

# The Burger Court Opinion Writing Database

*United California Bank v. United States*  
439 U.S. 180 (1978)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

November 21, 1978

Re: 77-1016 - United California Bank v. United States

Dear Byron:

I join.

Regards,

WRB

Mr. Justice White

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

November 3, 1978

RE: No. 77-1016 United California Bank, et al v. United  
States

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Dear Byron:

I agree.

Sincerely,

*Bill*

Mr. Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

November 2, 1978

Re: No. 77-1016, United California Bank v. U.S.

Dear Byron,

I shall await John Stevens' dissent in  
this case.

Sincerely yours,

P.S.  
P.J.

Mr. Justice White

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

November 28, 1978

Re: No. 77-1016, United California Bank  
v. United States

Dear John,

Please add my name to your dissenting  
opinion.

Sincerely yours,

Mr. Justice Stevens

Copies to the Conference

PS  
1

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 1 NOV 1978

Recirculated: \_\_\_\_\_

## 1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 77-1016

United California Bank and Lillian  
Disney Truyens, Co-Executors  
of the Estate of Walter E.  
Disney, Petitioners,  
*v.*  
United States. } On Writ of Certiorari to  
the United States Court  
of Appeals for the  
Ninth Circuit.

[November —, 1978]

MR. JUSTICE WHITE delivered the opinion of the Court.

Under the provisions of the Internal Revenue Code of 1954 in effect during the years in question, taxpayers, including decedents' estates,<sup>1</sup> with net long-term capital gains exceeding net short-term capital losses, paid either a "normal" income tax calculated by applying ordinary graduated rates to taxable income computed with a 50% capital-gains deduction permitted by § 1202 of the Code or, if it was a lesser sum, the alternative tax calculated as directed by § 1201 (b).<sup>2</sup> Under

<sup>1</sup> Subchapter J of the Code, 26 U. S. C. §§ 641-691 (1964 ed.), deals with the taxation of Estates, Trusts, Beneficiaries and Decedents. Section 641 (b) provides that the tax on estates and trusts imposed by 26 U. S. C. § 1 (d) (1964 ed.) "shall be computed in the same manner as in the case of an individual, except as otherwise provided in this part."

<sup>2</sup> 26 U. S. C. § 1202 (1964 ed.) provides:

"In the case of a taxpayer other than a corporation, if for any taxable year the net long-term capital gain exceeds the net short-term capital loss, 50 percent of the amount of such excess shall be a deduction from gross income. In the case of an estate or trust, the deduction shall be computed by excluding the portion (if any), of the gains for the taxable year from sales or exchanges of capital assets, which, under sections 652 and 662 (relating to inclusions of amounts in gross income of beneficiaries of

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

December 1, 1978

Re: No. 77-1016 - United California Bank  
v. United States

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Dear Harry,

I propose reprinting my draft in United California with the indicated changes. I have added two footnotes in response to the dissent. More important, I have rewritten Part IV, hoping that it might satisfy you. Of course, it may not and you may prefer to file your concurrence.

Reprinting would also effect a number of stylistic and miscellaneous changes and corrections not shown on this copy and of no great substance.

Sincerely yours,



Mr. Justice Blackmun

**STYLISTIC CHANGES THROUGHOUT.**  
**SEE PAGES: 2, 12-13, 16-20**

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice White

Circulated: \_\_\_\_\_

Recirculated: 5 DEC 1978

**SUPREME COURT OF THE UNITED STATES**

No. 77-1016

United California Bank and Lillian Disney Truyens, Co-Executors of the Estate of Walter E. Disney, Petitioners, *v.* United States. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[November —, 1978]

MR. JUSTICE WHITE delivered the opinion of the Court.

Under the provisions of the Internal Revenue Code of 1954 in effect during the years in question, taxpayers, including decedents' estates,<sup>1</sup> with net long-term capital gains exceeding net short-term capital losses, paid either a "normal" income tax calculated by applying ordinary graduated rates to taxable income computed with a 50% capital-gains deduction permitted by § 1202 of the Code or, if it was a lesser sum, the alternative tax calculated as directed by § 1201 (b).<sup>2</sup> Under

<sup>1</sup> Subchapter J of the Code, 26 U. S. C. §§ 641-692 (1964 ed.), deals with the taxation of estates, trusts, beneficiaries and decedents. Section 641 (b) provides that the tax on estates and trusts "shall be computed in the same manner as in the case of an individual, except as otherwise provided in this part."

