The Abortion Cases}).
\item \textsuperscript{179} Karst, Legislative Facts in Constitutional Litigation, 1960 Sup. Ct. Rev. 75, 76-77.
\item \textsuperscript{180} Minnesota is one of only 19 states that make available transcripts or tapes of debates on the floors of their legislatures. Of the 19, 3 states do not make them available on a regular basis. Thirty-two states, including Minnesota, make available transcripts or tapes of the testimony before legislative committees. Of the 32, 16 do not make them available on a regular basis. Only 14 states publish the reports of their standing and special legislative committees; 9 states publish the reports of their special legislative committees only; 4 states publish the reports of their standing legislative committees only; and 23 states do not publish any reports of their legislative committees. Some of the states who do publish reports of their legislative committees do so on an irregular basis.
\item I am indebted to David Curle, a student at the University of Minnesota Law School, for compiling these data from M.L. Fisher, \textit{Guide to State Legislative Materials} (Fred B. Rothman & Co. 1979).
\item \textsuperscript{181} Two copies of each tape, made by employees of the house and senate, are deposited in the State Legislative Reference Library. \textit{See} Permanent Rules of the House 1.18, 6.6; Permanent Rules of the Senate 65. At the end of each biennium, copies of the tapes are transferred to the State Historical Society, as the house rules require. Under the senate rules, the tapes may be dis-
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before 1974, it would have been impossible to recount the legislative history of chapter 346.

Finally, Justice Brennan's views are not shared by a majority of the present Justices and are inconsistent with an unbroken line of Supreme Court decisions holding that legislative facts not before the legislature when it acted may be brought to the reviewing court's attention in challenge or support of the constitutionality of the legislature's action. In one of the earliest cases in which the Court confronted this issue, *Chastleton Corp. v. Sinclair*, 182 rent control in the District of Columbia was attacked for violating the due process clause of the fifth amendment on the ground that the war-created emergency that justified rent control in 1919 had come to an end by 1922, despite a congressional declaration to the contrary. Speaking for the Court, Justice Holmes wrote that "upon the facts that we judicially know we should be compelled to say that the law has

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Generally, he stated:

We repeat what was stated in Block v. Hirsh, 256 U.S. 135, 154, as to the respect due to a declaration of this kind by the legislature so far as it relates to present facts. But even as to them a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . And still more obviously so far as this declaration looks to the future it can be no more than prophecy and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.

The Court reaffirmed the position it took in Chastleton in an opinion written by Justice Brandeis in Nashville, Chattanooga & St. Louis Railway v. Walters. In this case, the railroad contended that a Tennessee statute and implementing administrative order requiring the railroad to construct an underpass to eliminate a grade crossing and bear one-half the cost thereof, though reasonable at the time enacted, became unreasonable because economic and transportation conditions had changed. The Court reversed the supreme court of Tennessee for refusing to consider these changes and remanded the case so that they could be considered.

In Borden's Farm Products Co. v. Baldwin, the Supreme Court reversed the decree of a three-judge district court that granted a motion to dismiss the complaint attacking the constitutionality of a provision of the New York Milk Control Law of 1933. The Supreme Court remanded the case for the taking of evidence as to the economic conditions and trade practices underlying the law. Nothing in the opinion indicates that the Court assumed that only the legislative facts known to the New York legislature at the time it acted were relevant to the fourteenth amendment issue.

Upholding a federal prohibition of the interstate shipment of skimmed milk mixed with nonmilk fats in United States v. Carolene Products Co., the Court stated:

[A] statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.

Where the existence of a rational basis for legislation whose consti-

183. Id. at 549.
184. Id. at 547-48 (citations omitted).
185. 294 U.S. 405 (1935).
186. 293 U.S. 194 (1934).
187. Id. at 213.
188. 304 U.S. 144 (1938).
tutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist. Chasleton Corporation v. Sinclair, 264 U.S. 543.

In Kassel v. Consolidated Freightways Corp., seven Justices (the four Justices in the plurality and the three dissenting Justices) agreed that evidence bearing on the constitutional issues could be introduced at a trial and would not be restricted to evidence before the legislature at the time it enacted the challenged legislation. In Clover Leaf, too, it is clear that the United States Supreme Court, like the Minnesota Supreme Court, did not limit its consideration to the legislative facts before the Minnesota legislature at the time it banned nonreturnable plastic milk containers. Despite the passages from his opinion quoted above, Justice Brennan took into account all the evidence in the record made at the trial, including the evidence that was not before the legislature.

Jordan v. American Eagle Fire Insurance Co., a decision by the District of Columbia Circuit Court of Appeals, also reflected long-standing Supreme Court precedent. In Jordan, the constitutionality of fire insurance rates was attacked on the ground that they were confiscatory, an issue also present in the Rating Association case. After holding that procedural due process required "a judicial type of hearing" at some point in the course of the administrative ratemaking or judicial review thereof, the District of Columbia Circuit decided that the Constitution did not require such a hearing to be "included in the legislative or administrative process." But, if not included in that process, such a hearing had to be afforded the complaining insurance companies in "a judicial proceeding in which new evidence may be supplied and full opportunity afforded for exploration of the bases of the disputed order."

189. Id. at 152-53.
192. See id.
193. 169 F.2d 281 (D.C. Cir. 1948).
194. Id. at 291.
195. Id. at 288.
196. Id. at 289.
197. Id. (citation omitted).
2. Did the State District Court in the *Rating Association* Case Consider Only the Legislative Facts before the Minnesota Legislature at the Time It Acted and Ignore the Testimony and Documentary Data Introduced at the Trial?

There is no clear answer to this question. The attorney general did not contest the insurers' position, that facts not before the legislature could be brought to the court's attention in challenging the constitutionality of legislative action, but maintained that the district court did consider the testimony and data introduced at the trial.198

At trial, both the insurers and the attorney general submitted testimony and data concerning the cost savings, if any, resulting from the changes made by chapter 346 in the benefits payable to injured workers and in the administration and operation of the workers' compensation system. The Rating Association and insurers presented three expert witnesses—Mr. Michael Aafedt, an experienced Minnesota workers' compensation attorney, Mr. William Curtis, a claims manager with more than twenty years of experience in the Minnesota workers' compensation system, and Mr. Patrick Newlin, chairperson of the Rating Association's actuarial committee and chief workers' compensation actuary for the St. Paul Fire and Marine Insurance Company. They also called as witnesses Mr. Michael D. Markman, then commissioner of insurance, and Mr. Craig Anderson, an employee of the Rating Association. The attorney general presented Mr. Clarence Atwood, an actuary from California who was the state's only expert witness, Mr. Duane Harves, chief hearing examiner of the State Office of Administrative Hearings, and Ms. Bonnie Faye Venburg, supervisor of records and compliance in the Workers' Compensation Division of the Minnesota Department of Labor and Industry.

The findings of fact and conclusions of law of the state district court,199 which adopted verbatim those proposed by the attorney general, consist almost entirely of statements identifying the materials in the record dealing with the legislative history of proposed changes in the workers' compensation system that resulted in the passage of chapter 346. The materials identified include the voluminous reports of the 1977 and 1979 study commissions established by the Minnesota legislature to study the workers' compensation system, the proposed

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199. See Appendix II, infra, at 669-76.
bills, and the various memoranda and statements estimating potential cost savings to insurers from proposed benefit and administrative changes, only some of which found their way into chapter 346. The reports of the two study commissions do not contain estimates of the cost savings to the insurers that might result from the changes in the workers' compensation system recommended therein. Nor, as an examination of the legislative history of the mandated 15% rate reduction shows, did any legislator refer to either of these reports during the entire course of the discussion of the various proposals that led, eventually, to the enactment of chapter 346.

Of the written materials before the legislature, all those containing estimates of the actual cost savings that might result from proposed changes in the workers' compensation system became part of the trial record by agreement of the parties. These estimates came from only two sources. The first source was Mr. Craig Anderson. His estimates were cited by others and incorporated in the legislative staff's memoranda referred to in the district court's finding. The only other source was Commissioner Markman, on whom the legislature relied heavily. Commissioner Markman based his estimates on the bill introduced on March 30, 1981, before the Labor Subcommittee of the Senate Employment Committee. Commissioner Markman embodied his estimates in three memoranda—two to Senator Collin Peterson and one to Senator Wayne Olhoff. There were substantial differences between the proposed changes in the workers' compensation system, to which the estimates of both Commissioner Markman and Mr. Anderson related, and the changes finally enacted in chapter 346.

The district court rendered no opinion evaluating the materials before the legislature or the testimony and documents introduced at the trial. It did not even attempt to describe the testimony and documents. Nor did the district court attempt to explain the basis on which it determined the soundness and persuasiveness, or lack thereof, of the views and data furnished by the expert witnesses. Two of the twenty-nine

200. See Joint Stipulation of Facts at 11, Rating Ass'n.
201. See Brief for Appellants at A-15 to A-40 app, Rating Ass'n.
203. Appendix II, infra, at 670-72.
204. Transcript of the Trial at 16, Rating Ass'n.
205. Joint Exhibits 9, 10, and 11, Rating Ass'n.
206. Trial Transcript at 15-17, 42, 73, 89, 91, 93, 96, 101, Rating Ass'n.
findings of fact by the district court—findings twenty-eight and twenty-nine—may arguably be said to have been based on the testimony and data introduced at the trial:

28. Plaintiffs have failed to prove that the cost savings resulting from the aggregate of all the benefit, administrative and operational changes in ch. 346 are less than 15%.

29. The cost savings in the Act are greater than 15% and indeed are at least 20%.

From all that appears in the district court's findings of fact, conclusions of law, and order for judgment, these findings may have been based on the district court's reading of the legislative history. This possibility is strengthened by the comments of the district court during trial; the court considered its function to be to determine whether the Minnesota legislature, in light of only the information before it when chapter 346 was passed, could rationally have concluded that the actual cost savings to the insurers resulting from chapter 346 would justify a rate reduction of at least 15%.

Although the attorney general seemed to accept the view that facts not before the legislature may invalidate legislative action, he nevertheless argued that the legislative history and the information and data before the legislature alone were sufficient to compel a finding that the legislature acted rationally. Indeed, the attorney general went so far as to say that if "the facts before the Legislature could reasonably be conceived to be true by it then the Legislature was acting in a rational fashion and the law should be upheld." But the essential point of the United States Supreme Court cases considered above is that the legislative facts before the legislature are never alone sufficient to uphold the constitutionality of legislation if subsequently at a trial legislative facts are adduced demonstrating that the legislative action has no reasonable basis. The legislative facts before the legislature cannot be viewed separately, apart from the legislative facts adduced at the trial.

3. The Applicability of the Rules of Evidence in the Trial of Legislative Facts

At trial, the district court applied the rules of evidence, par-

207. Appendix II, infra, at 676.
208. Trial Transcript at 12, 13, 61, 62, 67, 173, 174, 176, Rating Ass'n.
209. See Brief for Respondents at 16-28, Rating Ass'n. The attorney general also took this position at the trial. See, e.g., Trial Transcript at 13, 14, Rating Ass'n.
ticularly the hearsay rule and the requirement of an evidentiary foundation, to the admissibility of the legislative facts that the parties sought to introduce as bearing upon the issue of constitutionality. The Minnesota and federal rules of evidence, however, were meant to apply only to adjudicative facts and should not govern the admissibility in evidence of legislative facts. No Minnesota or federal rule of evidence deals expressly with legislative facts but both sets of rules were intended to give the courts the widest latitude in taking judicial notice of legislative facts. Rule 201 of the Minnesota Rules of Evidence, the counterpart of rule 201 of the Federal Rules of Evidence, deals only with the judicial notice of adjudicative facts. The Minnesota Supreme Court Advisory Committee commented that it was "in agreement with the promulgators of the federal rule of evidence [rule 201] in not limiting judicial notice of legislative facts."

After quoting Professor Edmund Morgan's description of the methodology of judicial determination of domestic law, the United States Supreme Court Advisory Committee stated:

This is the view which should govern judicial access to legislative facts. It renders inappropriate any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level. It should, however, leave open the possibility of introducing evidence through regular channels in appropriate situations. See Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, ..., (1934), where the cause was remanded for the taking of evidence as to the economic conditions and trade practices underlying the New York Milk Control Law.

Clearly courts' access to legislative facts was not intended to be limited in any way—certainly not by the rules of evidence, which obviously do not come into play when judicial notice is taken of these facts. There is no question that the Rating Association case presented an "appropriate situation" for the introduction of evidence as to the legislative facts


213. MINN. R. EVID. 201.

214. FED. R. EVID. 201.

215. See MINN. R. EVID. 201 advisory committee comment (refers generally to FED. R. EVID. 201 advisory committee note).

216. MINN. R. EVID. 201 advisory committee comment.

217. FED. R. EVID. 201 advisory committee comment.
"through regular channels," that is, before the trial court. Introducing such evidence did not convert the legislative facts into adjudicative facts or otherwise bring the rules of evidence into play.

It is strange that a court should apply the rules of evidence to the admissibility of legislative facts bearing upon the constitutionality of a legislatively-fixed insurance rate when the commissioner of insurance would not have been bound by the rules of evidence in a contested case proceeding to fix such a rate. Furthermore, the hearing examiner in such a case would have been authorized to "admit documentary and statistical evidence accepted and relied upon by an expert whose field of expertise may have some relevance to workers' compensation rate matters, without the requirement of traditional evidentiary foundation."

In any case, the state district court's application of the rules of evidence to the admissibility of legislative facts did not prevent the parties in the Rating Association case from presenting the essentials of their cases to the tribunal. The court did, however, exclude from the record certain written actuarial explanations of the data relied on by the insurers which could have helped the court to understand the complex, quantitative issues in the case. The insurers inserted the most important of these explanations in the appendix to their brief to the Minnesota Supreme Court without objection from the attorney general or the court.

4. The Standard for Review of the Legislative Facts by the Trial Court

The United States Supreme Court overruled the Minnesota Supreme Court in Clover Leaf because the state court substituted "[its] evaluation of legislative facts for that of the legislature" in applying the federal constitutional standards of equal protection and due process. Justice Brennan acknowledg-

220. See Brief for the Appellants at 41-58 app., Rating Ass'n.
222. Id. at 470.
223. Justice Stevens, dissenting, argued that so long as the Minnesota courts had articulated the proper federal constitutional standards, which he thought they had, see id. at 486, the United States Supreme Court lacked the authority "to make the majestic announcement that it is not the function of a state court to substitute its evaluation of legislative facts for that of a state legislature," id. at 479 (emphasis in original).
edged that Clover Leaf had produced impressive supporting evidence at trial to prove that the probable consequences of the ban on plastic nonreturnable milk containers will be to deplete natural resources, exacerbate solid waste disposal problems, and waste energy, because consumers unable to purchase milk in plastic containers will turn to paperboard milk cartons, allegedly a more environmentally harmful product. Nevertheless, he went on to emphasize:

But States are not required to convince the courts of the correctness of their legislative judgments. Rather, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." Vance v. Bradley, 440 U.S. [93, 111 (1979)]. See also Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 425 (1952); Henderson Co. v. Thompson, 300 U.S. 258, 264-265 (1937).

Although parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational, United States v. Carolene Products Co., 304 U.S. 144, 153-154 (1938), they cannot prevail so long as "it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable." Id. at 154. Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was

The allocation of functions within the structure of a state government [is] a matter for the State to determine. I know of nothing in the Federal Constitution that prohibits a State from giving lawmaking power to its courts. Nor is there anything in the Federal Constitution that prevents a state court from reviewing factual determinations made by a state legislature or any other state agency. . . . The functions that a state court shall perform within the structure of state government are unquestionably matters of state law. . . . [T]he factual conclusions drawn by the Minnesota courts concerning the deliberations of the Minnesota Legislature are entitled to just as much deference as if they had been drafted by the state legislature itself and incorporated in a preamble to the state statute. The State of Minnesota has told us in unambiguous language that this statute is not rationally related to any environmental objective; it seems to me to be a matter of indifference, for purposes of applying the federal Equal Protection Clause, whether that message to us from the State of Minnesota is conveyed by the State Supreme Court, or by the state legislature itself.

Id. at 479-82 (citations omitted).

Justice Brennan sharply attacked Justice Stevens’s argument as “novel” but “without merit.”

[W]hen a state court reviews state legislation challenged as violative of the Fourteenth Amendment, it is not free to impose greater restrictions as a matter of federal constitutional law than this Court has imposed. Oregon v. Hass, 420 U.S. 714, 719 (1975).

The standard of review under equal protection rationality analysis—without regard to which branch of the state government has made the legislative judgment—is governed by federal constitutional law, and a state court’s application of that standard is fully reviewable in this Court . . . .

449 U.S. at 461-62 n.6 (citation omitted).

224. Id. at 463-64.
These passages are beset with internal contradiction. To say that the reviewing court must determine whether the legislative facts "reasonably" support the classification is to impose a more stringent standard of review than saying that the reviewing court must determine whether "the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." For what may reasonably be "conceived" (which, in its dictionary sense, means "imagined," "supposed," "suspected," or "fancied") to be the case may not reasonably be the case in light of all the known facts.

It is possible to distinguish between the standard the reviewing court should apply in determining what the legislative facts are and the standard it should apply in determining whether the legislative facts, as so determined, reasonably support the legislative action. Justice Brennan could then be read as saying that the reviewing court must accept as the legislative facts those that could "reasonably be conceived to be true by the governmental decisionmaker" and then decide whether these facts "reasonably" support the legislative action. But such a distinction is unreal. If the reviewing court accepts the legislative facts on which the legislation was based because those facts could reasonably be imagined to be true by the governmental decisionmaker, the accepted facts will always support the reasonableness of the legislative action. Thus, for example, if the reviewing courts had to accept as legislative fact that the cost savings to the insurers resulting from chapter 346 amounted to a sum justifying a 15% rate reduction merely because the Minnesota legislature could reasonably have imagined this to be the case, then of course the mandated 15% rate reduction was reasonably related to its articulated purpose.

The cases Justice Brennan cited, and others decided by the Court, do not support his conclusion that the ultimate question of constitutionality must be determined on the basis of legislative facts that could "reasonably be conceived to be true by the governmental decisionmaker." First, as indicated above, Justice Brennan's conclusion is based on the erroneous view that

225. 449 U.S. at 464 (citation omitted) (brackets the Court's).
only the legislative facts before the legislature at the time it acted are constitutionally significant. For example, the language Justice Brennan quoted from *Vance v. Bradley* was not intended to state the standard of judicial review when a party attacking the constitutionality of legislation introduced data rebutting the presumption of constitutionality. Instead, the passage was merely a restatement of the presumption of constitutionality attached to legislation.

In *Vance v. Bradley* the Court upheld a federal law that required federal employees covered by the Foreign Service retirement and disability system to retire at age sixty but did not apply the same requirement to civil service employees serving overseas under similar conditions and facing comparable hardships. The case had been decided in the federal district court on cross-motions for summary judgment. In this context, the Supreme Court used the word "conceived" in reply to the Foreign Service employees’ argument that the procedural posture of the case and the legislative facts stated in the employees’ motion for summary judgment required the government “to have current empirical proof that health and energy tend to decline somewhat by age 60 and . . . to offer such proof for the District Court’s perusal before the statute could be sustained.” The government had no such burden, concluded the Court, because appellees (the Foreign Service employees) had not rebutted the presumption of constitutionality. To do so, they were “required to demonstrate that Congress has no reasonable basis for believing that conditions overseas generally are more demanding than conditions in the United States and that at age 60 or before many persons begin something of a decline in mental and physical reliability.” Reviewing the legislative facts in the appellees’ motion for summary judgment and in their brief, the Court concluded that appellees had not sustained this burden.

The “reasonably can be conceived” language seems to have been used for the first time in *Borden’s Farm Products Co. v. Baldwin,* in which the Court reversed a district court’s dismissal of fourteenth amendment due process and equal protec-

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227. 440 U.S. 93, 111 (1979); supra text accompanying note 148.
228. 440 U.S. at 94-95.
229. Id. at 95.
230. 440 U.S. at 110 (citation omitted).
231. Id. at 111 (emphasis added).
232. Id. at 111-12.
233. 293 U.S. 194 (1934).
tion challenges to the New York Milk Control Law of 1933. Chief Justice Hughes, in his opinion for the Court, wrote:

Respondents invoke the presumption which attaches to the legislative action. But that is a presumption of fact, of the existence of factual conditions supporting the legislation. As such, it is a rebuttable presumption. . . . It is not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault. Nor is such an immunity achieved by treating any fanciful conjecture as enough to repel attack. When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.234

This passage may be interpreted in two ways—either the legislative facts that can reasonably be conceived to support the legislative action give rise to the presumption of constitutionality, or the presumption of constitutionality compels the reviewing court to accept as legislative facts those which could reasonably be conceived to be true by the governmental decisionmaker. In either case the legislative facts that give rise to the presumption of constitutionality, or come into "being" because of the presumption, may be rebutted. Once rebutted, the reviewing court must determine what are the legislative facts (resolving reasonable doubts in favor of the validity of the legislation) and whether the legislative facts so determined reasonably support the legislative action.