<sup>2</sup> 26 U. S. C. § 1202 (1964 ed.) provides:

"In the case of a taxpayer other than a corporation, if for any taxable year the net long-term capital gain exceeds the net short-term capital loss, 50 percent of the amount of such excess shall be a deduction from gross income. In the case of an estate or trust, the deduction shall be computed by excluding the portion (if any), of the gains for the taxable year from sales or exchanges of capital assets, which, under sections 652 and 662

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

November 2, 1978

Re: No. 77-1016 - United California Bank v. U.S.

Dear Byron:

I shall hold off until the dissent comes around.

Sincerely,

*T.M.*  
T.M.

Mr. Justice White

cc: The Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

November 10, 1978

Re: No. 77-1016 - United California Bank v. United States

Dear Byron:

The first of the week I shall circulate a short concurrence. The net effect of this is that I am joining parts I, II and III of your opinion and, of course, the judgment.

Sincerely,



Mr. Justice White

cc: The Conference

Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Blackmun  
Circulated: NOV 10 1978

Recirculated: \_\_\_\_\_

No. 77-1016 - United California Bank v. United States

MR. JUSTICE BLACKMUN, concurring.

I join the judgment of the Court and Parts I, II, and III of its opinion. I write separately to express my own understanding of why United States v. Foster Lumber Co., 429 U.S. 32 (1976), where I was in dissent, id., at 49, is different from this case.

In Foster Lumber we considered the meaning of the 1954 Code's § 172(b)(2), which governs the computation of the net operating loss deduction. That section permits a taxpayer to carry a loss back to offset his income of a prior tax year. If the loss exceeds the prior year's "taxable income," the taxpayer may use the "excess" to offset taxable income in his next succeeding year.

The question in Foster Lumber was whether a loss carryback was absorbed by capital gain, as well as by ordinary income, in the

Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

APR 2 3

From: Mr. Justice Blackmun

Circulated:

Recirculated: NOV 14 1978

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1016

United California Bank and Lillian  
Disney Truyens, Co-Executors  
of the Estate of Walter E.  
Disney, Petitioners,  
v.  
United States.

On Writ of Certiorari to  
the United States Court  
of Appeals for the  
Ninth Circuit.

[November —, 1978]

MR. JUSTICE BLACKMUN, concurring.

I join the judgment of the Court and Parts I, II, and III of its opinion. I write separately to express my own understanding of why *United States v. Foster Lumber Co.*, 429 U. S. 32 (1976), where I was in dissent, *id.*, at 49, is different from this case.

In *Foster Lumber* we considered the meaning of the 1954 Code's § 172 (b)(2), which governs the computation of the net operating loss deduction. That section permits a taxpayer to carry a loss back to offset his income of a prior tax year. If the loss exceeds the prior year's "taxable income," the taxpayer may use the "excess" to offset taxable income in his next succeeding year. The question in *Foster Lumber* was whether a loss carryback was absorbed by capital gain, as well as by ordinary income, in the year to which it was first carried. The answer depended on the meaning of "taxable income" in § 172 (b)(2). Consistently with the broad definition of "taxable income" elsewhere in the Code, the Court held that "taxable income" for § 172 (b)(2) purposes included capital gains.

Because *Foster Lumber* involved a construction of § 172 (b)(2), it is literally distinguishable from this case. Yet *Foster Lumber* assumes relevance when one considers the

December 4, 1978

Re: No. 77-1016 - United California Bank v. United States

Dear Byron:

Thank you for your letter of December 1 and for letting me see the changes proposed in your opinion for the Court. It seems to me that the footnotes you have added adequately answer the dissent.

I think, also, that your new edition of part IV adequately answers my concern. If the opinion is changed in this way, I shall be able to join you in full and shall then withdraw my proposed concurrence.

I might ask you to favor me in one respect. Because I was in dissent in Foster Lumber, I would feel somewhat more comfortable if your several references to that decision and its holding were placed in terms of "the Court" rather than in terms of "our" and "we." I am perhaps being picky in making this request, for indeed one may speak of the Court institutionally. The places I have in mind are the second and sixteenth lines of the first typed page of part IV and the fourth and sixth lines of the second typed page. Perhaps the last could be made to read "it was able" rather than "we were able."

Sincerely,

HAB

Mr. Justice White

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 6, 1978

Re: No. 77-1016 - United California Bank v. United States

Dear Byron:

I am glad to join your second draft circulated December 5. In view of this, I shall withdraw my proposed separate concurring opinion.

Sincerely,



Mr. Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

November 13, 1978

No. 77-1016 United California Bank v. U. S.

Dear Byron:

Please join me.

Sincerely,

*Lewis*

Mr. Justice White

Copies to the Conference

LFP/lab

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

December 6, 1978

No. 77-1016 United California Bank v. U.S.