United States v. Carolene Products Co.235 is consistent with this reading of Vance v. Bradley and Borden’s Farm Products Co. v. Baldwin. In Carolene Products, the trial court had sustained a demurrer to the indictment of the company for the interstate shipment of skimmed milk mixed with nonmilk fats, holding that the Act prohibiting the shipment was unconstitutional on its face because it infringed the due process clause of the fifth amendment and transcended Congress’s power under the commerce clause.

The Supreme Court stated that, in view of the procedural posture of the case, it “might rest decision wholly on the presumption of constitutionality.”236 “But affirmative evidence also sustains the statute,” the Court added, and then reviewed this evidence.237 By demurring, the Carolene Products Com-

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234. Id. at 209 (citations omitted).
235. 304 U.S. 144 (1938).
236. Id. at 148.
237. Id. at 149-50.
pany chose not to introduce any facts to rebut the presumption of constitutionality. Thus the following statements in *Carolene Products*, cited by the Court in *Clover Leaf*, must be evaluated in light of this procedural posture:

[A] statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.

But such we think is not the purpose or construction of the statutory characterization of filled milk as injurious to health and as a fraud upon the public. There is no need to consider it here as more than a declaration of the legislative findings deemed to support and justify the action taken as a constitutional exertion of the legislative power, aiding informed judicial review, as do the reports of legislative committees, by revealing the rationale of the legislation. Even in the absence of such aids the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators. . . .

Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist. *Chastleton Corporation v. Sinclair*, 264 U.S. 543. . . . But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. Here the demurrer challenges the validity of the statute on its face and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it.

The Court's statement that it was required to sustain congressional judgment so long as "the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited," obviously refers to the situation in that case, in which a demurrer challenged the validity of the statute on its face and no facts were introduced by the challengers to rebut the presumption of constitutionality. The Court based its conclusion on the legislative facts it found in examining the legislative history of the chal-

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239. 304 U.S. at 152-54 (citations omitted).
lenged Act and on the legislative facts of which it took judicial notice. In any case, there is no real difference between asking the reviewing court on the basis of all the evidence before it to determine whether it is reasonable to assume the truth of the legislative facts supporting the validity of the legislative action, and asking the court to determine whether the truth of the legislative facts is "at least debatable." Yet both these standards are quite different from asking the reviewing court whether it is reasonable to conceive or imagine legislative facts that might support the challenged legislation. They are also different from the standard rejected by the Court in Carolene Products, namely that the reviewing court should independently determine, after weighing all the evidence, what are the legislative facts. This latter difference may be what Justice Brennan referred to in Clover Leaf when he said that legislative action may not be invalidated by a showing that the legislature was "mistaken," but only by a showing that the legislative facts did not "reasonably" support the legislative action.240

In Day-Brite Lighting, Inc. v. Missouri,241 which upheld the Missouri law requiring employers to give employees time off with pay to vote, no legislative facts were in dispute. Invalidation of the law would have negated state policy. In this context, unrelated to the ascertainment of legislative facts, the Court explained:

The judgment of the legislature that time out for voting should cost the employee nothing may be a debatable one. It is indeed conceded by the opposition to be such. But if our recent cases mean anything, they leave debatable issues as respects business, economic and social affairs to legislative decision.242

Finally, Henderson Co. v. Thompson243 is also consistent with the suggested interpretation of the other cases cited by Justice Brennan in Clover Leaf. In Henderson Co., the Court sustained a Texas statute and implementing administrative order prohibiting the use of sweet natural gas for the manufacture of carbon black.244 In upholding the Texas policy, the Court concluded that the distinction between sweet and sour gas "has ample support in the evidence"245 and "[n]o facts have been found, or established by the evidence, which would

240. 449 U.S. at 464.
242. Id. at 425.
244. For a discussion of Henderson Co., see supra text accompanying note 128.
245. Id. at 265.
justify us in pronouncing the action of the Legislature arbitrary."\(^2\)

Indeed, if one examines how Justice Brennan dealt with the legislative facts involved in \textit{Clover Leaf}, it becomes apparent that he did ask whether, despite the data introduced at the trial, it was reasonable to accept the legislative facts justifying the differentiation between nonreturnable plastic and nonreturnable paperboard milk containers. Justice Brennan held that the trial court in \textit{Clover Leaf} patently violated the principles governing rationality analysis under the federal equal protection clause because it took the position that as fact-finder it was obliged to weigh and evaluate the evidence and resolve the sharp conflict between the parties over the legislative facts.\(^2\) According to Justice Brennan the Minnesota Supreme Court committed the same error when it also concluded that the statute was unconstitutional,\(^2\) and explained that "[b]ased upon the relevant findings of fact by the trial court, supported by the record, and upon our own independent review of documentary sources, we believe the evidence conclusively demonstrates that the discrimination against plastic nonrefillables is not rationally related to the Act's objectives."\(^2\)

Thus Justice Brennan assumed that the Minnesota courts had concluded that the Minnesota legislature was simply "mis- taken" as to the legislative facts and that the courts had not confined their inquiry to whether it could reasonably be concluded that the legislative facts adduced in support of the classification were true.\(^2\) In determining that it could reasonably be concluded that these supporting legislative facts were true, the United States Supreme Court conducted "its own de novo review of [the] state legislative record in search of a rational

\(^{246}\) \textit{Id.} at 264.

\(^{247}\) 449 U.S. at 464. A fuller quotation from the trial court's memorandum is set forth in Justice Stevens's dissenting opinion. \textit{See id.} at 481 n.6.

\(^{248}\) \textit{Id.} See 449 U.S. at 464-65.


\(^{250}\) Justice Brennan's assumption may be unwarranted because the Minnesota Supreme Court concluded that "the evidence conclusively demonstrates that the discrimination against plastic nonrefillables is not rationally related to the Act's objectives." \textit{Id.} This conclusion reasonably carries the implication that the Minnesota Supreme Court also concluded that the legislative facts adduced in support of the classification could not rationally be assumed to be true. The Minnesota Supreme Court stated it was following the principles governing rationality analysis under the federal equal protection clause. \textit{See id.} at 81.
Taking into account all the evidence in the record, including the evidence introduced at the trial, Justice Brennan concluded that "the Minnesota Legislature could rationally have decided that its ban on plastic nonreturnable milk jugs might foster greater use of environmentally desirable alternatives," one of the statute's objectives. For this conclusion, he relied on statements by two state senators who supported the statute. Both senators argued that once a new plastic nonreturnable milk container was introduced, the legislature would find the container very difficult to ban. Justice Brennan also relied on evidence that the plastic jug was the most popular, and the gallon paperboard carton the most cumbersome and least well-regarded, package in the industry, and the inference therefrom that the ban on plastic nonreturnables would buy time while environmentally preferable alternatives were developed and promoted by an industry that would not wish to retain the paperboard carton indefinitely. Justice Brennan then added:

This Court has made clear that a legislature need not "strike at all evils at the same time or in the same way," and that a legislature "may implement [its] program step by step, . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations." It was also reasonable for the Minnesota legislature, as many legislators explained, to ban the plastic nonreturnables before they became entrenched, in order to prevent the loss, in the event of a later ban, of the larger amounts of capital that would be invested in the plastic container industry in the interim. It was reasonable, too, to permit the use of paperboard containers in the short run in order to prevent the severe economic dislocation in the milk industry that would have resulted from a simultaneous ban on both plastic and paperboard nonreturnable milk containers because few milk dairies were yet able to package their products in refillable bottles or plastic pouches.

The Minnesota Supreme Court had concluded that the

251. 449 U.S. at 482 (Stevens, J., dissenting).
252. Id. at 466 (emphasis in original).
253. Id. at 465-66.
254. Id. at 466 (citations omitted) (quoting Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 610 (1935) and City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976)) (brackets the Court's).
255. See 449 U.S. at 467.
256. See id. This justification, advanced by the State, was not directly addressed by the Minnesota Supreme Court. Id.
“production of plastic nonrefillables requires less energy than production of paper containers” and, therefore, the ban on plastic nonrefillables would not achieve another of the Act's objectives—to conserve energy. Relying on statements made during the floor debate on the Act and a reliable empirical study cited during the legislative debate, Justice Brennan concluded that it was “at least debatable” whether the contrary was true because plastic milk jugs are made from plastic resin, an oil and natural gas derivative, whereas paperboard milk cartons are primarily comprised of pulpwood, a renewable resource.

The Minnesota Supreme Court had also determined that plastic milk jugs occupy less space in landfills and present fewer solid waste disposal problems than do paperboard containers and, therefore, the ban on plastic nonrefillables was not a rational means to achieve the last of the Act's major objectives—to ease the state's solid waste disposal problem. Relying on statements made during the floor debate and on the same empirical study, which reported that plastic milk jugs occupy a greater volume in landfills than other nonreturnable milk containers, Justice Brennan rejected the Minnesota Supreme Court's conclusion because the truth of its contradictory was “at least debatable.”

In sum, Clover Leaf seems to say that if it is at least debatable—that is, if there is a reasonable difference of opinion—as to the legislative facts on which the constitutionality of legislative action depends, the reviewing court must accept the version of the facts that would sustain the constitutionality of the legislation and not reject that version simply because the court is persuaded that the legislature was mistaken as to the facts. On the basis of the facts so accepted, the reviewing courts must then determine whether the statutory means are rationally related to the statutory objectives. Yet, as we shall see in the next section, the United States Supreme Court has taken judicial notice of constitutionally significant legislative facts without inquiring whether there was a reasonable difference of opinion about them and whether it was at least debatable that their contradictories might be true.

It is impossible to know what standard the state district
court used in the *Rating Association* case in reviewing the legislative facts as to the cost savings to the insurers resulting from the changes made by chapter 346. All we know is that the district court accepted the attorney general’s proposed findings that the insurers “failed to prove that the cost savings resulting from the aggregate of all the benefit, administrative and operational changes in ch. 346 are less than 15%” and that these cost savings “are greater than 15% and indeed are at least 20%.” These findings read as if they are the result of the district court’s independent evaluation of the legislative facts. The district court also found, as proposed by the attorney general, that “the Legislature had before it sufficient information and data . . . as to clearly preclude a finding that the Legislature acted arbitrarily, capriciously or irrationally in mandating a 15% rate reduction.”

B. DOES THE “CLEARLY ERRONEOUS” TEST APPLY TO THE REVIEW BY THE MINNESOTA SUPREME COURT OF THE LEGISLATIVE FACTS FOUND BY THE DISTRICT COURT?

Rule 52.01 of the *Minnesota Rules of Civil Procedure* provides that “findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” The attorney general argued that this test applied because there was conflicting expert testimony about the cost impact of various changes made by chapter 346. The Rating Association and insurers responded with three arguments. The Rating Association maintained that the district court’s ultimate conclusions regarding legislative facts were clearly erroneous under traditional standards; that, under accepted doctrine, the clearly erroneous test should not apply in this case; and, more important, that rule 52.01 applies only to findings of adjudica-

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262. Appendix II, *infra*, at 676 (Finding of Fact No. 28).
263. *Id.* (Finding of Fact No. 29).
264. *Id.* at 675-76 (Finding of Fact No. 27).
265. *Minn. R. Civ. P.* 52.01.
266. *Brief for Respondents at 10-12, Rating Ass’n.*
267. For an example of the application of such traditional standards, see *In re Trust Known as Great Northern Iron Ore Properties*, 308 Minn. 221, 225, 243 N.W.2d 302, 305, *cert. denied*, 429 U.S. 1001 (1976) (“the trial court’s findings may be held clearly erroneous, notwithstanding evidence to support such findings, if the reviewing court is left with the definite and firm conviction that a mistake has been made”).
SUBSTANTIVE DUE PROCESS

The insurers argued that the conflicting expert testimony about the cost impact of chapter 346 did not require the application of the clearly erroneous standard because that conflict did not center on the "credibility of the witnesses" within the meaning of rule 52.01. The credibility of the witnesses in the Rating Association case did not turn on conflicting eyewitness reports or evaluations of the witnesses' demeanors or conduct. Instead it turned on the pertinence and applicability of the data bases and the assumptions, methodologies, analyses, and reasoning used by the expert witnesses to reach their respective conclusions about the impact of chapter 346 on insurers' costs. Credibility in this sense is discernible to anyone who analyzes the record. The Minnesota Supreme Court was as competent as the district court to resolve these conflicts and to reach ultimate conclusions about the reasonableness of the legislative determination that these changes would have sufficient cost impact to justify the mandated 15% rate reduction. Under established precedent, the Minnesota Supreme Court need not have deferred to the district court's assessments.268

The insurers' third argument, that rule 52.01 of the Minnesota Rules of Civil Procedure, like its counterpart, rule 52(a) of the Federal Rules of Civil Procedure,269 applies only to findings of adjudicative facts and not to the legislative facts that were embodied in the district court's findings twenty-eight and twenty-nine,270 requires a more detailed analysis.

The principal reason for the clearly erroneous rule in the review of a trial court's findings of adjudicative facts does not apply to legislative facts. Unlike the determination of disputed adjudicative facts—that is, facts involving "who did what, where, when, how, and with what motive or intent,"271—the determination of disputed legislative facts, as explained above,

268. See id. There is also authority for the proposition that an appellate court must engage in more careful scrutiny of a trial court's findings of fact when, as in the Rating Association case, the trial court adopted verbatim the prevailing party's proposed findings of fact. See Hagans v. Andrus, 651 F.2d 622, 626 (9th Cir. 1981); see also United States v. Forness, 125 F.2d 928, 942-43 (2d Cir.), cert. denied, 316 U.S. 694 (1942); Murphy v. Murphy, 269 Minn. 393, 404-06, 131 N.W.2d 220, 227-28 (1964). The insurers did not present this argument to the Minnesota Supreme Court.

269. FED. R. CIV. P. 52(a).

270. Findings of Fact Nos. 28 and 29 are reprinted in Appendix II, infra, at 676.

271. 3 K.C. DAVIS, supra note 212, § 15.4, at 147.
does not “depend peculiarly upon the credit given to witnesses by those who see and hear them.”272 Furthermore, the advisory committee note on the federal rules explains that rule 52(a) “accords with the decisions on the scope of the review in modern federal equity practice.”273 Each of the federal cases cited in support of this statement involved adjudicative facts.274 The note then points out that in Minnesota, among other states, “the review of findings of fact in all non-jury cases . . . is assimilated to the equity review.”275 The case cited in support of this proposition also involved adjudicative facts.276

That the “findings of fact” governed by rule 52.01 refer to findings of adjudicative, not legislative, facts is further demonstrated by the impact of rule 201 of the Minnesota Rules of Evidence and its counterpart, rule 201 of the Federal Rules of Evidence.277 Both rules deal only with the judicial notice of adjudicative facts and were not intended to limit the judicial notice of legislative facts. In the cases cited in the Minnesota Supreme Court Advisory Committee’s comment on rule 201 of the Minnesota Rules of Evidence,278 the Minnesota Supreme Court took judicial notice of extrarecord legislative facts that were the products of the court’s own research and understanding.279 Furthermore, there is general agreement that the United States Supreme Court “commonly takes judicial notice of disputable and even disputed legislative facts.”280 In numerous cases, the Court has relied heavily on extrarecord legisla-

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272. Cf. United States v. Yellow Cab Co., 338 U.S. 338, 341 (1949) (“Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them.”).

273. FED. R. CIV. P. 52(a) advisory committee note.

274. See Warren v. Keep, 155 U.S. 265 (1894); Furrer v. Ferris, 145 U.S. 132 (1892); Kimberly v. Arms, 129 U.S. 512 (1889); Tilghman v. Proctor, 125 U.S. 136 (1888); Silver King Coalition Mines Co. v. Silver King Consol. Mining Co., 204 F. 166 (8th Cir.), cert. denied, 229 U.S. 624 (1913). These cases were cited in FED. R. CIV. P. 52(a) advisory committee note.

275. FED. R. CIV. P. 52(a) advisory committee note.

276. See State Bank of Gibbon v. Walter, 167 Minn. 37, 208 N.W. 423 (1926), cited in FED. R. CIV. P. 52(a) advisory committee note.

277. MINN. R. EVID. 201; FED. R. EVID. 201.

278. MINN. R. EVID. 201 advisory committee comment.


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erred because it did not apply the "clearly erroneous" test when it rejected the federal district court's finding that Pullman-Standard and the Union, in agreeing to a particular seniority system, had not intended to discriminate against black employees of Pullman-Standard. The issue of the parties' motive or intent is, of course, a typical issue of adjudicative fact. Regarding rule 52(a), the Court stated:

Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

The court of appeals in Pullman-Standard had made an independent determination of the "ultimate" adjudicative fact—that the disproportionately adverse impact of the seniority system on black employees reflected an intent to discriminate on the basis of race. It had applied the "clearly erroneous" test to the trial court's findings of "subsidiary" facts, from which the inference of discriminatory intent was drawn. But some of these subsidiary facts were adjudicative facts and others were legislative facts. For example, the trial court found that linking seniority to "departmental age" was typical of seniority arrangements generally and of agreements in the railroad equipment manufacturing industry in particular. The court of appeals did not disagree with this finding of legislative fact. The trial court also found that the arrangement of departments at the Pullman-Standard plant was rationally related to the nature of the work there and consistent with practices generally followed in unionized plants throughout the country. The court of appeals did not disagree with the trial court about what these general practices were—legislative facts. But it rejected the trial court's findings that the structure of departments at Pullman-Standard's plant was rational and in line with general industry practice and, therefore, did not reflect a discriminatory intent—all adjudicative facts.

Therefore, when the Supreme Court stated that rule 52(a)
“does not make exceptions or purport to exclude certain categories of factual findings” from its ambit,\textsuperscript{292} it did not have in mind the distinction between adjudicative and legislative facts. It was referring to the distinction between “subsidiary” adjudicative facts and “ultimate” adjudicative facts.

In \textit{Rogers v. Lodge},\textsuperscript{293} the Supreme Court relied on \textit{Pullman-Standard v. Swint} in holding that the “clearly erroneous” standard applied to a finding of the federal district court of an adjudicative fact—that the at-large system of voting for members of the Board of Commissioners in Burke County, Georgia, was being maintained for the invidious purpose of diluting the voting strength of the black population.\textsuperscript{294} For this reason, the at-large system was held to violate the fourteenth and fifteenth amendment rights of the black citizens.\textsuperscript{295} The Court also held that rule 52(a) applied to the trial court’s subsidiary findings of fact, which may fairly be described as involving issues of legislative, as well as adjudicative, fact.\textsuperscript{296}

Neither in \textit{Pullman-Standard v. Swint} nor in \textit{Rogers v. Lodge} does it appear that a party argued that rule 52(a) does not apply to the trial court’s “subsidiary” findings of legislative facts. In \textit{Pullman-Standard v. Swint}, unlike the \textit{Rating Association} case, the “ultimate” facts as well as the “subsidiary” facts about which the trial court and the court of appeals differed were adjudicative facts, to which the Supreme Court held rule 52(a) applicable. In \textit{Rogers v. Lodge}, too, unlike the \textit{Rating Association} case, the “ultimate fact” was an adjudicative fact but the subsidiary facts underlying the ultimate fact were mainly legislative facts.

The Supreme Court in \textit{Rogers v. Lodge} advanced two additional reasons for upholding the trial court’s findings of fact. The first was the “two-court rule”—the “Court of Appeals did not hold any of the District Court’s findings of fact to be clearly erroneous, and this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts.”\textsuperscript{297} The Court also stated that it was not inclined to overturn the trial court’s factual findings in a voting rights case such as \textit{Rogers v. Lodge} because they represented “a blend of history and

\textsuperscript{292} 456 U.S. at 287.
\textsuperscript{293} 458 U.S. 613, \textit{reh’g denied}, 103 S. Ct. 198 (1982).
\textsuperscript{294} \textit{See id.} at 622-23.
\textsuperscript{295} \textit{See id.} at 616.
\textsuperscript{296} \textit{See id.} at 623-24.
\textsuperscript{297} \textit{Rogers}, 458 U.S. at 623. As \textit{Clover Leaf} demonstrates, this rule does not apply to the review of state court judgments.
intensely local appraisal of the design and impact of the . . . County multimember district in the light of past and present reality, political and otherwise."

In other words, there were special reasons why the federal district court was best able to appraise the subsidiary "legislative" facts in the voting rights case. Other special reasons may impel an appellate court to give weight to a trial court's determination of legislative facts. The trial court is able to question expert witnesses so as to be sure it understands what they are saying and has time to study and inquire about written data submitted to it. In short, the trial process may enable the trial court to obtain a deeper understanding of the legislative facts than an appellate court that is dependent upon a written record and the briefs of counsel. But none of these special reasons was present in the Rating Association case, where the trial court's ultimate conclusions of legislative fact were unaccompanied by any findings with respect to the cost savings to the insurers resulting from any of the specific changes made by chapter 346, by any evaluation of the testimony or documentary evidence presented at the trial, or by any opinion indicating independent reflection.

Finally, the Fifth Circuit Court of Appeals has applied the clearly erroneous test in a situation that casts the Rating Association case into interesting perspective. In Usery v. Tamiami Trail Tours, Inc., the Fifth Circuit upheld a federal district court's determination of the legislative facts underlying its conclusion that an intercity bus company that had a policy of refusing to consider persons between the ages of forty and sixty-five for initial employment as bus drivers did not violate the Age Discrimination in Employment Act because the age limit imposed was a bona fide occupational qualification reasonably necessary to the safe operation of its business. Again, the issue as to whether rule 52(a) applied to legislative facts was apparently not raised; the cases cited by the court in elaborating the clearly erroneous standard involved only adjudicative facts. But the application of the clearly erroneous rule to the trial court's determination of the legislative facts was contrary to what the Supreme Court did in a similar case three years later. In Vance v. Bradley, which involved an issue of legislative

298. Id. at 622 (quoting White v. Regester, 412 U.S. 755, 769-770 (1973)).
299. 531 F.2d 224 (5th Cir. 1976).
300. See id. at 233.
fact similar to that in *Tamiami*—whether a sixty-year age limit for Foreign Service officers is justified—the Supreme Court took judicial notice of legislative facts that were contrary to the findings of the federal district court without mentioning rule 52(a).

Judge Brown, who wrote the court's opinion in *Tamiami*, also wrote an additional, specially concurring opinion that is significant for the *Rating Association* case. Speaking only for himself, Judge Brown said: "Though a court, with its adversary procedure, is not necessarily precluded from resolving issues of legislative fact... it is generally thought their determination is particularly appropriate to the administrative process, where staffs of specialists and great storehouses of information are available." He further noted that

> the determination of a factor as decisive as the age of employment having such universal application an administrative agency with its broader power of inquiry should be in a better position to evaluate the various factors pro and con than a court on the limited record—no matter how long the trial—that traditional adversary rules of evidence bring about.

> In deciding such a serious problem the trier ought not to be left, as was the Judge below, in the predicament of trying to choose the view, pro and con, of the incumbent Deputy Director of the Bureau of Motor Carrier Safety who, as a witness, supported the government's position but who was opposed by equally explicit contrary testimony from his immediate predecessor who likewise appeared as an expert witness but on behalf of the carriers.

Judge Brown thought the "ideal resolution" of the case would have been for the court to seek further information and guidance by asking the federal Department of Transportation to investigate, hear, and decide initially the issue of legislative fact. The relief the insurers requested in the *Rating Association* case resembled the "ideal resolution" proposed by Judge Brown in *Tamiami*, which Professor Davis thinks should "become the foundation for future law." To obtain this relief, the insurers did not ask the Minnesota Supreme Court to determine, independently, precisely what percentage reduction in insurance rates was warranted by the actual cost savings to the insurers resulting from chapter 346. They asked the court to render the decision it would have reached if it were the first tribunal to evaluate the legislative facts. In other words, they

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302. *Tamiami*, 531 F.2d at 245.
303. Id. at 243, 246.
304. Id. at 239.
asked the court to determine independently whether it could reasonably be concluded that the cost savings justified the mandated 15% rate reduction and not to decide merely whether it was clearly erroneous for the trial court to conclude that the Minnesota legislature did not act "arbitrarily, capriciously or irrationally in mandating a 15% rate reduction." Neither the United States nor the Minnesota Supreme Court has so restricted itself when taking judicial notice of legislative facts. To discharge their ultimate responsibility of implementing constitutional guarantees, courts must exercise an independent judgment, at least to the extent urged by the insurers, about the legislative facts on which the constitutional validity of challenged legislative action depends.

The Minnesota attorney general argued strongly that the clearly erroneous rule applied in the Rating Association case, but did not discuss the insurers' contention that rule 52.01 does not apply to a trial court's findings of legislative facts. Because the Minnesota Supreme Court disposed of the case summarily, we do not know what it thought of this contention.

306. See Appendix II, infra, at 676 (Finding of Fact No. 27).
307. See New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The Court stated: "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. . . . We must 'make an independent examination of the whole record. . . .'" Id. at 285 (quoting Edwards v. South Carolina, 372 U.S. 229, 235 (1963)). In a footnote, the Court further noted that it also must "review the finding of facts . . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary." Id. at 285 n.26 (quoting Fiske v. Kansas, 274 U.S. 380, 385-86 (1927)). The facts in Sullivan were adjudicative; the Court's responsibility to examine the evidence independently is even clearer when legislative facts are at issue.

Furthermore, with respect to the determination of legislative facts, there should be no difference between economic and non-economic due process cases, although the degree of deference to legislative policy may differ in the two categories of cases.

308. Brief for Respondents at 9-16, Rating Ass'n. The attorney general argued that "we need not reach the interesting legal question of whether the clearly erroneous standard does not apply in a case where the facts are solely 'legislative' as opposed to 'adjudicative.'" Id. at 11. The attorney general arrived at this position on the basis of a misunderstanding of the concept of legislative facts. The attorney general assumed that legislative facts are only those facts that the legislature considered in the course of enacting chapter 346. Id. at 10-12. But obviously, the testimony and data presented to the district court by the expert witnesses also related to legislative facts. These facts went to the underpinnings of the legislatively mandated 15% rate reduction. The insurers' contention that rule 52.01 does not apply to a trial court's conclusions about legislative facts was not at all "premised," as the attorney general maintained, "upon the implausible proposition that the Trial Court did not consider the testimony of the expert witnesses at trial." Id. at 11. These two contentions had nothing to do with each other.
C. Were the Minnesota Courts Warranted in Concluding that the Actual Cost Savings to the Insurers Resulting from the Changes Made by Chapter 346 Reasonably Justified a Rate Reduction of at Least Fifteen Percent?

Chapter 346 contained 146 sections. After a brief review of the legislative history of the 15% reduction, each of the sections that the state claimed might result in cost savings to the insurers will be described. The sections dealing with the administration and operation of the workers’ compensation system will be considered first, followed by the sections dealing with the changes in the benefits payable to injured workers.

1. Legislative History of the Mandated Fifteen Percent Rate Reduction

Twenty-five of the twenty-nine findings of fact by the trial court in the Rating Association case related to the legislative history of the various proposals to change Minnesota's worker's compensation system. They were intended to support the court's finding twenty-six that “[p]laintiffs' claims that the Legislature lacked a rational basis for mandating this [15%] reduction are unsubstantiated.”309 Yet, the legislative history of the mandated reduction shows that the legislature gave it only superficial consideration.310

A mandated rate reduction of 15% was proposed for the first time in the conference committee, which had the task of reconciling different house and senate bills. To reflect the cost savings to the insurers expected to accrue from the proposed benefit changes, the house bill mandated a rate reduction of 8% and the senate bill, 10%.311 To reflect the cost savings expected from the proposed administrative and operational changes, the house bill mandated an additional reduction of 2%, and the senate bill, 10%.312 In addition, the house bill directed the commissioner of insurance to reduce rates by another 2%, on October 1 of 1982, 1983, 1984, and 1985, to reflect the full impact of the changes. The commissioner was authorized to vary this percentage, however, if the cost savings to the insurers proved to

309. See Appendix II, infra, at 675.
310. The legislative history is set forth in full in the Brief for Appellants at A-15 to A-40, Rating Ass'n.
312. See sources cited supra note 311.
be more or less than was anticipated. Thus, the senate bill would have mandated an immediate 20% reduction in rates as compared to the 10% reduction mandated by the house bill. Any further rate reduction under the house bill would have been problematic. On the other hand, the 20% reduction under the senate bill was to have been for one year only. The conference committee’s and the legislature’s decisions to mandate an immediate and continuing 15% rate reduction rejected the approaches of both the senate and house bills.

The only, and very brief, legislative committee discussion of the basis for the mandated 15% rate reduction occurred during the May 15, 1981, meeting of the conference committee. Senator Peterson asked Insurance Commissioner Markman whether a mandated reduction of 15% was not “open to some debate.” Commissioner Markman replied that it was and that 15% represented his “best estimate,” that he could be right or wrong, and that the rate reduction justified by proposed benefit changes “could as well be 2% . . . as it could be 14 [%].”

There was no discussion of the mandated 15% rate reduction on the floor of the senate and only the briefest discussion on the floor of the house. Representative Stadum argued that, based on Commissioner Markman’s estimates, only an 11% reduction in rates was justified. Representative Simoneau replied that he believed “everything that is in the bill amounts to an immediate fifteen percent discount.”

2. The Changes in the Administration and Operation of the Workers’ Compensation System
   a. Commencement of Payment of Compensation and Penalizing Failure to Make Timely Payments of Benefits

   Section 96 of chapter 346 required the insurer to commence payment of compensation within fourteen days of the notice to, or knowledge by, the employer of a compensable injury. Only if the employer determined that the worker’s disability was not the result of a compensable injury could payment of compensation be discontinued. Within thirty days after the first payment was due, the employer could apply to the com-

313. See Brief for Appellants at A-38, Rating Ass’n.
314. Id. at A-39 to A-40.
missioner of labor and industry\textsuperscript{316} for a thirty day extension within which to determine whether the injury was compensable. Even if the employer decided to discontinue payments, those already made could be recovered only if the commissioner found that the employee's claim of work-related disability had not been made in good faith. Under prior law, the insurer was required to commence payment of compensation within thirty days of notice to, or knowledge by, the employer of a compensable injury, unless within that time the employer or insurer filed with the commissioner of labor and industry a denial of liability or a request for an extension of time within which to determine liability.\textsuperscript{317} Section 96 further provided that the employer or insurer who failed to begin compensation, to file a denial of liability within the prescribed time, or to request an extension of time within which to determine liability had to pay a penalty to the Special Compensation Fund amounting to 100% of the delayed payments.\textsuperscript{318}

Section 97 provided that if the employer was guilty of inexcusable delay in making payments, the delayed payments to the worker were to be increased by 10%.\textsuperscript{319} If any sum ordered to be paid by the Department of Labor and Industry was not paid when due and the order was not appealed, the sum bore 12% interest until paid.\textsuperscript{320} Under prior law, any payment not made when due bore 8% interest until paid.\textsuperscript{321}

Furthermore, section 98 added the provision that if an insurer repeatedly failed to pay benefits within three days of the due dates, the commissioner of labor and industry would order the insurer to explain the failure in person.\textsuperscript{322} If prompt payments were not made thereafter, the commissioner of labor and industry was directed to refer the insurer to the commissioner of insurance for disciplinary action.

\textsuperscript{316} The commissioner of the Department of Labor and Industry administers the workers' compensation system. \textit{Minn. Stat.} § 175.17 (1982).


\textsuperscript{318} Ch. 346, § 96, 1981 Minn. Laws at 1672 (amending \textit{Minn. Stat.} § 176.221 subd. 5 (1980)).

\textsuperscript{319} Ch. 346, § 97, 1981 Minn. Laws at 1674 (amending \textit{Minn. Stat.} § 176.225 (1980)).

\textsuperscript{320} \textit{Id.}


\textsuperscript{322} Ch. 346, § 98, 1981 Minn. Laws at 1674 (amending \textit{Minn. Stat.} § 176.231 subd. 2 (1980)).
b. **Administrative Procedures with Respect to the Initial Determination of a Compensation Claim**

1. Settlement agreements

Sections 134 and 135 clarified the prior law; settlement agreements between an injured worker or the worker's dependent and the employer or insurer must be approved by the authority with jurisdiction over the matter at the time of the settlement. To be approved, the settlement agreement must have been found to be reasonable, fair, and in conformity with the workers' compensation law. A settlement agreement was conclusively presumed to meet these criteria if the parties were represented by attorneys. Consistent with the law prior to chapter 346, the Workers' Compensation Court of Appeals could set aside an award made upon a settlement.

To encourage settlements, section 72 required that judgment be entered on a settlement agreed to by the parties up to one day before a matter was to be heard. If one party rejected a reasonable offer of settlement made by the other party, evidence of the offer was not admissible except in a proceeding to determine attorney's fees. If a rejected offer of an employer or insurer was more favorable than the judgment finally obtained by the worker, the employer was not liable for any part of the worker's attorney's fees. If a rejected offer of an employee was at least as favorable as the judgment finally obtained by the worker, the employer or insurer would be required to pay 25% of the attorney's fee in excess of two hundred fifty dollars. Under prior law, an employer who unsuccessfully contested liability was not obligated to pay any such

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324. Minn. Stat. § 176.521 subd. 2 (1982 & Supp. 1983). The authority may be either the Workers' Compensation Division, a compensation judge, the Workers' Compensation Court of Appeals, or a district court. Id.

325. Id. Subdivision 2 withdraws the conclusive presumption when the settlement concerns an employee's right to medical compensation or rehabilitation, in which case the settlement must be approved by the Workers' Compensation Division, a compensation judge, or the Workers' Compensation Court of Appeals. Id.

326. Id. § 176.521 subd. 3. That section authorizes the Workers' Compensation Court of Appeals to set aside an award made upon a settlement only upon filing of a petition by any party to the settlement and after a hearing on the petition. The court of appeals must refer such petitions to the chief hearing examiner for assignment to a compensation judge for hearing.

327. Ch. 346, § 72, 1981 Minn. Laws at 1652 (amending Minn. Stat. § 176.081 (1980)).
2. Burden of proof

Section 55 specifically stated that the burden was on the injured worker or dependent to prove that the injury or death of the worker arose out of and in the course of employment. The employer bore the burden of proving that the employer was not liable because either the injury was self-inflicted or the worker’s intoxication was the proximate cause of the injury. Section 56 provided that all disputed issues of fact in claims for compensation must be decided by a preponderance of the evidence. It then defined such evidence as “evidence produced in substantiation of a fact which, when weighed against the evidence opposing the fact, has more convincing force and greater probability of truth.” It also stated that questions of law arising under the workers’ compensation law “shall be determined in accordance with the rules of construction generally applied to all other civil matters.” The legislative history reveals that the legislative committees linked sections 55 and 56 with section 136, which deleted the phrase that section 176.531 of the Minnesota law was to be “liberally construed” to insure the prompt payment of compensation by public employers.

3. The medical panel in permanent partial disability cases

Section 89 provided that the administrator of the Workers’ Compensation Court of Appeals should choose three Minnesota counties, including at least one rural county, for a pilot medical panel project to continue until January 1, 1983. In 1983 the administrator was to report on its operation and make recommendations as to its future. The project required the administrator to compile and maintain a list of names of physicians, podiatrists, and chiropractors qualified to determine the extent of permanent partial disability. From that list, the em-

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329. Ch. 346, § 55, 1981 Minn. Laws at 1644 (amending Minn. Stat. § 176.021 subd. 1 (1980)). See also Ch. 290, § 32, 1983 Minn. Laws at 1329 (amending Minn. Stat. § 176.021 subd. 1a (1982)).
331. Id.
332. Id.
333. Ch. 346, § 136, 1981 Minn. Laws at 1687 (amending Minn. Stat. § 176.531 subd. 3 (1980)). See also Brief for Appellants at A-20 to A-21, Rating Ass’n.
ployer and the injured worker were to select a medical panel to report on the extent of the disability when that was an issue. The report of the panel would be binding on the compensation judge and subject to very limited review by the Workers' Compensation Court of Appeals and the Minnesota Supreme Court. The panel members' fees were to be paid either by the employer or, if the worker proceeded in bad faith, by the worker.

c. Transfer of Workers' Compensation Judges to the Office of Administrative Hearings

The workers' compensation judges were transferred to the Office of Administrative Hearings and made independent of the Workers' Compensation Division of the Department of Labor and Industry, effective July 1, 1981. The three settlement judges remained in the division. Hearing reporters and support staff for the compensation judges also were transferred to the Office of Administrative Hearings.

Chapter 346 provided that the compensation judges would perform the functions of a hearing examiner in workers' compensation matters. No other hearing examiner could be assigned to these matters. The compensation judges were required to be "learned in the law," to have "demonstrated knowledge of workers' compensation laws," and to be "free of any political or economic association that would impair their ability to function officially in a fair and objective manner." Workers' Compensation Division attorneys who represent employees in workers' compensation proceedings were prohibited from being hired or appointed as compensation judges for a period of two years following termination of service with the Division.

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d. *Separation of the Workers' Compensation Court of Appeals from the Department of Labor and Industry and Modification of the Court's Powers*

The existing Workers' Compensation Court of Appeals was reconstituted as an independent agency in the executive branch, with its judges subject to the limitations of article VI, section 6 of the Minnesota Constitution, to the jurisdiction of the Commission on Judicial Standards, and to the constraints of the *Code of Judicial Conduct*.338 The judges of the existing court were to be judges of the reconstituted court until their terms expired. New judges would be appointed for staggered, six-year terms by the governor, with the advice and consent of the senate. Together with the other officers and employees of the court of appeals, the judges were forbidden, under penalty of removal, to induce other officers or employees of the state to adopt their political views, favor any political person or candidate for office, or contribute funds for campaigns or other political purposes.339

Unless an appeal was taken to a district court, chapter 346 provided that the Workers' Compensation Court of Appeals was the exclusive agency to hear appeals by workers, employers, and insurers from decisions of the commissioner of labor and industry, the Workers' Compensation Division, or a compensation judge.340 The court of appeals also could review cases transferred to it by the district court. In all such cases, the statute provided that the court of appeals "shall be the sole, exclusive, and final authority for the hearing and determination of all questions of law and fact arising under the workers' compensation laws of the state," subject only to appeal to the Minnesota Supreme Court.341

The court of appeals was not permitted to hear the case *de novo*. It could, however, examine the record made before the compensation judge, disregard that judge's findings of fact, and substitute its own findings of fact. It also could remand the case for a *de novo* hearing before a compensation judge.342

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338. Ch. 346, § 42, 1981 Minn. Laws at 1638 (codified at Minn. Stat. § 175A.01 (1982)).
339. Ch. 346, § 44, 1981 Minn. Laws at 1639 (codified at Minn. Stat. § 175A.03 (1982)).
341. Id. See also ch. 346, § 51, 1981 Minn. Laws at 1641 (codified at Minn. Stat. § 175A.01 (1982)).
chief judge of the court also could refer any question of fact to
the chief hearing examiner for assignment to a compensation
judge. The chief judge could request that the compensation
judge hear the evidence and either report the evidence to the
court of appeals or make findings of fact and report them to the
court of appeals.343

e. Increased Prefunded Limit for Purposes of the Workers' Compensa-
tion Reinsurance Association

Under the prior law as well as the current law, the Reinsur-
ance Association assumes 100% of the liability of its member
insurers for compensation payments above the retention limits
explained below.344 All insurers licensed to write workers' compen-
sation insurance in Minnesota must be members of the
Association.345 The Association charges its members premiums
to cover its liabilities and expenses; the premiums are assessed
according to a specified formula and include two different por-
tions—the "prefunded limit" portion and the "pay as you go"
portion.346

Under prior law, the Reinsurance Association was required
to charge its member insurers premiums that would be suffi-
cient to cover (1) expected liabilities for compensation pay-
ments, which ranged between a $100,000 or $300,000 lower limit,
for which the member insurer elected to retain liability, and a
$500,000 higher limit—the "prefunded limit" portion; (2) actual
payments for claims in excess of $500,000—the "pay as you go"
portion; and (3) incurred or estimated operating and adminis-
trative expenses.347 The Reinsurance Association, in turn, was
empowered to reinsure all or any portion of its liabilities, in-
cluding its potential liability in excess of the prefunded limit.

Sections 19 and 20 of chapter 346 raised the prefunded limit
to $2,500,000.348 This limit was subject to upward adjustment, as

345. Ch. 290, § 7, 1983 Minn. Laws at 1314 (amending Minn. Stat. § 79.34 subd. 1 (1982)).
were the retention limits, on January 1, 1983, and each January 1 thereafter by the percentage increase in the statewide average weekly wage. The increase in the prefunded limit was also made retroactive to October 1, 1979, and the Reinsurance Association was authorized to adjust its members' premiums to take account of the retroactive change.

f. The Assigned Risk Plan

Responsibility for the Assigned Risk Plan was transferred from the Rating Association to the commissioner of insurance who was authorized to issue rules to implement it. The commissioner was to fix the initial premiums for insuring risks that were rejected by the insurers in the normal course of business but determined by the commissioner to be "in good faith entitled to coverage." After the rejected employer paid the premium, the commissioner assigned the risk to one or more qualified members of the Rating Association or qualified group self-insurance administrators. The commissioner would then enter into a contract with the assignee to issue a policy, or a group self-insurance administration contract, covering the compensation liability of the assigned risk. Unlike the situation under prior law, assignees would compete for the business.

All members of the Rating Association were reinsurers among themselves of the compensation liability assumed for assigned risks. Moreover, each qualified group self-insurance administrator was made a member of the Reinsurance Association, and the Assigned Risk Plan itself was treated as a group self-insurer member electing the higher retention of liability limit.

Section 14 created an Assigned Risk Plan Review Board with five members. The commissioner of insurance was one of the five and appointed the other four, two members of the Reinsurance Association and two employers insured under the Assigned Risk Plan. An assessment of 0.25% was levied on policies issued under the Plan to pay for the review board.

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349. Id.
350. Id.
353. Id.
Assigned Risk Plan was not to be effective until January 1, 1982, and was to expire on July 1, 1983, and be superseded by a new and a different plan.\textsuperscript{355}

3. The Impact of the Changes in the Administration and Operation of the Workers' Compensation System

The table below sets forth the quantitative differences between the state and the insurers with respect to the rate impact of the changes made by chapter 346 in the administration and operation of the workers' compensation system.

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|}
\hline
\textbf{Changes Made By} & \textbf{Rate Changes Justified} & \\
\textbf{Chapter 346} & \textbf{By Resulting Changes} & \\
\textbf{State's} & \textbf{In Insurers' Costs} & \\
\textbf{Estimate} & \textbf{Estimate} & \\
\textbf{%} & \textbf{%} & \\
\hline
Increased prefunded limit for purposes of the Worker's Compensation Reinsurance Association & +0.7 & +0.7 \\
Assigned Risk Plan & -0.8 & 0.0 to -1.0 \\
All other changes & -8.4 & 0.0 \\
Total & -8.5 & +0.7 to -0.3 \\
\hline
\end{tabular}
\caption{TABLE 1}
\end{table}

\textbf{a. Impact of Increasing the Prefunded Limit for Purposes of the Workers' Compensation Reinsurance Association}

The state and the insurers agreed that the increase in the prefunded limit would increase costs to the insurers by an amount sufficient to justify a rate increase of 0.7%.

\textbf{b. Impact of the Assigned Risk Plan}

The state's expert witness testified that the Assigned Risk Plan would justify a rate reduction of 0.8%.\textsuperscript{356} Using the latest financial data, which the state's expert did not do, the insurers'

\textsuperscript{355} Ch. 346, § 146, 1981 Minn. Laws at 1693. The superceding plan was set out in chapter 346, § 34, 1981 Minn. Laws at 1634 (codified at Minn. Stat. § 79.63 (1982), repealed by ch. 290, § 173, 1983 Minn. Laws at 1404). See also ch. 290, §§ 5-6, 1983 Minn. Laws at 1311-13 (changing the Assigned Risk Plan and its administration).

\textsuperscript{356} Trial Transcript at 612, Rating Ass'n.
expert estimated the justified rate reduction at 1.0%. But chapter 346 fixed January 1, 1982, as the effective date of the Assigned Risk Plan, and the Plan did not go completely into effect until March 1982 at the earliest—eight months after the mandated 15% rate reduction became effective—and it expired on July 1, 1983. In light of these facts, it was arbitrary to justify any part of the continuing 15% rate reduction on the basis of the Plan. Nevertheless, in arriving at the conclusion that no reasonable estimate of the aggregate of the cost savings to the insurers resulting from all the changes made by chapter 346 justified a rate reduction of more than 5%, the insurers accepted the 0.8% estimate of the state's expert.

c. Impact of all Other Changes in the Administration and Operation of the Workers' Compensation System

With respect to the other changes outlined above, the state and the insurers also agreed that the settlement agreement provision and the use of medical panels in the pilot project in three counties would not result in any cost savings to the insurers justifying any part of the mandated rate reduction.

The other changes that the state claimed justified an 8.4% rate reduction concerned other aspects of the administrative and judicial handling of workers' compensation claims—subjects with which the Minnesota Supreme Court is very familiar. No estimate was ever presented to the legislature or the district court of the cost savings reasonably attributable to each of these changes taken separately. Instead, Insurance Commissioner Markman estimated that the cost savings to the insurers from all these changes would justify a rate reduction of 2% a year for five years, 10% at the end of five years. The state's expert witness did not independently assess the impact of these changes but simply accepted Commissioner Markman's estimate as correct and "applied commonly accepted discounting methodology" to arrive at his 8.4% estimate. Each of these changes taken alone was, as the district court acknowledged, "unpriceable." Taken together, they were also unpriceable. The insurers maintained that it was arbitrary for the legislature to quantify the unquantifiable and that there was no

357. *Id.* at 461, 464.
358. *See id.* at 46-47; Joint Exhibits at 9, 11, *Rating Ass'n.*
360. *See Appendix II, infra,* at 670.
reasonable basis on which any of these changes could justify any rate reduction.

1. Impact of the fourteen-day payment requirement

The legislative history of chapter 346 reveals the legislature assumed that if injured workers were paid compensation within fourteen days, they would be less disposed to litigate and more likely to go back to work sooner, thereby effecting cost savings to the insurers justifying some rate reduction. Commissioner Markman agreed that the prompt payment requirement would affect only the "relatively small number" of disputed claims, ensuring that these claims "will be paid sooner, as opposed to later." On the basis of all the testimony at the trial, it appeared that 90% of all workers' compensation claims are undisputed and about 83% of these claims were being paid by a typical insurer within the fourteen days even before chapter 346 was enacted.

Furthermore, even in the small percentage of cases in which it was assumed that insurers who had not previously done so would now be compelled to commence payments within fourteen days or be penalized, the Workers' Compensation Court of Appeals, in effect, read the penalties out of the statute. In Wagner v. Farmers Union Central Exchange, the court held that the changes made by section 96 of chapter 346 relieved the employer and its insurer of the penalties provided by that section until thirty days after the date on which the first payment was due, or forty-four days, not, as the state claimed, fourteen days after notice to or knowledge by the employer of a compensable injury. In Zimprich v. Hiniker Company, the court held that the penalty provisions of section 97 as applied by the Workers' Compensation Division violated the procedural due process rights of employers and insurers under both the Minnesota and United States Constitutions.

The Minnesota Supreme Court, in Wagner, rejected the interpretations of both the state and the Workers' Compensation Court of Appeals, holding that when no denial of liability or request for an extension of time has been filed by the employer,

361. Trial Transcript at 48-49, Rating Ass'n.
362. Id. at 55.
363. Id. at 281-83.
365. 34 W.C.D. 620 (Workers' Comp. Ct. App. 1982). This decision was not appealed to the Minnesota Supreme Court.
the 100% penalty for the benefit of the Special Compensation Fund may be imposed if payments are not commenced within thirty days, not fourteen days or forty-four days, of notice to or knowledge by the employer of a compensable injury. Thus, the supreme court destroyed the state's attempted use of the fourteen-day payment requirement as a justification, in part, for the mandated rate reduction in the Rating Association case. Indeed the changes made by chapter 346 in this respect may well increase costs to the insurers because they are required to make nonrecoverable payments in cases in which no liability is ultimately found but in which the worker's claim is made in good faith.

2. Impact of the burden of proof and preponderance of evidence provisions

The legislative history reveals that the legislative committees assumed that sections 55, 56, and 136, taken together, would significantly increase the injured worker's burden of proof and thereby decrease the number and amount of com-

366. Wagner v. Farmers Union Cent. Exch., 329 N.W.2d 801 (Minn. 1983). The court reached this conclusion by reading the statute to make compensation "due" prior to the date on which payment must commence. It termed the state's 14-day contention "illogical." Id. at 805. The court affirmed the decision of the court of appeals because the insurer paid on the 29th of the 30 days.

Chapter 290, § 129, 1983 Minn. Laws at 1379 (amending Minn. Stat. § 176.221 (1982)) changed the law as interpreted by the state supreme court. It provided that the payment of temporary total compensation must begin within 14 days of notice to or knowledge by the employer of a compensable injury. Having begun payment, the employer may file a notice of denial of liability within 30 days of notice to or knowledge by the employer of the injury and thereupon may terminate payment of compensation. The commissioner of labor and industry is deprived of the authority to grant employers any extension of time within which to determine their liability. If, however, the employer does not begin the payment of temporary total compensation within 14 days of notice to or knowledge by the employer of the injury and fails to file a denial of liability within that period, the 100% penalty in favor of the Special Compensation Fund will be imposed.

Chapter 290, § 129, 1983 Minn. Laws at 1379 (amending Minn. Stat. § 176.221 (1982)) changed the law as interpreted by the state supreme court. It provided that the payment of temporary total compensation must begin within 14 days of notice to or knowledge by the employer of a compensable injury. Having begun payment, the employer may file a notice of denial of liability within 30 days of notice to or knowledge by the employer of the injury and thereupon may terminate payment of compensation. The commissioner of labor and industry is deprived of the authority to grant employers any extension of time within which to determine their liability. If, however, the employer does not begin the payment of temporary total compensation within 14 days of notice to or knowledge by the employer of the injury and fails to file a denial of liability within that period, the 100% penalty in favor of the Special Compensation Fund will be imposed.

The amendment to § 176.221 also authorizes a compensation judge, as well as the commissioner of labor and industry, (1) to find whether the employee's claim of work-related disability was made in good faith, upon which depends the employer's recovery of compensation payments made until the employer denied liability and terminated payments, and (2) to assess penalties for the delay of payments. Id.

367. The decisions of the Minnesota Supreme Court in Wagner and the Workers' Compensation Court of Appeals in Zimprich reveal the strange result that would be reached if only the legislative facts before the legislature at the time it acted could be considered in the course of constitutional review when the premises underlying these facts subsequently disappear as a result of authoritative statutory interpretation or constitutional review. See also infra notes 386-87 and accompanying text.
pensation awards, with resulting cost savings to the insurers which would justify a rate reduction. The state sought to buttress this assumption by also relying on section 52 of chapter 346 which provided: "It is the intent of the legislature that chapter 176 be interpreted so as to assure the quick and efficient delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers . . . ." Because sections 55 and 56 simply codified pre-existing, judicially-imposed standards for the interpretation of the workers' compensation law and changed nothing, it was arbitrary for the legislature to assume they would produce cost savings to the insurers.

Nor was it reasonable to attribute any cost saving to the insurers on the basis of section 136. The admonition in section 176.531 prior to amendment was intended to assure only that public employers make prompt payment of compensation to injured public employees. But practically all public employers in Minnesota are self-insured. Thus, the elimination by section 136 of the "liberally construed" language could hardly result in cost savings to insurers of private employers. Furthermore, sections 136 and 52 were hardly sufficient, by themselves, to induce the Minnesota Supreme Court to abandon its often-stated principle that humanitarian and remedial legislation must be liberally construed. The workers' compensation law was the major piece of remedial social legislation enacted in the early twentieth century. Ever since 1923, when the court decided Kaletha v. Hall Mercantile Co., it has been consistent judicial policy to construe the worker's compensation law liberally so as to resolve doubts in favor of the injured worker. Certainly nothing in chapter 346 required a change in this judicial policy and there was no reason to think that anything in chapter 346 would induce the court to make such an about-face. Ultimately, of course, it would have been for the court to say. But it was un-
reasonable for legislation to posit an immediate and continuing 15% rate reduction, in part, on unlikely suppositions as to what the court might do in future cases that would not be decided until years after the mandated reduction became effective.\textsuperscript{375}

3. Impact of the transfer of workers' compensation judges to the Office of Administrative Hearings, the separation of the Workers' Compensation Court of Appeals from the Department of Labor and Industry, and the modification of the court's powers

The physical transfer of the workers' compensation judges to the Office of Administrative Hearings was not accomplished until December 1981. Even after December 1981, however, the changes were superficial only. The individuals serving as compensation judges were the same after as before the transfer. New rules were adopted for the conduct of workers' compensation hearings that did not differ materially from the rules that antedated chapter 346. Mr. Duane Harves, the chief hearing examiner and head of the Office of Administrative Hearings, testified that he had instituted a number of administrative changes that were not required by chapter 346 and could have been in-

\textsuperscript{375} See supra note 367. The 1983 Minnesota legislature may have obviated the necessity for any resolution of this issue by the Minnesota Supreme Court and thereby acknowledged the strength of the insurers' arguments in the Rating Association case. A 1983 amendment to \textsection{176.001} provided:

It is the specific intent of the legislature that workers' compensation cases shall be decided on their merits and that the common law rule of “liberal construction” based on the supposed “remedial” basis of workers' compensation legislation shall not apply in such cases. The workers' compensation system in Minnesota is based on a mutual renunciation of common law rights and defenses by employers and employees alike. Employees' rights to sue for damages over and above medical and health care benefits and wage loss benefits are to a certain degree limited by the provisions of this chapter, and employers' rights to raise common law defenses such as lack of negligence, contributory negligence on the part of the employee, and others, are curtailed as well. Accordingly, the legislature hereby declares that the workers' compensation laws are not remedial in any sense and are not to be given a broad liberal construction in favor of the claimant or employee on the one hand, nor are the rights and interests of the employer to be favored over those of the employee on the other hand.

Ch. 290, \$ 25, 1983 Minn. Laws at 1324 (amending \textsc{Minn. Stat.} \textsection{176.001} (1982)).

The legislature also amended \textsection{176.021} to provide:

- All disputed issues of fact arising under chapter 176 shall be determined by a preponderance of the evidence, and in accordance with the principles laid down in section 176.001. . . .
- Questions of law arising under chapter 176 shall be determined on an even-handed basis in accordance with the principles laid down in section 176.001.

Ch. 290, \$ 32, 1983 Minn. Laws at 1329 (amending \textsc{Minn. Stat.} \textsection{176.021 subd. 1} (1982)).
stituted even before the transfer of the compensation judges to his office.\textsuperscript{376} The mail and filing systems in workers' compensation matters were reorganized to minimize the loss of mail and files that occurred under the prior system.\textsuperscript{377} The practice of issuing pre-hearing orders was instituted.\textsuperscript{378} Transcript preparation was speeded up.\textsuperscript{379} Funding for the training of compensation judges was provided.\textsuperscript{380} Mr. Harves offered no testimony on whether these changes would result in any cost savings to the insurers.

Except to make the court of appeals an independent agency separate from the Department of Labor and Industry and to deprive it of the power to grant a \textit{de novo} hearing, chapter 346 simply recodified existing law concerning the court and its procedures. Even before chapter 346, the court of appeals occupied a separate building, apart from the one that housed the Workers' Compensation Division of the Department of Labor and Industry. Although the court of appeals may not grant a \textit{de novo} hearing, it may call for another hearing before a compensation judge either on the whole case or on particular questions of fact. Even if it does not take such action but renders its decision on the record made before a compensation judge, the court of appeals is not limited to an appellate function but must exercise an independent judgment on the facts and the law.\textsuperscript{381}

The insurers' expert witness testified that depriving the court of appeals of the authority to grant \textit{de novo} hearings could increase the insurers' litigation costs because the court of appeals must now remand cases to compensation judges for \textit{de novo} hearings whenever it is dissatisfied with the state of the record, instead of having the record supplemented before it. This will necessitate additional court appearances and additional costs to the insurers.\textsuperscript{382}

The legislative history also reveals that the legislative committees believed that transferring the compensation judges, making Workers' Compensation Division attorneys who represented injured workers ineligible to serve as compensation

\begin{footnotes}
\item[376] Trial Transcript at 704, \textit{Rating Ass'n}.
\item[377] \textit{Id.} at 684, 685, 691, 698, 699.
\item[378] \textit{Id.} at 698.
\item[379] \textit{Id.} at 699.
\item[380] \textit{Id.} at 690, 702.
\item[381] \textit{See supra} notes 340-43 and accompanying text.
\item[382] Trial Transcript at 241, \textit{Rating Ass'n}. The state offered no testimony concerning the impact of the "reconstituted" Workers' Compensation Court of Appeals.
\end{footnotes}
judges for two years following termination of their employment by the Division,383 and "reconstituting" the Workers Compensation Court of Appeals as a separate agency would eliminate an inherent bias of the prior system in favor of injured workers and thereby result in cost savings to the insurers.384 The trial court's finding twenty-one also refers to evidence before the 1977 study commission that

the workers' compensation court system was partial to injured workers, . . . . that many of the workers' compensation judges were formerly civil service attorneys whose function is to represent plaintiffs, that workers' compensation court of appeals judges are often former workers' compensation judges, that all have come up through the system together at the Department of Labor and Industry, and [that] all office together at the State Department of Labor and Industry.385

The Minnesota Supreme Court rejected one of these key legislative assumptions as a "very crude generalization" and held the two-year ban on Workers' Compensation Division attorneys to be unconstitutional on equal protection grounds.386 "It is singularly unpersuasive, and potentially quite destructive of the integrity of the judiciary," said the court, "to distinguish among potential candidates for judicial appointment on the basis of source of salary without considering the individual candidate."387 It is equally crude and without any foundation to assume that lower compensation awards will be made to injured workers simply because the workers' compensation judges have been transferred to the Office of Administrative Hearings and the Workers' Compensation Court of Appeals has been legally separated from the Department of Labor and Industry. There is no reason whatsoever to suppose that these judges, under the ultimate supervision of the Minnesota Supreme Court, would do anything differently in the future than they did in the past—which was to do justice under the law.

The changes discussed above may reduce the cost to the state of administering the workers' compensation system, but

385. See Appendix II, infra, at 675.
387. Id. at 582. The dissenting justices did not disagree with this conclusion of the majority, but would have upheld § 103 of chapter 346 because it might be said to serve a different and legitimate legislative purpose—to broaden the backgrounds of compensation judges. Id. at 583-84 (dissenting opinion). Nelson v. Peterson also demonstrates the strange result that would be reached if only the legislative facts before the legislature at the time it acted could be considered in the course of constitutional review. See supra note 387.
the mandated 15% reduction in workers' compensation insurance rates was intended to reflect the cost savings to the insurers. No evidence was presented to the legislature or at the trial that any cost savings to the insurers would result from these administrative and operational changes. It was irrational simply to assume that they would.\textsuperscript{388}

4. Conclusion

The district court's findings nine, eleven, and fourteen through twenty-two\textsuperscript{389} all sought to buttress the conclusion that the legislature acted reasonably in mandating the 15% rate reduction by referring to various "unpriceable" changes in the law. The district court made no effort to itemize these changes, but it referred, presumably, to certain of the administrative and operational changes discussed above. The insurers submitted that these changes would not reasonably justify any reduction.

\textsuperscript{388} The state sought to attribute some savings in insurers' costs to chapter 346, § 59, 1981 Minn. Laws at 1646 (codified at Minn. Stat. § 176.021 subd. 8 (1982)), which permitted benefits to be calculated to the nearest dollar, and to the computerization of the records and information system of the Department of Labor and Industry. See ch. 346, § 144 subd. 7, 1981 Minn. Laws at 1692 (appropriating $450,000 for 1982 and $100,000 for 1983 to enable the Department to computerize its records). A minority proposal in the 1977 Study Commission report would have allowed rounding off payments, prohibited under the law prior to chapter 346, because it "could save a significant amount of administrative expense to insurers and thus reduce employers' workers' compensation premiums." Brief for Respondents at 55, Rating Ass'n.

It is difficult to know on what basis the 1977 Study Commission minority came to its conclusion. The insurers would have to calculate benefits to at least two decimal points in order to determine whether to round up or down. Under § 59, the computers must be instructed to take the additional step of rounding. The advances in computer technology since 1977 may account for the differences between the Study Commission minority report and the testimony of the insurers' expert that no cost saving would result from rounding off payments. In light of that technology, it is impossible to assume that § 59 would have had any cost saving effect.

A 1983 amendment to § 176.132 added subdivision 5 requiring payments of supplementary benefits to "be rounded up to the nearest dollar." Ch. 290, § 104, 1983 Minn. Laws at 1370 (codified at Minn. Stat. § 176.132 subd. 5 (Supp. 1983)) (emphasis supplied). To this extent, future costs to insurers will increase.

The significant fact about the program to computerize the records and information system of the Department of Labor and Industry is that it was not to be in operation until the fall of 1983 at the earliest. Even when the computerization becomes operational, it may reduce the administrative costs of the Department, but it is wholly speculative whether it will reduce insurers' costs to any extent. Certainly it was arbitrary for the legislature to mandate an immediate and continuing rate reduction of 15% on the basis, in part, of a computerization program that would not be in operation until at least two years after the reduction became effective and then would have a wholly speculative impact on insurers' costs. See supra note 367.

\textsuperscript{389} See Appendix II, infra, at 670, 673-74.
Although it was undoubtedly reasonable for the legislature to enact these changes, it was not reasonable for the legislature to render a quantitative judgment and mandate an immediate and continuing 15% rate reduction on the basis of “unpriceable” changes in the law involving dubious assumptions about the future behavior of injured workers, administrators in the Department of Labor and Industry, workers’ compensation judges, judges of the Workers’ Compensation Court of Appeals, and judges of the Minnesota Supreme Court. Acceptance of the insurers’ position on the effect of the administrative and operational changes would have required the court to hold the mandated 15% rate reduction unconstitutional. As we shall see, the benefit changes alone, as the state agreed, would not have justified a 15% rate reduction.

4. The Changes in the Benefits Payable to Injured Workers

a. Delay of Lump Sum Payments for Permanent Partial Disabilities until the Injured Employee Returns to Work

Under prior law, the insurer was required to make a lump sum payment for permanent partial disability only if payments for temporary total disability ceased and the employee returned to work within four weeks from the date of injury. If the employee did not return to work within that time, the insurer was required to pay 25% of the amount due for the permanent partial disability after four weeks from the date of injury, and again after eight weeks, after twelve weeks, and after sixteen weeks.

Chapter 346 required the insurer to make payments for permanent partial disability in a lump sum only if and when the injured worker returned to work. If the employee did not

390. To take the position unfavorable to that of the insurers, the rate increase of 0.7%, justified by the increase in the prefunded limit for purposes of the Reinsurance Association, was balanced by the rate decrease, justified by the changes in the Assigned Risk Plan. For the reasons indicated above, the insurers did not think that any continuing rate decrease was justified by the Assigned Risk Plan which expired July 1, 1983.


392. Id.

393. Ch. 346, § 57, 1981 Minn. Laws at 1644 (amending Minn. Stat. § 176.021 subd. 3 (1980); ch. 346, § 58, 1981 Minn. Laws at 1646 (codified at Minn. Stat. § 176.021 subd. 3a (1982)). The 1983 legislature made significant changes in the
return to work, and temporary total disability payments ceased, payments for permanent partial disability had to be made at the same intervals as temporary total payments were made, that is, weekly. As soon as an employee returned to work, the employer was to make a lump sum payment to the employee of any balance due for the permanent partial disability. The insurer also had to make lump sum payments for permanent partial disability if the employee was unable to return to work for specified reasons. Thus chapter 346 did not decrease the total amount of compensation for permanent partial disability to which an injured worker was entitled. It merely delayed any lump sum payment of the amount due, with certain exceptions, until the injured employee returned to work.

b. **Limitations on Death Benefits**

Under prior law, if the deceased employee left a dependent surviving spouse and no dependent child (that is, no child under eighteen or, if a student, under twenty-five), the spouse was entitled to receive 50% of the employee's daily wage at the time of the injury, adjusted annually for inflation, so long as the spouse lived and remained unmarried. If the deceased employee left a dependent surviving spouse and one dependent child, the payment increased to 60%. If the deceased employee left a dependent surviving spouse and two or more dependent children, the percentage increased to 66 2/3%.394

Section 78 of chapter 346 provided that if a deceased employee left a dependent surviving spouse and no dependent child, the spouse had the option of receiving 50% of the employee's daily wage at the time of the injury for a period of ten years, subject to adjustment for inflation, or a lump sum payment equal to ten years of compensation at 50% of the employee's daily wage at the time of the injury, without adjustment for inflation.395 If the surviving spouse did not accept a lump sum settlement and later remarried, the spouse was entitled to receive the lesser of either the remaining weekly benefits, including adjustment for inflation, or a lump

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394. See Minn. Stat. § 176.111 subds. 6-8, 10 (1980).

395. Ch. 346, § 78, 1981 Minn. Laws at 1658 (amending Minn. Stat. § 176.111 subd. 6 (1980)). See also ch. 290, § 87, 1983 Minn. Laws at 1360 (amending Minn. Stat. § 176.111 subd. 6 (1982)).
sum equal to two years of compensation without adjustment for inflation.396

Sections 79 and 80 provided that if the deceased employee left a dependent spouse with one or more dependent children, the spouse with one dependent child was entitled to be paid 60%, and with two or more dependent children 66%, of the employee’s daily wage at the time of the injury until the youngest child was no longer dependent.397 At that time, the spouse had the same options as a spouse with no dependent children, except that the payments would be equal to 16% less, if the spouse had one dependent child, or 25% less, if the spouse had two or more dependent children, than the last weekly benefit payment made while the last surviving child was still a dependent.398

If a surviving spouse with one or more dependent children remarried, the spouse would be entitled to receive compensation for the benefit of the dependent child or children until the youngest child was no longer dependent. In addition, the marrying spouse would be entitled to be paid in a lump sum two full years of weekly benefits equal to the difference between the weekly benefits payable if the spouse had not remarried and the amounts payable to the dependent child or children.399

Section 81 provided that the limitation placed by section 83 on the combined total of weekly social security survivor benefits and workers’ compensation death benefits should not apply to reduce the lump sum or weekly death benefits to which a dependent surviving spouse with dependent children was entitled.400 Section 82 provided that a portion of the death benefits payable to a surviving spouse with dependent children could be allocated to a guardian of the children.401 In that case, the limitation placed by section 83 on the combined total of weekly government survivor benefits and workers’ compensation death benefits would apply in determining the amount allocated to

396. See sources cited supra note 395.
398. See sources cited supra note 397.
399. Id.
401. Ch. 346, § 82, 1981 Minn. Laws at 1660 (amending Minn. Stat. § 176.111 subd. 10 (1980)).
the guardian.\textsuperscript{402}

c. \textit{Rehabilitation Services for a Dependent Surviving Spouse}

Section 76 entitled a dependent surviving spouse who is in need of rehabilitation assistance to become self-supporting to assistance through the Rehabilitation Service Section of the Workers' Compensation Division of the Department of Labor and Industry.\textsuperscript{403}

d. \textit{Limitation on Combined Total of Weekly Government Survivor Benefits and Workers' Compensation Death Benefits}

Section 83 reaffirmed that the sum of weekly social security survivor benefits and workers' compensation death benefits payable to a dependent surviving spouse and all dependent children could not exceed 100\% of the weekly wage earned by the deceased employee at the time of the injury.\textsuperscript{404} It expressly stated that in applying this limitation, a surviving spouse's insurance benefits under social security are to be regarded as government survivor benefits.\textsuperscript{405} These provisions were intended to reinstate the policy in effect prior to the Minnesota Supreme Court's decision in \textit{Redland v. Nelson's Quality Eggs, Inc.},\textsuperscript{406} which eliminated the social security offset against benefits payable under the workers' compensation law to certain surviving spouses and dependents.

e. \textit{Limitations on Medical and Hospital Fees}

Section 87 directed the commissioner of insurance, instead of the commissioner of labor and industry, to establish procedures for determining whether or not the charge for a health service was excessive.\textsuperscript{407} It further directed that such proce-
The procedures were also designed to encourage health care providers to develop and deliver services to rehabilitate injured workers. Hospital charges continued to be governed by existing fee regulations, subject to modification by the commissioner of insurance if necessary to prevent excessive charges and assure quality hospital care. Elaborating on prior law, section 87 also provided that if the commissioner of insurance, a compensation judge, the Workers' Compensation Court of Appeals, or a district court determined that the charge for a health or medical service was excessive, no payment in excess of the reasonable charge for that service would be made. Moreover, the provider could not attempt to collect any amount in excess of the reasonable charge from the injured worker, any other insurer, or the government.409

408. Ch. 346, § 87, 1981 Minn. Laws at 1664 (amending MINN. LAWS § 176.136 (1980)).
409. Id. The 1983 amendments also returned the powers of the commissioner of insurance over medical and hospital fees to the commissioner of labor and industry. Ch. 290, § 108, 1983 Minn. Laws at 1371 (amending MINN. STAT. § 176.136 (1980)). Furthermore, the amendments gave the commissioner of labor and industry express authority to adopt, amend, or repeal:
(c) rules . . . establishing standards and procedures for determining whether or not charges for health services or rehabilitation services . . . are excessive. In this regard, the standards and procedures shall be structured to determine what is necessary to encourage providers of health services and rehabilitation services to develop and deliver services for the rehabilitation of injured employees.
The procedures shall include standards for evaluating hospital care, other health care and rehabilitation services to insure that quality hospital, other health care, and rehabilitation is available and is provided to injured employees;
(d) in consultation with the medical services review board and the rehabilitation review panel, rules establishing standards and procedures for determining whether a provider of health care services and rehabilitation services . . . is performing procedures or providing services at a level or with a frequency that is excessive, based upon accepted medical standards for quality health care and accepted rehabilitation standards.
If it is determined by the commissioner that the level, frequency or cost of a procedure or service of a provider is excessive according to the standards established by the rules, the provider shall not be paid for the excessive procedure, service, or cost by an insurer, self-insurer, or a group self-insurer. In addition, the provider shall not be reimbursed or attempt to collect reimbursement for the excessive procedure, service or cost from any other source, including the employee,
1. Adjustment of Benefits for Inflation

Under prior law, on October 1 of each year the amount of benefits due the employee or any dependents was adjusted upward for inflation at a rate determined by a percentage geared to the increase in the statewide average weekly wage, but not exceeding 6% a year. Under section 137, for injuries occurring prior to October 1, 1981, this inflation adjustment was to be made on October 1, 1981, and thereafter on the anniversary date of the employee's injury. For all new injuries—those occurring on or after October 1, 1981—the initial adjustment was to be deferred until the first anniversary of the date of the injury.

5. Impact of the Changes in the Benefits Payable to Injured Workers

The table below sets forth the quantitative differences between the state and the insurers with respect to the rate impact of the changes made by chapter 346 in the benefits payable to injured workers, in the administration and operation of the system, and of all changes combined.

another insurer, the special compensation fund, or any government program.
Ch. 290, § 165, 1983 Minn. Laws at 1395 (codified at Minn. Stat. § 176.83 (Supp. 1983)).

The Rehabilitation Review Panel predated chapter 346. The Panel's membership was enlarged and appointment of its members was transferred to the commissioner of labor and industry from the governor by the 1983 amendments. Ch. 290, § 71, 1983 Minn. Laws at 1349 (amending Minn. Stat. § 176.102 subd. 3 (1982)). In addition to its consultative duties under § 176.83(d), the Panel is required to hear appeals regarding eligibility for rehabilitation benefits and any other rehabilitation issue that the commissioner of labor and industry has determined. Id.


TABLE 2

<table>
<thead>
<tr>
<th>Changes Made By Chapter 346</th>
<th>Rate Changes Justified By Resulting Changes In Insurers' Costs</th>
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</thead>
<tbody>
<tr>
<td><strong>State's Estimate</strong></td>
<td><strong>Insurers' Estimate</strong></td>
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<tr>
<td>%</td>
<td>%</td>
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<tr>
<td>Rehabilitation services</td>
<td></td>
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<tr>
<td>for a dependent surviving</td>
<td>0.0 0.0</td>
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<tr>
<td>spouse</td>
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<tr>
<td>Limitation on combined total</td>
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<td>of weekly government</td>
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<tr>
<td>survivor benefits and</td>
<td></td>
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<td>workers' compensation</td>
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<tr>
<td>death benefits</td>
<td>0.0 0.0</td>
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<tr>
<td>Limitations on death</td>
<td></td>
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<tr>
<td>benefits</td>
<td>−2.0 −1.8</td>
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<tr>
<td>Delay of lump sum payments</td>
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<tr>
<td>for permanent partial</td>
<td></td>
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<td>disabilities until the</td>
<td></td>
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<tr>
<td>injured employee returned</td>
<td>−6.4 −3.1</td>
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<tr>
<td>to work</td>
<td></td>
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<tr>
<td>Limitations on medical and</td>
<td>−2.2 0.0</td>
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<tr>
<td>hospital fees</td>
<td></td>
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<tr>
<td>Adjustment of benefits</td>
<td>−1.5 0.0</td>
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<tr>
<td>for inflation</td>
<td></td>
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<tr>
<td>subtotal</td>
<td>−12.1 −4.9</td>
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<tr>
<td>Rate impact of changes</td>
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<tr>
<td>in the administration and</td>
<td></td>
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<tr>
<td>operation of the workers'</td>
<td></td>
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<tr>
<td>compensation system</td>
<td>−8.5 +0.7 to −0.3</td>
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<tr>
<td>Total Rate impact of all</td>
<td></td>
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<tr>
<td>changes</td>
<td>−20.6 −4.2 to −5.2</td>
</tr>
</tbody>
</table>

a. **Impact of the Provision for Rehabilitation Services for a Dependent Surviving Spouse**

The state and the insurers agreed that the new provision for rehabilitation services would not reduce insurers' costs and so would not justify any rate reduction. Indeed, insurers will have to pay the additional costs of these rehabilitation services. The insurers offered no estimates of the impact of these cost increases on rates.
b. Impact of the Limitation on Combined Total of Weekly Government Survivor Benefits and Workers' Compensation Death Benefits

The state and the insurers also agreed that the limitation on the combined total of these benefits would not reduce insurer's costs and so would not justify any rate reduction. The impact of *Redland v. Nelson's Quality Eggs, Inc.* had never been taken into account in fixing rates. That decision increased insurers' costs and justified an increase in insurance rates, but rates had never been increased to reflect these increased costs. By eliminating the effect of the *Redland* decision, chapter 346 obviated the necessity for a rate increase but did not justify a rate decrease.

c. Impact of the Limitations on Death Benefits

To arrive at the estimate that the limitations on death benefits would justify a rate reduction of 1.8%, the insurers' expert used a standard actuarial method employed by the National Council on Compensation Insurance. The state's expert used the same method but added 0.2% to the resulting 1.8% figure on the assumption that practically all surviving spouses would elect the lump sum option provided in the new law.

In general, the state argued that resolution of the disputed legislative facts in the *Rating Association* case involved a choice between "conflicting judgments and opinions on some highly subjective issues," and so it was reasonable to accept the judgments and opinions of the state's expert. But as the difference regarding the impact of the limitations on death benefits as well as the differences with respect to the impact of the other benefit changes that will be discussed below reveal, more was at issue than a mere difference of judgment or opinion. The insurers questioned the validity of the data presented, the

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412. 291 N.W.2d 371 (Minn. 1980). See also supra note 406 and accompanying text.
413. See Brief for Appellants at A-54 to A-57, *Rating Ass'n*. The National Council on Compensation Insurance is a national clearinghouse of workers' compensation data financed by the insurance industry.
414. The difference between 1.8% and 2.0% would seem to be so small as to make either estimate reasonable. But, as will be indicated, this was not the case. A difference of 0.2% in the rates amounts to $1,000,000 in premiums annually.
416. Id. at 12.
assumptions made, and the methodology and reasoning used to support the state's expert's conclusions.

A rhetorical question in the state's brief was the only justification advanced for the assumption of the state's expert that practically all eligible survivors would elect the lump sum benefit option. It asked:

Why should a widow take her benefits as an annuity with 6 percent escalation per year and risk losing benefits because of death or remarriage, when she could take it all now as a lump sum and invest it in a savings account at greater than 6 percent or, indeed, invest it at even higher rates in investments such as tax free municipal bonds?\textsuperscript{417}

But the inference sought to be drawn from the question assumed that interest rates would remain high. Furthermore, if the assumption of the state's expert was correct, the insurers would lose a significant amount of investment income by having to pay out lump sums. The state's expert did not offset any part of this resulting increase in insurers' costs against the cost savings estimated to flow from the limitations on the death benefits.

In any case, the actuarial analysis of the insurers' expert answered this rhetorical question and showed the unreasonableness of the assumption of the state's expert. The analysis accounted for the financial benefits that would accrue to surviving spouses in varying situations by electing to take lump sum payments. It assumed that those surviving spouses who would benefit by taking lump sum payments would do so; the others would not. The analysis also accounted for the surviving spouse's risk of death and diminution of benefits upon remarriage.

In human terms, the state's assumption that practically all surviving spouses would opt for lump sums is patently unrealistic. In some cases, a surviving spouse may wish the protection of an annuity against real or imagined pressures from children, other relatives, significant others, or creditors. Other surviving spouses may simply prefer not to take lump sums requiring financial management. If some people did not fall into these categories, the commonly sold retirement annuities would disappear. It is interesting that the 1983 legislature deprived surviving spouses of the option of taking a lump sum settlement—the option the state thought was so desirable. Surviving spouses are now required to accept weekly benefits for a period of ten years, subject to adjustment for inflation.\textsuperscript{418}

\textsuperscript{417} Id. at 42.
\textsuperscript{418} Ch. 290, §§ 87-89, 1983 Minn. Laws at 1360-61 (amending Minn. Stat.}
Again, as we saw in connection with the analysis of the impact of the administrative and operational changes, and shall see in connection with the other benefit changes, an immediate and continuing 15% rate reduction was mandated on the basis of the most dubious predictions of future human behavior. For these reasons, it was not reasonable to assume that the limitations on death benefits would result in cost savings to the insurers justifying a rate reduction in excess of 1.8%.

d. Impact of the Delay of Lump Sum Payments for Permanent Partial Disabilities until the Injured Employee Returns to Work

Under both chapter 346 and prior law, permanent partial benefits are benefits not linked directly to wage loss consequences of an injury and are, in fact, payable pursuant to a statutory schedule . . . . For example, [chapter 346] provides that for the loss of a little finger the employee should receive an amount equivalent to 66 2/3 percent of his daily wage at the time of injury for 20 weeks.419

Professor Arthur Larson, the foremost national authority on workers' compensation, attributed the relatively high workers' compensation rates in Minnesota to the legislature's 1974 abandonment of the "wage-loss approach" in favor of "paying for physical impairment as such . . . to what is probably the farthest extent of any state so far."420

Chapter 346 left the "physical-impairment approach" intact. Recall that chapter 346 did not decrease the total amount of compensation for permanent partial disability to which an injured worker would be entitled.421 Furthermore, the total amount of permanent partial disability benefits included not only compensation for the permanent partial disability, but also healing period, vocational rehabilitation, and medical benefits.422 Chapter 346 delayed only the lump sum payment of the

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419. Brief for Respondents at 37 n.24, Rating Ass'n.
421. See supra note 393 and accompanying text.
disability component of the total benefits until the injured employee returned to work. It did not change the timing of other component payments. From the legislative history it may be deduced that the legislature hoped the delay of lump sum payments would give injured employees a financial incentive to return to work earlier than they would have under the prior law and would thereby reduce the total amount of healing period, vocational rehabilitation, and medical benefits. If this hope materialized the resulting cost savings to the insurers would justify a rate reduction. The state acknowledged, however, that "there is little empirical data on the most critical component of the estimate [of cost savings resulting from the impact of the delay in lump sum payments], the component which measures the extent to which the amendment actually will change human behavior and reduce malingering." Nevertheless, the state concluded that the court should accept its expert's estimate that the resulting cost savings would justify a 6.4% rate reduction and reject the 3.1% estimate of the insurers' expert because the state's expert, allegedly, had "by far the broader and more diversified professional experience." But resolution of the difference between the two experts did not depend on their relative professional experience but, again, on the inherent plausibility and validity of the data they presented, the assumptions they made, and the methodology and reasoning they used to arrive at their conclusions—matters that a reviewing court was competent to evaluate without passing on the opposing experts' relative qualifications and experience.

In arriving at his estimate that the provisions for the delay in lump sum payments for physical impairments would reasonably justify a rate reduction of no more than 3.1%, the insurers' expert made assumptions that would maximize the cost savings to the insurers resulting from having to pay a lesser amount of healing period, vocational rehabilitation, and medical benefits. Thus the insurers' expert assumed that under the prior law one-third of the workers suffering physical impairments were "malingers," workers who were physically capable of returning to work but had not done so in order to continue to receive these weekly benefits, knowing they would nevertheless get the total payments due them within sixteen weeks of the dates of the injuries. He also assumed that under

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424. Id. at 41. The state's California expert admitted that he had no experience with, or knowledge of, the behavior of Minnesota workers. Trial Transcript at 649-650, Rating Ass'n.
chapter 346 the "malingers" would return to work one-third sooner than they would have under the prior law in order to receive lump sum payments for their physical impairments. On the basis of these assumptions he calculated the cost savings to the insurers that would result from having to pay lesser amounts of healing period benefits. Since the best judgment of the insurers' expert was that the number of "malingers" did not exceed 15 to 20% of those drawing permanent partial disability benefits under the prior law, the 3.1% reduction estimate was probably overstated.

Because vocational rehabilitation and medical benefits are unrelated to the length of time the injured employee remains out of work, it could not be assumed that the impact of chapter 346 on these benefits would be the same as on healing period benefits. Thus, to estimate the maximum impact of chapter 346, the insurers' expert assumed that the resulting savings in the costs of vocational rehabilitation and medical benefits would be one-half the savings in healing period benefits.

In arriving at the conclusion that the provision for the delay in lump sum payments for physical impairments would justify a rate reduction of 6.4%, the state's expert estimated that the total amount of healing period and rehabilitation benefits would be reduced by one-third, and the total amount of medical

425. Trial Transcript at 441, 452, Rating Ass'n.

426. Id. at 442. The insurers' expert maximized the cost savings to insurers in other ways as well. If payments of the lump sums due for physical impairments were delayed for longer periods of time under chapter 346 than under the prior law, the investment income the insurers earned on the delayed payments would increase. This increase is equivalent to a cost savings, or decrease in the cost of benefits, to the insurers. The insurers' expert assumed that whereas under the prior law the insurers would pay out the total amount of the physical disability component over the allowed 16 week period, under chapter 346 the insurers would pay out these benefits over the average duration of the particular type of injury (136 weeks for major permanent partial disabilities; 31 weeks for minor permanent partial disabilities), with the first payment not being made until the end of the average healing period for that particular type of injury (31 weeks for major permanent partial disabilities; 9 weeks for minor permanent partial disabilities). See Brief for Appellants at A-46 to A-50, Rating Ass'n. This maximized the delay in the lump sum payments for the disability component of the permanent partial disability benefits that could occur under chapter 346 and, consequently, also maximized the decrease in the cost to the insurers of these benefit payments. The state's expert assumed no such decrease in insurers' costs.

The insurers' expert then added the savings to the insurers resulting from this assumed delay in the payments of the lump sums to the savings in the costs of healing period, vocational rehabilitation, and medical benefits to arrive at his estimate of the total cost savings, on the basis of which he justified a maximum 3.1% reduction in rates. See id. at A-41 to A-50.
benefits by one-fifth.\textsuperscript{427} The estimates of the California expert assumed an extent of malingering on the part of Minnesota workers under the prior law that was completely unreasonable and can only be described as in the realm of fantasy. In effect, the state's expert was saying that either (1) one of every three injured workers eligible for permanent partial disability benefits was a malingering under the prior law and would be induced by chapter 346 to return to work immediately after receiving the injury and so would receive \textit{no} healing period, vocational rehabilitation, or medical benefits; or (2) every single injured worker eligible for permanent partial disability benefits was a malingering under the prior law and would now have his or her healing period, vocational rehabilitation, and medical benefits cut by approximately one-third. In fact, at least 60\% of all injured workers eligible for permanent partial disability benefits suffer the dismemberment or loss of use of an arm, leg, hand, foot, or eye.\textsuperscript{428} Such severe injuries will hardly enable one-third of the workers suffering them to return to work immediately or all the workers suffering them to return to work one-third earlier than they would have under the prior law, even if they are very anxious to obtain lump sum payments.\textsuperscript{429}

Here again, an immediate and continuing rate reduction was mandated, in part, on the basis of dubious assumptions about the impact of delaying the lump sum portion of the permanent partial disability benefits on the behavior of injured workers. The purported justification for attributing 6.4\% of the 15\% mandated rate reduction to the delaying provision was another example of an attempt to quantify the unquantifiable in an arbitrary fashion.

e. \textit{Impact of the Limitations on Medical and Hospital Fees}

The state conceded that the limitations on doctors' and hospital fees sought to be imposed by chapter 346 were not in effect at the time the case was argued before the Minnesota Supreme Court in January 1983. Nor were any efforts underway or even contemplated by the commissioner of insurance to limit these fees in the near future, and the state cited no such effort. These facts alone established the arbitrary nature of the

\textsuperscript{427} Trial Transcript at 613, Rating Ass'n.
\textsuperscript{428} Brief for Appellants at A-45, A-47, Rating Ass'n.
\textsuperscript{429} Furthermore, in arriving at his estimate, the state's expert, unlike the insurers' expert, did not use the most recent data available. See Trial Transcript at 718, Rating Ass'n; Brief for Respondents at 40, Rating Ass'n; Reply Brief for Appellants at 17-18, Rating Ass'n.
legislative action mandating an immediate and continuing 15% rate reduction on the basis, in part, of the constraints on medical and hospital fees contemplated by chapter 346.

Though the state did not dispute the insurers' general contention that legislative facts coming into existence after the legislature acted could be taken into consideration in reviewing the constitutionality of the legislative action, in this specific context the state argued that "it is difficult to see how the inability, whether because of budgetary problems or otherwise, of administrative officials to carry out the legislative directive could result in a determination that the Legislature was irrational." But it was unreasonable for the legislature to assume that the complex administrative program it asked the commissioner of insurance to institute to limit doctors' and hospital fees would be implemented by July 1, 1981, when the mandated 15% rate reduction became effective. In any case, as the state seemed generally to agree, the question of constitutionality is always whether the legislation is reasonable and not whether the legislators were rational. As indicated above, the United States Supreme Court has long held that the legislative facts before the legislature do not alone demonstrate the reasonableness of the legislative action if, subsequently, legislative facts are adduced showing that the legislation has no reasonable basis. The differences between the experts, therefore, involved estimates of what might happen if medical and hospital fees were ever actually constrained. It is now apparent that med-

430. Brief for Respondents at 44, Rating Ass'n.
431. See supra notes 182-97 and accompanying text.
432. See supra note 367.
433. The insurers' expert estimated that the cost savings resulting from the eventual limitations on medical and hospital fees might justify rate reductions of at most 0.4% and 0.9% respectively. Trial Transcript at 420, 538, Rating Ass'n; Brief for Appellants at A-51 to A-53, Rating Ass'n. The state's expert estimated that these eventualities would justify a rate reduction of 2.2%. Trial Transcript at 617, 619, 621, 622, Rating Ass'n.

To determine the actual distribution of doctors' fees above the 75th percentile in 1981, the insurers' expert relied on data reported by the insurers as to the actual doctors' fees they paid on actual workers' compensation claims in Minnesota. He relied on 1978 data supplied by the National Council on Compensation Insurance to determine the percentage of total worker's compensation costs accounted for by total medical costs. The state's expert relied on 1980 public welfare data unrelated to actual workers' compensation claims to determine the distribution of doctors' fees above the 75th percentile in 1981 and on 1975, not 1978, data supplied by the National Council on Compensation Insurance to determine the percentage of total worker's compensation costs accounted for by total medical costs. See Brief for Appellants at 46-47, Rating
ical and hospital fee constraints will not be imposed prior to the deregulation of workers' compensation insurance rates. There was never a reasonable basis for mandating the 15% rate reduction, in part, on the cost savings to insurers assumed to result from these constraints.

f. Impact of the Adjustment of Benefits for Inflation

The difference between the state and the insurers regarding the savings in insurers' costs that could reasonably be attributed to chapter 346's change in the adjustment of benefits for inflation resulted from the attorney general's rejection of the Department of Labor and Industry interpretation of section 137 of chapter 346. Section 137 provided in pertinent part:

Subd. 1. Amount. For injuries occurring after October 1, 1975 for which benefits are payable . . . , the total benefits due the employee or any dependents shall be adjusted in accordance with this section. On October 1, 1981, and thereafter on the anniversary of the date of the employee's injury the total benefits due shall be adjusted by multiplying the total benefits due prior to each adjustment by a [percentage geared to the increase in the statewide average weekly wage]. No adjustment . . . shall exceed six percent a year.

Subd. 2. Time of First Adjustment. For injuries occurring on or after October 1, 1981, the initial adjustment made pursuant to subdivision 1 shall be deferred until the first anniversary of the date of the injury.434

Section 137 differentiated between workers injured prior to October 1, 1981, and those injured thereafter.435 For injuries occurring on or after October 1, 1981, it was undisputed that the cost savings to the insurers would result from the deferral of the first inflation adjustment until one year after the date of injury. But any such cost savings would be more than offset by the provision regarding injuries occurring prior to October 1, 1981. For these injuries, the Department of Labor and Industry required the insurers to make the first inflation adjustment after passage of chapter 346 on October 1, 1981, and subsequent

435. See supra note 411 and accompanying text.
adjustments on the anniversary date of the injury.\textsuperscript{436}

The attorney general disagreed with this interpretation of section 137. Yet, the interpretation not only is required by the language of section 137, but also is eminently reasonable. It is not inconsistent, as the attorney general claimed,\textsuperscript{437} with the provision in section 137 that no adjustment for inflation "shall exceed six percent a year." An example will make this clear.

A worker injured on April 1, 1979, would have received inflation adjustments under the prior law on October 1, 1979, and October 1, 1980. Under the Department's interpretation of section 137, this worker should have received inflation adjustments on October 1, 1981, on April 1, 1982, and on April 1 of each year thereafter. The first two adjustments after passage of chapter 346 do not amount to more than 6% "a year," either in calendar year 1981 or calendar year 1982. Nor do they amount to a "double payment," as the attorney general claimed, in the twelve-month period from October 1, 1981, to October 1, 1982.\textsuperscript{438} Since April 1 was the average anniversary date for injuries that occurred prior to chapter 346, all workers injured prior to October 1, 1981, would have received their inflation adjustment for 1982 six months earlier, on the average, than under the prior law. The acceleration of the inflation adjustment for 1982 deprived the insurers of the monetary benefit of holding on to the adjustment amounts for as long as was possible under the prior law. Since there obviously were many more injured workers receiving benefits as of October 1, 1981, than workers injured during the policy year after October 1, 1981, the acceleration of the inflation adjustment for 1982 required by chapter 346 resulted in a net decrease in the monetary benefit of holding on

\textsuperscript{436} Id.
\textsuperscript{437} Brief for Respondents at 32-37, Rating Ass'n.
\textsuperscript{438} Id. The attorney general argued that "a year" should be construed to mean any 12-month period, not a calendar year, despite the fact that Minn. Stat. § 645.44 (1982) states that a "year" shall be taken to mean a calendar year unless otherwise defined by statute and the "six percent a year" limitation has always been interpreted under the prior law as limiting the inflation adjustment to six percent in each calendar year. See Brief for Respondents at 32-37, Rating Ass'n.

The attorney general argued, further, that his interpretation was required by the canon of construction that "when, in the same law, several clauses are irreconcilable, the clause last in order of date or position shall prevail," Minn. Stat. § 645.26 (1982). See Brief for Respondents at 36, Rating Ass'n. Even if the clause in § 176.645, subdivision 1, containing the "six percent a year" limitation is assumed to be irreconcilable with the acceleration required by subdivision 1, the canon does not settle the matter because the latter requirement is "last in order of date" but the limitation is "last in order of . . . position."
to the adjustment amounts.\textsuperscript{439} For this reason, section 137 increased insurers' costs.

Furthermore, the interpretation of the Department of Labor and Industry was not, as the attorney general charged, "a construction that is in clear conflict with the intention of the law."\textsuperscript{440} It is true, of course, that the legislature intended chapter 346 to lower workers' compensation costs. But the legislature intended to enact only a one-year deferral of the inflation adjustment; a proposed two-year deferral was rejected.\textsuperscript{441} If the attorney general's interpretation of section 137 had been adopted, the intent of the legislature would have been defeated. Using the prior example again, a worker injured on April 1, 1979, would have received inflation adjustments under the prior law on October 1, 1979, and October 1, 1980. According to the attorney general, the injured worker should have received an inflation adjustment on October 1, 1981, and then would have waited until April 1, 1983—a period of eighteen months—to receive the next inflation adjustment. A worker injured on September 1, 1979, would have received inflation adjustments under the prior law on October 1, 1979, and October 1, 1980. According to the attorney general, the injured worker should have received an inflation adjustment on October 1, 1981, and then waited until September 1, 1983—a period of twenty-three months—to receive the next inflation adjustment. The legislature that enacted chapter 346 never intended section 137 to have such harsh consequences for a great many injured workers.

So the intent of the legislature may not be fully realized no matter which of the alternative interpretations of section 137 is ultimately adopted by the courts—if and when the issue is presented to them. In the meantime, it is the Department of Labor and Industry, not the attorney general or the insurance commissioner, that is entrusted with administering the workers' compensation law. Unless and until its interpretation is reversed by the courts, the Department speaks authoritatively for the state in this matter. Thus we have yet another instance in

\textsuperscript{439} Because the adjustment of benefits for inflation began on October 1, 1975, there were six years of claimants (October 1, 1975, to September 30, 1981) who, on the average, had the adjustment of their benefits for inflation in 1982 come sooner under § 137 than it would have under the prior law. But there was only one year of claimants who had the adjustment of their benefits for inflation in 1982 come later under chapter 346 than it would have under the prior law. \textit{See Brief for Appellants at A-58, Rating Ass'n.}

\textsuperscript{440} Brief for Respondents at 36, \textit{Rating Ass'n.}

\textsuperscript{441} Brief for Appellants at 48, \textit{Rating Ass'n.}
which the immediate and continuing 15% rate reduction was sought to be justified, in part, on the basis of a statutory provision which was interpreted by an agency of the state so as to increase insurers' costs, and the ultimate impact of which would not be determined unless and until it was litigated and decided by the Minnesota courts years after the rate reduction became effective. It cannot be said that section 137 reasonably justified any part of the mandated rate reduction.

IV. THE INSURERS' CLAIM THAT THE RATES IN EFFECT AFTER THE LEGISLATIVELY MANDATED FIFTEEN PERCENT RATE REDUCTION VIOLATED THEIR DUE PROCESS RIGHTS BECAUSE THEY DEPRIVED THEM OF REVENUES SUFFICIENT TO COVER THEIR EXPENSES AND YIELD A REASONABLE PROFIT

In approving the 11.8% rate increase in the April 21, 1981, order, which became effective June 5, 1981, the commissioner of insurance found that a return of 18%, including investment income, was reasonable and neither excessive nor inadequate, within the meaning of section 79.071 of the Minnesota Statutes. On the basis of the assumptions, methodology, and analysis used by the commissioner to arrive at this conclusion, the insurers sought to present the most recent data available to the district court, indicating that all the insurers writing workers' compensation insurance in Minnesota, taken together, were earning a rate of return, including investment income, of 11.7% before taxes and that each of thirty insurers named as plaintiffs was earning a return of even less than 11.7%. Moreover, the 11.7% return was calculated on the assumption that the actual cost savings to the insurers resulting from the changes made by chapter 346 justified a 15% reduction in rates. Accepting the insurers' contention that the changes made by chapter 346 justified no more than a 5% reduction in rates, the resulting rate of return would have been approximately 9%—half the return the commissioner found adequate.

The insurers sought to introduce these data to demonstrate that (1) the mandated 15% rate reduction could not be validated on the ground that it was rationally related to a purpose other than that articulated in chapter 346, that is, to fix workers' compensation rates at, but not below, the minimum rates

within the constitutional zone of reasonableness;\textsuperscript{443} (2) the legislature was arbitrary in mandating a 15% rate reduction when the insurers were already earning less than a reasonable rate of return; and (3) the insurers were not earning "extra" profits that would mitigate unduly optimistic estimates or approximations of the actual cost savings to the insurers resulting from the changes made by chapter 346 and so require the reasonableness of the mandated 15% reduction to be judged in light of the impact of error on the insurance industry's rate of return.

The district court sustained the state's objection to the offered data and testimony\textsuperscript{444} and, upon reconsideration, affirmed its ruling.\textsuperscript{445} It gave the following two reasons for its ruling:

Firstly, this argument [that chapter 346, section 142 is unconstitutional because the reduction of rates ordered by the legislature is confiscatory] is inapplicable to insurance companies. The utilities cases which have been cited are based upon reasons which have no application to insurance companies, and secondly, even if . . . the theory contained in the utility cases had application to insurance companies, the plaintiff insurers have failed to meet their burden of proof, that Section 142 is unconstitutional in establishing rates which, as to them, are confiscatory. The Constitution does not require that rates be fixed at a level which will guarantee a profit to all insurers, so that confiscation claim, as well as the confiscation grounds is dismissed . . . \textsuperscript{446}

The first reason given by the district court for excluding the offered data and testimony paralleled the views of state District Court Judge Summers. In his memorandum denying the insurers' motion for a stay, Judge Summers had written:

The court is not persuaded that an insurer would be in a position to claim a violation of the Constitution even if it could not profitably do business here at the legislatively mandated rate. Unlike railroads, trucking companies, and utilities, which have extensive capital investments, geographically limited operating rights, and mandates to provide services in Minnesota, plaintiffs [insurers] are free to do business or not to do business here as they choose. This being so, it is arguable that the Legislature has as much right to fix maximum compensation insurance rates as it does to set the usury rate, leaving market forces to determine who will do business and who will not.\textsuperscript{447}

The state accepted Judge Summers's argument and contended the insurers were claiming that the mandated 15% rate reduc-

\textsuperscript{443} It should be noted that Judge Summers, in his memorandum denying the insurers' motion for a stay, said that "[a]ssuming for the purposes of argument that the Legislature acted in error in requiring a 15% rate cut, there is no evidence that any individual insurer will now be forced to do business in Minnesota at a loss ratio which would amount to a confiscation." \textit{See} Appendix I, infra, at 668.

\textsuperscript{444} Trial Transcript at 559, \textit{Rating Ass'n}.

\textsuperscript{445} \textit{Id.} at 571.

\textsuperscript{446} \textit{Id.} at 571-72.

\textsuperscript{447} \textit{See} Appendix I, infra, at 668.
tion "took their property without compensation resulting in a confiscation." This interpretation of the insurers' claim, which was also implied in Judge Summers's argument, is clearly erroneous.

The due process guarantee of the fourteenth amendment includes two separate guarantees that limit state action: (1) the guarantee that no person shall "be deprived of life, liberty, or property, without due process of law;" and (2) the incorporated fifth amendment due process guarantee that private property shall not "be taken for public use, without just compensation." The insurers did not contend that the existing rates effected a "taking" of their property within the meaning of the just compensation clause. Rather, they contended that they were deprived of their property without due process of law because the existing rates did not allow a reasonable rate of return for risks incurred in writing workers' compensation insurance in Minnesota.

Similarly, in making their claim under the Minnesota Constitution, the insurers did not invoke article I, section 13, which guarantees that "[p]rivate property shall not be taken . . . for public use without just compensation therefor, first paid or secured." They relied instead on article I, section 7, which guarantees that no person shall "be deprived of life, liberty or property without due process of law."

The distinction between the taking and due process claims reveals the misunderstanding of the Minnesota courts in the Rating Association case. The United States Supreme Court has long rejected the first reason given by the district court for excluding the data and testimony offered by the insurers in support of their due process claim. Although the insurers are unlike public utilities, and are legally free, in Judge Summers's words, "to do business or not to do business [in Minnesota] as they choose," this status does not disentitle them from claiming that a particular state regulation of their business—rate fixing in the Rating Association case—violates the due process guarantees.

Before Neff v. New York was decided, the United States Supreme Court took the position that "a state legislature

448. Brief for Respondents at 60-62, Rating Ass'n.
is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is "affected with a public interest." Thus, in *Adams v. Tanner* a state law prohibiting employment agencies from collecting fees from workers was invalidated; in *Tyson Brother v. Banton* state regulation of the resale price of theatre tickets was invalidated; in *Ribnik v. McBride* state regulation of employment agency fees was invalidated; and in *New State Ice Co. v. Liebmann* a state law requiring a license from a state commission to enter into the business of manufacturing ice was invalidated. None of the businesses involved in these cases was a public utility or regarded as "affected with a public interest."

Even during this period in our history, the Supreme Court, in *German Alliance Insurance Co. v. Lewis*, upheld the constitutionality of state regulation of insurance rates and rejected the contention that such regulation deprived insurance companies of their liberty (freedom of contract) and property without due process of law. It did so on the ground that the insurance industry was "affected with a public interest" because it was of "public consequence" and affected the "community at large."

The Court dismissed the insurance companies' argument that the state had no constitutional power to regulate their rates and charges because the public had no right to demand and receive service from them. This view of the insurance industry as one "affected with a public interest" was reaffirmed by the Court in *O'Gorman & Young, Inc. v. Hartford Fire Insurance Co.*

*Nebbia v. New York* held that states had the constitutional power to regulate industries that were not like public utilities. "The phrase 'affected with a public interest,'" wrote Justice Roberts for the Court, "can, in the nature of things, mean no more than that an industry, for adequate reason, is

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454. 244 U.S. 590 (1917).
455. 273 U.S. 418 (1927).
456. 277 U.S. 350 (1928).
459. *Id.* at 413.
460. *Id.* at 405.
subject to control for the public good." The Court then examined the adequacy of the reasons advanced by New York for regulating minimum and maximum retail prices for milk. It did not hold that Nebbia, the proprietor of a small grocery store in Rochester, New York, who was convicted for selling milk at less than the fixed minimum price, was not entitled to make and be heard on his constitutional claim because he was not like a public utility and was under no legal obligation to sell milk to the public but was free to do business or not to do business in New York as he chose. Nebbia was heard on the merits of his constitutional claim that the state had no power to regulate his transaction. The New York law was sustained because it satisfied the following standard enunciated by the Court: "the guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

In no subsequent case, including those overruling the pre-Nebbia decisions referred to above, has the Court rejected a due process claim on the grounds enunciated by Judge Summers and the district court and accepted by the Minnesota Supreme Court in the Rating Association case. These cases demonstrate that the United States Supreme Court will hear on the merits the claims of industries not like public utilities, including the insurance industry, that particular state regulations, including rate or price fixing regulations, violate constitutional due process guarantees, even if no "taking" involving the just compensation clause is charged. The unreasonable state action violating due process in rate cases is often described as "confiscatory," but the issue remains one of due process.

Thus, for example, in Jordan v. American Eagle Fire Insurance Co., the Court of Appeals for the District of Columbia Circuit explicitly recognized the right of insurance companies

463. Id. at 531.
464. Id.
466. 169 F.2d 281 (D.C. Cir. 1948).
to contest the constitutionality of insurance rates fixed by the superintendent of insurance. The appellate court stated that "[t]he power to regulate insurance rates is a police power. Undoubtedly the constitutional limitations of due process of law, both procedural and substantive, apply."\textsuperscript{467} The procedural due process "which must be accorded in enforcement of a reduction in rates," held the court, "includes a judicial type of hearing before a capable tribunal."\textsuperscript{468} The substantive limitations of due process require "that there be enough revenue for operating expenses, capital costs, and sufficient return to the equity owner to assure financial integrity of the enterprise, so as to maintain its credit and to attract capital."\textsuperscript{469}

The Massachusetts Supreme Judicial Court has reached the same conclusion as the District of Columbia Circuit in a situation analogous to the \textit{Rating Association} case. In \textit{Aetna Casualty \& Surety Co. v. Commissioner of Insurance},\textsuperscript{470} the Massachusetts legislature instituted no-fault automobile insurance and simultaneously mandated a 15\% reduction in automobile insurance rates. The Massachusetts Supreme Judicial Court held the law unconstitutional for the following reasons:

The Commonwealth's admitted power to regulate the insurance business and the rates which are charged for insurance does not permit it to limit the conduct of such business to those companies which submit to whatever rates the Commonwealth may fix, even if they be confiscatory. The writing of insurance is a lawful business and the Commonwealth may not impose unconstitutional conditions upon the exercise of the right to engage therein. While it is not constitutionally required to fix rates which will guarantee a profit to all insurers, it may not constitutionally fix rates which are so low that if the insurers engage in business they may do so only at a loss. The insurers are not required to either submit to confiscatory rates or go out of business. They have a right to rates which are not confiscatory, or which satisfy any higher applicable statutory standards; and to a judicial review on the constitutional or statutory adequacy of such rates.\textsuperscript{471}

It is precisely the substantive limitations of due process deline-
ated by the District of Columbia Circuit and the Massachusetts Supreme Judicial Court that the insurers in the Rating Association case claimed were exceeded by the Minnesota legislature in mandating the 15% rate reduction. The data and testimony offered by them and excluded by the district court supported this argument.

The second reason offered by the district court for dismissing the insurers' claim that the existing rates failed to yield a fair rate of return is perplexing. The insurers agreed that the due process clause does not guarantee a profit to each and every insurer. For this reason, they sought to introduce data and testimony showing that the existing rates did not allow the Minnesota workers' compensation insurance industry as a whole to earn a fair rate of return for the risks incurred in writing the insurance. The district court excluded the data and testimony. By ruling that the insurers "failed to meet their burden of proof" that the mandated 15% reduction resulted in rates "which, as to them, are confiscatory," the district court implied that the due process clause guaranteed a fair rate of return to each insurer but that the insurers did not offer proof of the impact of the existing rates on each of the thirty insurance companies named as plaintiffs. But this was not the case. The insurers also sought to present data and testimony dealing with the impact of the existing rates on each of these companies, but the district court excluded these data and testimony as well.

Relying on Aetna Insurance Co. v. Hyde, the state argued that the district court properly excluded the insurers' offer of testimony and data to show that the existing rates deprived all the insurers writing workers' compensation insurance in Minnesota, taken together, of a reasonable rate of return. Aetna Insurance Co. v. Hyde had raised the issue, as the court of appeals in Jordan succinctly put it, whether the constitutional guarantee of due process "applies to the companies severally, as their individual figures may indicate, or whether it applies to the group as a whole upon a reasonable appraisal of the experience of all the companies." Although it did not decide that issue, the court of appeals expressed the opinion that the latter alternative is the most reasonable inter-

472. See supra text accompanying note 443.
473. 275 U.S. 440 (1928).
474. Brief for Respondents at 62 n.30, Rating Ass'n.
475. Jordan, 169 F.2d at 293.
pretation of the due process requirement and the one that will best effectuate the public interest.\footnote{476}

*Aetna Insurance Co. v. Hyde* is not without ambiguity, as the court of appeals also pointed out in *Jordan*\footnote{477}. On the one hand, the Supreme Court said: “Rates sufficient to yield adequate returns to some may be confiscatory when applied to the business of others.”\footnote{478} This implies that the constitutional guarantee of due process applies to the insurance companies severally. The Court added that a company that might have a constitutional claim that rates are confiscatorily low when applied to its business has no constitutional right to prevent these rates from being imposed as maximum rates on other companies for which such rates are sufficient to yield adequate returns because the “Fourteenth Amendment does not protect against competition.”\footnote{479} But immediately thereafter, the Court said:

Moreover, “aggregate collections” sufficient to yield a reasonable profit for all do not necessarily give to each just compensation for the contracts of insurance written by it. It has never been and cannot reasonably be held that state-made rates violate the Fourteenth Amendment merely because the aggregate collections are not sufficient to yield a reasonable profit or just compensation to all companies that happen to be engaged in the affected business.\footnote{480}

This implies that state-made rates need not yield a reasonable profit to every company in the affected business and contradicts previous statements by the Court that the constitutional guarantee of due process applies to the companies severally.\footnote{481}

The court of appeals in *Jordan* concluded that *Aetna Insurance Co. v. Hyde* “appears to hold that the rates fixed by general order may be generally valid but invalid as to those companies which can show such rates to be confiscatory as to them.”\footnote{482} But the court of appeals was “not sure that that is the correct rule here.”\footnote{483} It explained that if “constitutional validity is to be determined by consideration of the several companies separately, the only valid uniform rate would be that fixed by the experience of the company with the highest ex-

\footnote{476} Id. at 292-93. 
\footnote{477} Id. at 310. 
\footnote{478} *Aetna*, 275 U.S. at 447. 
\footnote{479} Id. 
\footnote{480} Id. 
\footnote{481} Clearly, the Court assumed as a matter of course that either the insurance industry as a whole or an individual insurance company could attack state-fixed insurance rates on due process grounds. 
\footnote{482} *Jordan*, 169 F.2d at 292. 
\footnote{483} Id.
"Such," the court said, "surely is not the requirement of due process." Furthermore, this alternative, which results in the highest possible rates, would be contrary to the public interest. The only alternative, said the court, would be to abandon the effort to fix a uniform rate in favor of "a series of rates for the same risk, which in ultimate precision could be a separate rate for each company." The court then concluded:

The practical effect of a series of rates would necessarily be the establishment of the lowest responsible rate as the uniform rate, and the resulting financial squeeze would tend to a monopoly in a few companies. On the other hand, if constitutional validity can be tested by a reasonable figure fixed by the general experience of all, the public interest in reasonable rates, the public interest against monopoly, the companies' interest in reasonable return, and the incentive toward good management by the companies would all be well-served.

The court of appeals also referred to the practical difficulties of fixing separate maximum rates for individual companies. This kind of difficulty has led, more recently, to the Federal Power Commission's abandonment of the individual company cost-of-service method for regulating the rates of independent producers of natural gas in favor of imposing a single group of maximum rates on all the producers of natural gas in an area.

_Aetna Insurance Co. v. Hyde_ was decided in 1928. Since that time experience in price and rate regulation has accumulated in the railroad, trucking, air carrier, natural gas, and insurance industries. General price and rent control during World War II added to this experience. In all these areas, rates applicable to a number of sellers of a commodity or providers of a service were based upon "a reasonable appraisal of the experience of all the companies." In the _Permian Basin Area Rate Cases_, the Supreme Court upheld the constitutional au-

484. Id. at 293.
485. Id.
486. Id.
487. Id.
488. Id. at 292.
490. _Jordan_, 169 F.2d at 293. See also _The Permian Basin Area Rate Cases_, 390 U.S. 747 (1968); Bowles v. Willingham, 321 U.S. 503, 516-19 (1944); Yakus v. United States, 321 U.S. 660 (1944); Leventhal, _The Role of the Price Lawyers_, in OFFICE OF PRICE ADMIN., PUB. No. 11, PROBLEMS IN PRICE CONTROL: LEGAL PHASES 77-87 (1947) [hereinafter cited as PROBLEMS IN PRICE CONTROL]; Nathanson, _The Emergency Court of Appeals_, in PROBLEMS IN PRICE CONTROL, supra, at 5-26.
Substantive Due Process

Authority of the Federal Power Commission to impose a single group of maximum rates on all the producers of natural gas in an area, without even mentioning Aetna Insurance Co. v. Hyde.

The Court said:

This Court has repeatedly recognized that legislatures and administrative agencies may calculate rates for a regulated class without first evaluating the separate financial position of each member of the class; it has been thought to be sufficient if the agency has before it representative evidence, ample in quantity to measure with appropriate precision the financial and other requirements of the pertinent parties.

No constitutional objection arises from the imposition of maximum prices merely because "high cost operators may be more seriously affected . . . than others" . . . .

The Court also said that "maximum rates must be calculated for a regulated class in conformity with the pertinent constitutional limitations." Accordingly, "any rate selected by the Commission from the broad zone of reasonableness permitted by the [Natural Gas] Act cannot properly be attacked as confiscatory." It held that rates determined in conformity with the Act, and intended to "'balance . . . the investor and the consumer interests,' are constitutionally permissible." The Court made clear, however, that it was not suggesting "that maximum rates computed for a group or geographical area can never be confiscatory."

Because section 7(b) of the Natural Gas Act then prohibited any natural gas company from abandoning its facilities, or any service it was rendering by means of such facilities, without commission permission, it was argued that "the members of the regulated class must, under the Constitution, be proffered opportunities either to withdraw from the regulated activity or to seek special relief from the group rates." The Court did not dispose of this argument, stating: "We need not determine whether this is in every situation constitutionally imperative, for such arrangements have here been provided by the Commission, and we cannot now hold them inadequate."

The whole tenor of its opinion indicates that the Supreme Court would see no constitutional objection if group rates imposed losses on individual companies, such as insurance com-

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492. 390 U.S. at 769 (citations omitted) (quoting Bowles v. Willingham, 321 U.S. 503 (1944)).
493. Id.
494. Id. at 770.
495. Id. (quoting F.P.C. v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944)).
496. Id.
497. Id.
498. Id.
panies, that are under no legal obligation to continue to provide services.

Furthermore, in *Bowles v. Willingham*, a case on which *Permian Basin* relied, the Supreme Court held that, because the World War II Emergency Price Control Act provided that no person was required "to sell any commodity or to offer any accommodations for rent," there was no constitutional objection to the statutory standard that maximum rents be "generally fair and equitable," even though they "may be most unfair and inequitable as applied to a particular landlord." It "has never been thought," said the Court, "that price-fixing, otherwise valid, was improper because it was on a class rather than an individual basis."

The Minnesota law, taking the same approach, prohibited (until January 1, 1984) any insurer from writing workers' compensation insurance at rates that exceeded the maximum rates set forth in the schedule of rates adopted by the commissioner of insurance for all the insurance companies writing such insurance. The schedule of rates was not to "be excessive, inadequate, or unfairly discriminatory." Obviously the Minnesota legislature, like other legislatures and administrative agencies, had concluded that such a group standard of ratemaking would best promote the public interest. But fixing rates on this basis did not protect any insurance company from competition, as the state charged. The insurance commissioner adopted only a schedule of maximum rates; any insurer was legally free to compete by charging lower rates.

If adopted, the position taken by the attorney general in the *Rating Association* case on the issue raised in *Aetna* and long since decided by the United States Supreme Court would have necessitated the conclusion that the provisions in the Minnesota law for fixing group rates for workers' compensation insurance were unconstitutional. In any case, since the insurers in the *Rating Association* case also offered to prove that each of the individual insurers named as plaintiffs was unable to earn a fair rate of return, the district court and Minnesota Supreme Court erred under whichever of the alternative stan-

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500. *Id.* at 516-19.
501. *Id.* at 518.
504. Brief for Respondents at 47, *Rating Ass'n.*
The adequacy of possible administrative relief for the insurers.

The state asserted that if the insurers were prejudiced by any aspect of chapter 346, they should have sought adjustments of the rates by the commissioner of insurance. Since the attorney general never contended that the Rating Association case should be dismissed because of the insurers' failure to exhaust their administrative remedies, it is difficult to know what point the attorney general was trying to make. In any event, the insurance commissioner could not grant the insurers the relief they were seeking.

The only authority for the insurance commissioner to reconsider the 15% rate reduction was that set forth in section 11 of chapter 346, which provided:

If . . . the commissioner determines that the loss experience of Minnesota workers' compensation insurers indicates a change in the existing schedule of rates, the commissioner may, in his discretion, order a change in the schedule of rates or order a hearing to determine whether and by what percentage the schedule of rates should be changed.

"Loss experience" refers to the dollars in benefits that insurers actually have paid or are obligated to pay. Loss experience for all policies written in the period January 1 through December 31, 1981, and expiring December 31, 1982—the first policy year containing any loss experience under chapter 346—would not begin to be reported until 1984. The loss experience under chapter 346 would not be completely known for an additional five to six years. This delay is inherent in the workers' compensation system because losses under policies written in any calendar year continue to be incurred by the insurance companies for years thereafter. Furthermore, such losses do not begin to be reported until at least eighteen months after the last policies were written. It will be years before the insurers or the commissioner can assemble sufficient data to ascertain how much of the loss experience was due to chapter 346 and how much to other factors.

Even if the commissioner could have distinguished the factors responsible for the loss experience and increased rates be-

505. Id. at 73-75.
cause the assumptions made by chapter 346 did not materialize, the increased rates would have applied only “to new and renewal policies issued after the effective date” of the commissioner’s final order increasing the rates. By that time, July 1, 1986—the date set by chapter 346 for the deregulation of workers’ compensation insurance rates—would have arrived and the insurance commissioner would have been completely out of the picture. By moving up the deregulation date to January 1, 1984, and prohibiting the insurance commissioner from approving any proposed increase in rates after May 1, 1983, the 1983 legislature made it impossible for any state agency to right even a part of the wrong inflicted upon the insurers by the mandated 15% rate reduction. Only the courts could grant the insurers the relief that would have enabled them to recover the past losses suffered because of the mandated reduction. Without the courts’ intervention, the mandated reduction was a “permanent” reduction, at least from July 1, 1981, when it became effective, until January 1, 1984, the date of deregulation.

VI. THE RATING ASSOCIATION’S STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE MANDATED FIFTEEN PERCENT RATE REDUCTION

Judge Summers was the first to imply that there might be some question about the Rating Association’s standing to challenge the constitutionality of the mandated 15% rate reduction. In denying the insurers’ motion for a stay, he wrote that the Rating Association was “merely a rating bureau composed of insurers” and “cannot suffer harm whether the order goes into effect or not.” The district court dismissed the Rating Association as a party from the case because it had “insufficient statutory authority to act as a party in a declaratory judgment action seeking a declaration that a law is unconstitutional.” With all due respect, the views of Judge Summers and the district court are inconsistent with the principles of standing enunciated by the United States and Minnesota Supreme Courts.

508. Ch. 290, § 2, 1983 Minn. Laws at 1311 (amending MN. STAT. § 79.071, subd. 1 (1982)).
509. Id.
510. See Appendix I, infra, at 667.
511. See Appendix II, infra, at 676.
The Rating Association is an association of all Minnesota workers' compensation insurers doing business in Minnesota. Created in 1921 as part of the adoption of the new compulsory workers' compensation insurance system, the association owns or rents the property and offices in which it conducts its business. It contracts with employers, suppliers, member insurers, and even the state to buy and sell goods and services. It is a legal entity separate and apart from its members, with general authority to sue or be sued in its own name.

The statutes required the Rating Association to undertake certain actions in connection with the operation of the workers' compensation system but did not circumscribe its day-to-day operations or the scope of the additional services it might perform for its members. These matters were dealt with in its articles of association and bylaws, which the statutes authorized the Rating Association to adopt and which had to be approved by the commissioner of insurance. The articles of association and bylaws of the Rating Association authorized the association to take such action "as may be required" to pro-

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512. Act of March 15, 1921, ch. 85, § 2, 1921 Minn. Laws at 132-33 (current version at Minn. Stat. § 79.34 (1982)).
514. Minn. Stat. §§ 79.01-32 (1982). In addition to its participation in rate proceedings, which will be discussed in the text, the Rating Association was also authorized to conduct a survey of all insurance risks, Minn. Stat. § 79.08 (1982), repealed by ch. 290, § 15, 1983 Minn. Laws at 1321; to adopt, subject to administrative approval, a manual governing all operations of the workers' compensation system, Minn. Stat. § 79.076 (1982), repealed by ch. 290, § 15, 1983 Minn. Laws at 1321, and rules and regulations governing the classification of workers' compensation risks, Minn. Stat. §§ 79.09, 79.17 (1982), repealed by ch. 290, § 15, 1983 Minn. Laws at 1321; to maintain records covering all aspects of workers' compensation insurance in Minnesota, Minn. Stat. § 79.18 (1982), repealed by ch. 290, § 15, 1983 Minn. Laws at 1321; and to participate in the liquidation of the obligations of insolvent insurers, Minn. Stat. §§ 79.28-31 (1982), repealed by ch. 290, § 15, 1983 Minn. Laws at 1321. In addition, the Rating Association was responsible for the operation of the Assigned Risk Plan. Minn. Stat. §§ 79.24-26 (1982). As was the case with its member insurers, the Rating Association had to be licensed, file annual reports, and risk license revocation if it failed to perform its obligations in a lawful manner. Minn. Stat. §§ 79.15, 16, 23, 32 (1982), repealed by ch. 290, § 15, 1983 Minn. Laws at 1321.
515. The statutes provided:

The association shall adopt articles of association and bylaws for its government and for the government of its members. These articles and bylaws and all amendments thereto shall be filed with and approved by the commissioner [of insurance] and shall not be effective until so filed and approved. The Association shall admit to membership any insurer authorized to transact workers' compensation insurance in this state. The charges and services of the association shall be fixed in the articles or bylaws and shall be equitable and non-discriminatory as between members.
tect the interests of its members. Its members directed the Rating Association to institute the lawsuit.

The Rating Association was authorized to "assist the commissioner and insurers in approving rates, determining hazards and other material facts in connection with compensation risks, and to assist in promoting safety in the industries." Since 1921, the Rating Association has represented its member insurers before the state administrative agencies empowered to fix workers' compensation insurance rates and in the courts. The Rating Association also had statutory standing as an "interested party" in administrative rate proceedings. It was authorized to petition for an administrative hearing to change the schedule of workers' compensation rate and to seek judicial review of any final rate order issued by the insurance commissioner. Thus the Rating Association was an "interested party" authorized to seek judicial review of a final order entered under section 79.071, subdivision 1a, because section 79.073 authorized judicial review of all final orders of the insurance commissioner "pursuant to Sections 79.071 and 79.072."

Section 142, subdivision 1, of chapter 346 directed the commissioner to issue an order implementing the mandated 15% rate reduction "pursuant to the authority" granted in section 11, codified as section 79.071, subdivision 1a. The commissioner issued the implementing order on June 5, 1981, the same day he issued the order under section 79.071, subdivision 1, approving a rate increase of 11.8%. There was no statutory basis for concluding that the Rating Association was an interested party authorized by section 79.073 to seek judicial review of the latter order under section 79.071, subdivision 1, but not of the order implementing the mandated 15% rate reduction under section 79.071, subdivision 1a.

Finally, it could not reasonably have been maintained that in the course of judicial review of an order issued under section 79.071, subdivision 1, the Rating Association could not attack the constitutionality of any statutory provision on which the order was based. The situation was no different when the Rating Association sought, through its declaratory judgment action, to attack the order issued under section 79.071, subdivision 1a, which rested entirely on the legislatively-mandated 15% rate reduction.

reduction. A party declared by statute to be an interested party and given standing by statute to seek judicial review of an administrative order may raise any issue, including a constitutional issue, that is necessary to a just resolution of the case or controversy.

The Rating Association was not deprived of standing because only its members wrote workers' compensation insurance in Minnesota and would suffer losses because of the challenged legislative action and implementing administrative order. The Minnesota Supreme Court has consistently accorded standing to associations representing members who clearly had standing in their individual capacities. The federal law of standing is in accord. As the United States Supreme Court remarked in *Sierra Club v. Morton*, "it is clear that an organization whose members are injured may represent those members in a proceeding for judicial review." Professor Kenneth C. Davis has concluded that the "law supporting that remark is abundant."

In *National Automatic Laundry and Cleaning Council v. Schultz*, the Court of Appeals for the District of Columbia Circuit authorized the Council, a national trade association for the coin-operated laundry and dry cleaning industry, to bring a suit to challenge a ruling of the administrator of the Wage and Hour Division of the Department of Labor. The circuit court held that an "organization that is a sufficiently effective spokesman for the interests of its members to assure an adversarial presentation of the issues has standing to present their views even though the action is not brought under Rule 23 [class actions]."

It would have been a foolish and wasteful use of judicial time and effort for the Rating Association, or any insurer, to have instituted a class action to challenge the mandated reduction when the Minnesota law recognized the Rating Association as an interested party that properly represented all workers' compensation insurance companies in the state in rate matters. Indeed, the Rating Association was uniquely qualified to repre-

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522. Id. at 739.
523. 4 K.C. Davis, supra note 212, § 24.15, at 268 (2d ed. 1983).
524. 443 F.2d 689 (D.C. Cir. 1971).
525. Id. at 704.
sent the interest of all workers' compensation insurers in the case because the constitutional issue turned on the impact of chapter 346 on the entire workers' compensation insurance industry in Minnesota. No single named plaintiff insurer was as qualified as the Rating Association to assure an adversarial presentation of this constitutional issue.

VII. CONCLUSION—THE MINNESOTA SUPREME COURT'S SUMMARY OPINION

The Minnesota Supreme Court entered a summary opinion adopting the district court's findings of fact and conclusions of law and affirming its judgment "declaring that Section 142 of Minn. Laws 1981, ch. 346 is valid and constitutional in all respects" and dismissing the Rating Association as a party from the action. The court's summary disposition of the case is astounding.

The court, of course, did not state why it decided the case without opinion, but certainly it could not be said that a detailed opinion would have no precedential value. We can only assume that the court concluded that the cost savings to the insurers resulting from the aggregate of all the benefit, adminis-

526. See Appendix II, infra, at 676.

527. The summary opinion was entered pursuant to the Minnesota Rules of Civil Appellate Procedure which then provided:

In any case decided under Rule 133.01 or in any other case where the Supreme Court determines that a detailed opinion would have no precedential value, the Supreme Court in its discretion may enter the following summary opinion:

"Affirmed (or reversed or other appropriate direction for action), pursuant to Rule 136.01(2)."

Minn. R. Civ. App. P. 136.01 (1982). Rule 133.01 then provided:

(1) The Supreme Court, on its own motion or on motion of any party, may summarily affirm, may summarily reverse with directions, may remand or dismiss an appeal or other request for relief upon grounds proper for remand or dismissal, or may limit the issues to be considered on appeal. Summary dispositions have no precedential value and shall not be cited.

(2) Motions for such relief may be made at any time but shall be filed promptly when the occasion appears and shall comply with the requirements of Rule 127.

Minn. R. Civ. App. P. 133.01 (1982). These rules have been revised. Rule 136.01 now provides that the Supreme Court, and the new court of appeals, must issue "a statement of the decision" in every case. Minn. R. Civ. App. P. 136.01 Each statement of the decision must be accompanied by a written opinion "containing a summary of the case and the reasons for the decision" unless the appellate court "determines that the contents of the statement of the decision sufficiently explain the disposition made." Id. The rule also provides that a "statement of the decision without a written opinion shall not be officially published and shall not be cited as precedent, except as law of the case, res judicata or collateral estoppel." Id.
trative, and operational changes made by chapter 346 justified the legislatively-mandated 15% reduction in rates. This conclusion of legislative fact, like any other conclusion of fact, would itself have no precedential value. But an explication of the court's approach to the many issues concerning the determination of legislative facts raised by the Rating Association case would have had precedential value. The case gave the court an excellent opportunity to indicate what effect it was going to give to the United States Supreme Court's opinion in Clover Leaf. The court could have decided whether legislative facts not before the legislature at the time it acted may be considered by the reviewing courts when the constitutionality of the legislative action is challenged. It could have decided whether the rules of evidence apply in the trial of legislative facts and whether the clearly erroneous test applies on appeal from a trial court's findings of legislative facts. It could have decided whether it would more carefully scrutinize legislative action claimed to violate economic due process under the Minnesota Constitution than under the United States Constitution. It could have decided whether it regarded the Rating Association case as a run-of-the-mill or an unusual economic due process case and, if unusual, whether that made any difference with respect to the applicable standards of review.

The Minnesota Supreme Court's opinion on all these issues would obviously have had precedential value. So would its opinion on why the insurers were not entitled to claim that the existing rates violated their due process rights because they did not enable them to cover their expenses and earn a reasonable rate of return for the risks they incurred in writing workers' compensation insurance in Minnesota. Finally, an opinion explaining why the Rating Association did not have standing to challenge the constitutionality of the mandated 15% rate reduction would also have had precedential value. Indeed, the court's resolution of most of these issues would have had precedential value in constitutional cases that did not involve economic regulation.

Even more was involved than the deplorable fact that the Minnesota Supreme Court missed an opportunity to express its opinion on significant issues of state and federal constitutional law. Its summary disposition of the Rating Association case left the insurance industry, on which Minnesota workers and employers depend for the implementation of the state's workers' compensation system, without any explanation of why the Minnesota courts concluded that its constitutional contentions
were without merit. Even if the court's explanations would have had no precedential value, the insurers were also entitled to know, in a case as important as this one, why the Minnesota courts rejected the legislative facts they adduced to demonstrate that the mandated 15% rate reduction bore no fair or reasonable relation to the actual cost savings to the insurers resulting from the changes made by chapter 346.
The 1981 Legislature adopted L. 1981, Ch. 346. Chapter 346 is a comprehensive reform of our workers’ compensation code. Section 142 mandates a reduction of 15% in the maximum rate which may be charged by workers’ compensation insurers.

The 15% reduction is premised upon a legislative finding that it is justified by the "impact of changes in the benefits payable pursuant to [the workers' compensation law] and in the administration and operation of the Minnesota workers compensation system".

Defendant Commissioner issued an order June 5, 1981, imposing the legislatively mandated 15% rate reduction.

The evidence in the file supports a finding that the actuarially predictable impact of the changes in benefits payable and in administration would result in a savings in the neighborhood of 8% rather than 15%.

This case is not, however, a review of an administrative proceeding establishing a rate; it is in fact a challenge to the constitutionality of a statute. This being so, the test to be applied by the court is not whether the challenged order is based upon erroneous premises or an inadequate record, but whether enforcement will deprive plaintiffs of their property without due process of law.

Plaintiff association is merely a rating bureau composed of insurers. The association cannot suffer harm whether the order goes into effect or not.

The 30 individual plaintiffs are representative of the approximately 300 companies which write workers’ compensation insurance in Minnesota.

In the nature of things, the bureau maximum rate will have been set high enough so that most, if not all, the insurers will make money at the maximum rate. This is the way things work.

Because of differences in efficiency of management, and quality of risk, the loss ratios, and hence the operating profit, of individual insurers cannot be determined by reference to the maximum rate set by the challenged order. The overall profit-

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ability of each insurer will also be affected by the return on its investment.

Assuming for the purposes of argument that the Legislature acted in error in requiring a 15% rate cut, there is no evidence that any individual insurer will now be forced to do business in Minnesota at a loss ratio which would amount to a confiscation.

The court is not persuaded that an insurer would be in a position to claim a violation of the Constitution even if it could not profitably do business here at the legislatively mandated rate. Unlike railroads, trucking companies, and utilities, which have extensive capital investments, geographically limited operating rights, and mandates to provide services in Minnesota, plaintiffs are free to do business or not to do business here as they choose. This being so, it is arguable that the Legislature has as much right to fix the maximum compensation insurance rate as it does to set the usury rate, leaving market forces to determine who will do business and who will not.


*Aetna* is distinguishable on two points:

(1) In *Aetna*, there was evidence to support a finding that imposition of the legislatively mandated rate reduction would result in an aggregated underwriting loss; there is no such evidence here.

(2) *Aetna* does not address the issue of whether a due process violation has occurred if the legislatively established rate is such that some, but not all, insurers can still do business at a profit. The Constitution surely cannot be stretched to guarantee a rate so high that even the most marginal company can still make money.

The Court having considered the evidence and the stipulations between the parties, having heard the arguments of counsel, and having been advised in the premises, and having considered all of the files and proceedings herein, makes the following:

**FINDINGS OF FACT**

1. Plaintiff, Workers' Compensation Insurers Rating Association of Minnesota (hereinafter "Association"), is an unincorporated association established under the laws of the State of Minnesota (Minn. Stat. § 79.01 et seq. (1980)) with its principal offices in Minneapolis, Minnesota. By law, every insurer transacting the business of workers' compensation insurance in the state is required to be a member of the Association.

2. Plaintiffs, other than the Association, are insurance

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companies duly authorized to insure workers' compensation risks within the state of Minnesota who have at all times relevant to this action engaged in the issuance and renewal of policies of workers' compensation within the state.

3. Defendant State of Minnesota through the Department of Commerce, Insurance Division is engaged *inter alia* in the regulation of workers' compensation insurers doing business in this state. Defendant, Michael D. Markman, is the duly appointed Commissioner of Insurance (hereinafter "Commissioner") for the state of Minnesota and is charged by statute with implementing the statutes which are the subject matter of this litigation.

4. In 1977 a Workers' Compensation Study Commission was established by the Minnesota Legislature to improve the system of providing workers' compensation insurance at fair and reasonable rates to employers within the state.


6. A second Study Commission was created in 1979 and it held 12 additional hearings between March 24, 1980, and December 9, 1980. It issued an additional 325 page "Report to the Minnesota Legislature and Governor" dated December 1980.

7. In the 1981 Session of the Legislature, beginning January, 1981, various changes in the Workers' Compensation law were introduced in the Minnesota Legislature. Certain of these changes were considered for the first time in this legislative session while others were the result of studies by the two above-mentioned study commissions.

8. One of the workers' compensation reform bills considered in the 1981 Session, commencing in January, 1981, was Senate File 359, ultimately enacted as Minn. Laws 1981 ch. 346, the law which is challenged in this litigation.

9. During the period January to May 16, 1981, when SF 359 and other workers' compensation reform bills were under consideration, a number of written materials containing estimates of the cost savings which would result from the benefit and administrative changes under consideration were made available to the Legislature. Some changes were estimable numerically while others were "unpriceable" in the sense that, although it was known that they would generate cost savings, the precise amount of the savings could not be predicted using standard
Actuarial techniques are not suited to predicting human behavior factors associated with some types of changes. The estimates, whether or not numerical, included:

a. A memorandum dated December 19, 1980 prepared by Jordan Lorence, an aide to Senator Olhoft. In this memorandum numerical estimates were given as follows: a 3% savings for a 2 year delay in the escalator payment required by Minn. Stat. § 176.645 (1980), a 4% savings for a $75,000 cap on death benefits, and a 1.4% saving for removing the minimum benefit floor. Other changes were identified as having the effect of reducing rates but in an amount which could not be quantified. These include: a delay in permanent partial payments until return to work, a $275 cap on the permanent partial formula, an offset for prior injury awards, removal of the heart attack presumption, establishment of an 8 year statute of limitation, an upgraded computerized filing system for the Department of Labor and Industry, prohibiting state lawyers from representing workers in claims cases, establishing a degree of disability schedule, and allowing insurance companies to round off amounts to the nearest dollar.

b. An undated memorandum prepared by Jordan Lorence entitled "Priceable Provisions of the Compromise Workers Compensation Bill." In this memorandum numerical cost savings estimates were given as follows: 1.5% savings for a 10 year cap on death benefits, 1.2% for a 1 year delay in the escalator, a 5.3-9% increase for Reinsurance Association full funding, an 8-10% savings from a medical fee schedule. Other changes were identified as reducing costs over time but were not able to be estimated numerically such as the new preponderance of the evidence standard.

c. A March 25, 1981 memo re: Cost Implications of SF 359 from Paul Hyduke (an aide to Senators Nichols and Peterson) to Senator Nichols. In this memorandum numerical cost savings estimates were given as follows: 5-6% savings for permanent partial benefits upon return to work, 2.4% for a delay in the escalation of benefits for 104 weeks, 2.5% for a 5 year cap on death benefits. The memorandum also stated that other amendments with cost implications existed (e.g. reserve discounts, statute of limitations, medical fee schedule, settlements in district court) but that their cost impact could not be estimated prospectively.

d. A January 8, 1981, memorandum prepared by Jordan Lorence entitled "Summary of Workers' Compensation Modification Bill SF 21." The memorandum states that workers' compensation amendments proposed in SF 21 would reduce rates by 10%. The major provisions of SF 21 were described as a delay in the payment of permanent partial benefits until return to work, a change in the permanent partial formula by substituting a flat rate of $250 for the state average weekly wage, a 104-week delay in the escalator, an offset of benefits by previous awards in cases where a work related injury is aggravated by a compensated second injury, a $75,000 cap on death benefits, an 8-year statute of limitations on claims, and removal of the floor under temporary total benefits.

e. An undated document prepared by Jordan Lorence and labeled as from Senator Olhoft, entitled "Potential Areas To Cut Costs In W.C." This document described establishing a schedule of disabilities, establishing an internal organ compensability schedule, and establishing a medical panel and/or a medical fee schedule as involving a moderate
potential for cost savings. This document described litigation related matters such as adding workers compensation judges to reduce case backlogs, making small claims informal like conciliation court, eliminating the "liberal construction" standard, changing the mindset of the judges and adding certainty to the system as involving significant cost saving potential. This document described benefit-related changes which may speed return to work as involving significant cost savings potential. This document identified computerizing state records and administrative clean-up bills as involving limited potential for savings.

f. A statement by Insurance Commissioner Markman to the House Committee on Governmental Operations dated April 24, 1981. In this statement the Commissioner identified 8% in savings for benefit related changes and 2% per year for 5 years for administrative changes.

g. An April 20, 1981, memo to Senator Collin Peterson from Commissioner Markman. In this memorandum numerical estimates for the following were given: 2% for medical fee constraints, 1.9% for a 52 week escalator delay, 1.5% for a 10 year death benefit cap, 1.0% for the social security offset, 2.3% for a delay in permanent partial payments, a .7% increase for Reinsurance Association changes and 2% for each of the next 5 years for administrative changes, principally the 14-day payment change and the computerization of the Department of Labor and Industry.

h. An April 17, 1981, memo to Senator Collin Peterson from Commissioner Markman. In this memorandum it was stated that an increase of the delay in the escalator from 52 to 104 weeks would yield an additional .7% to 1% in savings, a change in the death benefit cap from 10 to 5 years would yield additional savings of 1.5 to 2%. The Commissioner further expressed that he was unable to estimate an amendment requiring apportionment of disabilities based on non-job related events and that the impact of a statute of limitations on open claims would be so small as to preclude measurement.

i. An April 20, 1981, memo to Senator Wayne Olhoft from Commissioner Markman. In this memorandum the effect of a higher retention limit for the Workers' Compensation Reinsurance Association was said to be less than 1%.

j. An April 17, 1981, letter from Craig Andersen to Jordan Lorence in which estimates of 1.5% for a 10-year death cap and 1.2% for an escalator delay of 1 year were given.

10. Changes in the workers' compensation laws were the subject of legislative hearings during the period January 1, 1981, to May 16, 1981. Excerpts from nine hearings at which the cost savings of various proposed changes in the workers' compensation system proposals were explicitly discussed were stipulated to by the parties as follows:

c. April 2, 1981 Senate Employment Committee.
d. April 24, 1981 House Governmental Operations Committee.
g. May 14, 1981 House-Senate Conference Committee.
h. May 15, 1981 House-Senate Conference Committee.
i. May 16, 1981 House Floor.
11. At the May 15, 1981, meeting of the House-Senate Conference Committee Commissioner Markman testified that the cost saving effect of the sections of the bill which he was able to estimate was 11% in the first year and an additional 2% per year for 4 more years but that the cost savings could be as high as 14% in the first year. Commissioner Markman's figures did not include estimates on unpriceable amendments such as the liberal construction change (§§ 56, 136) or the burden and standard of proof changes (§§ 55, 56).

12. The legislative history of SF 359 includes all of the materials referred to in paragraph 9 hereof; the committee and floor testimony and debates referred to in paragraph 10 hereof; the testimony and submissions of information to the study commissions referred to above and more fully discussed hereafter; and the reports of the study commissions. All of the legislative history must be considered in determining whether the Legislature had a rational basis for enacting the law challenged in this action. Included in the legislative history which must be considered are estimates of cost savings of amendments considered but never enacted, or enacted in some amended form. Such estimates cannot be excluded from the Legislature's rational basis since they could well form the basis for estimates and opinions of the cost savings effects of changes finally enacted.

13. Many changes in benefits and administration which were contained in SF 359, some in modified form, were either recommended or referred to in the final report of the 1977-1979 Study Commission, including payment of permanent partial awards on return to work, a delay in the escalator, a medical fee schedule, computerization of the Department of Labor and Industry, separating the Workers' Compensation Court of Appeals from the Department of Labor and Industry, a limitation on death benefits, rates to be set by competition rather than administrative determination, and rounding payments to the nearest dollar.

14. The first Study Commission staff found that litigation is a major factor in increased workers compensation costs.

15. The first Study Commission staff found that litigation results in many species of costs for a workers compensation system, as described at pp. 200-01 of the first Study Commission report. These included attorney fee costs for the defendants' attorneys and costs resulting from delays in rehabilitation and return to work.
16. The first Study Commission compared the administration of the Minnesota Worker's Compensation system with that in Wisconsin, whose system was believed to function better. Minnesota's loss development factors are bigger than Wisconsin primarily because of delays in settling and litigating claims. Wisconsin's system results in a much lower litigation rate. Senator Nichols, one of the Senate authors of SF 359 alluded to the Minnesota-Wisconsin comparison in committee testimony.

17. Many administrative changes in ch. 346 were designed to reduce litigation and thus lower costs although the amount by which they would be successful in doing so might not be actuarially calculable. Examples include speeding up the processing and improving administrative aspects of the Department of Labor and Industry operations by computerizing it (§ 144), requiring first payment to be made within 14 days (§ 96), changing procedures on the service of petitions (§ 106, 134-135, 72), transferring the workers' compensation judges to the Hearing Examiner's Office (§ 105-108), and restricting the workers' compensation court of appeals to an appellate function only and not a de novo trial court (§§ 113-120, 123-126, 133).

18. The first Study Commission received testimony from many persons, including employers and insurers, to the effect that the workers compensation law was being interpreted too liberally in favor of injured workers in unjustified factual situations. An American Insurance Association study gathered by the staff of the 1977-1979 Study Commission found that liberal interpretation of the law was the number one ranked problem in Minnesota.

19. The first Study Commission heard evidence that the traditional standard of evidence in civil cases (preponderance of the evidence) was not being applied in workers' compensation cases. In this connection it was said that not just the law but also the "facts" in workers compensation cases are liberally construed, that the preponderance of the evidence standard is being ignored and that findings awarding compensation are instead being based on a "scintilla of evidence".

20. Certain administrative changes in ch. 346 were designed to address problems referred to in paragraphs 18 and 19, including amendments deleting certain liberal construction language from the law (§ 136), prescribing that the law should be construed as in other civil cases (§ 56), expressly placing the burden of proof on the employee (§ 55) and expressly defining
the standard of proof to be “preponderance of the evidence” (§ 56).

21. The first Study Commission heard evidence to the effect that the workers' compensation court system was partial to injured workers, and that it was plaintiff-biased. The testimony was that many of the workers' compensation judges were formerly civil service attorneys whose function is to represent plaintiffs, that workers' compensation court of appeals judges are often former workers' compensation judges, that all have come up through the system together at the Department of Labor and Industry, and all office together at the State Department of Labor and Industry.

22. Certain administrative changes in ch. 346 were designed to improve the impartiality of the workers compensation court system including designating the workers' compensation court of appeals as a separate entity organizationally from the Department of Labor and Industry, redefining the function of that court to that of an appellate body, and moving the workers' compensation judges (physically and organizationally) to the Office of Administrative Hearings.

23. In April, 1981, the Minnesota Legislature passed different versions of SF 359. The bills went to a Conference Committee and a final bill was passed out of the Conference Committee on May 16, 1981. The Conference Committee Report passed the Senate by 55 to 7 and the House by 91 to 39. On June 1, 1981, the Governor signed the Act, which became law as Minn. Laws 1981, ch. 346.

24. The Act made a number of changes in the benefits payable under the Workers' Compensation Law and in the administration and operation of the law.

25. Section 142 of the Act directed the Commissioner of Insurance to within 15 days reduce by 15% the schedule of maximum rates. Under Minn. Stat. § 79.21 (1980) the schedule of maximum rates establishes the maximum rate insurers may charge, although insurers may charge less than this rate.

26. Plaintiffs' claims that the Legislature lacked a rational basis for mandating this reduction are unsubstantiated.

27. The legislative history of SF 359 shows that the Legislature had before it sufficient information and data, including numerical estimates of many amendments which were subject to actuarial or numerical evaluation and also including non-numerical opinions that other amendments would lead to cost savings, albeit in amounts which were not actuarially determi-
nable, as to clearly preclude a finding that the Legislature acted arbitrarily, capriciously or irrationally in mandating a 15% rate reduction.

28. Plaintiffs have failed to prove that the cost savings resulting from the aggregate of all of the benefit, administrative and operational changes in ch. 346 are less than 15%.

29. The cost savings in the Act are greater than 15% and indeed are at least 20%.

30. The plaintiff Association has insufficient standing to act as a party herein.

31. Any conclusions of law herein which should be termed findings of fact are hereby adopted as such.

CONCLUSIONS OF LAW


2. The plaintiff Association has insufficient statutory authority to act as a party in a declaratory judgment action seeking a declaration that a law is unconstitutional.

3. Any findings of fact herein which should be termed conclusions of law are hereby adopted as such.

ORDER FOR JUDGMENT

IT IS HEREBY ORDERED:

1. That Plaintiffs action be dismissed with prejudice and that Defendants be awarded judgment declaring that Section 142 of Minn. Laws 1981, ch. 346 is valid and constitutional in all respects;

2. That the plaintiff Association is dismissed as a party from this action; and

3. That Defendants be awarded their costs and disbursements herein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Date: March 2, 1982

JAMES M. LYNCH
Judge of District Court