Dear Byron:

I agree to the changes made in your second draft.

Sincerely,



Mr. Justice White

1fp/ss

cc: The Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

November 28, 1978

Re: No. 77-1016 United California Bank v. United States

Dear John:

Please join me in your dissent in this case.

Sincerely,

WR

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

November 1, 1978

Re: 77-1006 - United California Bank v.  
United States

Dear Byron:

In due course I shall circulate a dissent.

Respectfully,



Mr. Justice White

Copies to the Conference

Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

77-1016 - United California Bank v. United States

From: Mr. Justice Stevens

Circulated: NOV 27 1978

Recirculated: \_\_\_\_\_

MR. JUSTICE STEVENS, dissenting.

Section 1202 of the Internal Revenue Code describes the "normal" method of computing the tax on a long-term capital gain.<sup>1/</sup> Section 1201 describes the "alternative" method which must be used if it produces a lesser tax than the § 1202 computation.<sup>2/</sup> Under the "normal" method, one-half of the

1/ "SECTION 1202. Deduction for capital gains.

"In the case of a taxpayer other than a corporation, if for any taxable year the net long-term capital gain exceeds the net short-term capital loss, 50 percent of the amount of such excess shall be a deduction from gross income. In the case of an estate or trust, the deduction shall be computed by excluding the portion (if any), of the gains for the taxable year from sales or exchanges of capital assets, which, under sections 652 and 662 (relating to inclusions of amounts in gross income of beneficiaries of trusts), is includible by the income beneficiaries as gain derived from the sale or exchange of capital assets." 26 U.S.C. § 1202 (1964 ed.).

2/ Section 1201(b) provides:

"Other taxpayers.

"If for any taxable year the net long-term capital gain of any taxpayer (other than a corporation) exceeds the net short-term capital loss, then, in lieu of the tax imposed by sections 1 and 511, there is hereby imposed a tax (if such tax is less than the tax imposed by such sections) which shall consist of the sum of--

"(1) a partial tax computed on the taxable income reduced by an amount equal to 50 percent of such excess, at the rate and in the manner as if this subsection had not been enacted, and

"(2) an amount equal to 25 percent of the excess of the net long-term capital gain over the net short-term capital loss." 26 U.S.C. § 1201(b) (1964 ed.).

The "alternative" method for corporate taxpayers is specified in 26 U.S.C. § 1201(d) (1964 ed.).

P.1

Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: \_\_\_\_\_

Recirculated: NOV 29 1978

1st PRINTED DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 77-1016

United California Bank and Lillian  
Disney Truyens, Co-Executors  
of the Estate of Walter E.  
Disney, Petitioners,  
v.  
United States.

On Writ of Certiorari to  
the United States Court  
of Appeals for the  
Ninth Circuit.

[December —, 1978]

MR. JUSTICE STEVENS, with whom MR. JUSTICE STEWART  
and MR. JUSTICE REHNQUIST join, dissenting.

Section 1202 of the Internal Revenue Code describes the "normal" method of computing the tax on a long-term capital gain.<sup>1</sup> Section 1201 describes the "alternative" method which must be used if it produces a lesser tax than the § 1202 computation.<sup>2</sup> Under the "normal" method, one-half of the

<sup>1</sup> "SECTION 1202. Deduction for capital gains.

"In the case of a taxpayer other than a corporation, if for any taxable year the net long-term capital gain exceeds the net short-term capital loss, 50 percent of the amount of such excess shall be a deduction from gross income. In the case of an estate or trust, the deduction shall be computed by excluding the portion (if any), of the gains for the taxable year from sales or exchanges of capital assets, which, under sections 652 and 662 (relating to inclusions of amounts in gross income of beneficiaries of trusts), is includible by the income beneficiaries as gain derived from the sale or exchange of capital assets." 26 U. S. C. § 1202 (1964 ed.).

<sup>2</sup> Section 1201 (b) provides:

"Other taxpayers.

"If for any taxable year the net long-term capital gain of any taxpayer (other than a corporation) exceeds the net short-term capital loss, then, in lieu of the tax imposed by sections 1 and 511, there is hereby imposed a tax (if such tax is less than the tax imposed by such sections) which shall consist of the sum of—

"(1) a partial tax computed on the taxable income reduced by an

pp. 57

Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: \_\_\_\_\_

2nd DRAFT

Recirculated: DEC 7 1978

## SUPREME COURT OF THE UNITED STATES

No. 77-1016

United California Bank and Lillian  
 Disney Truyens, Co-Executors  
 of the Estate of Walter E.  
 Disney, Petitioners,  
 v.  
 United States.

On Writ of Certiorari to  
 the United States Court  
 of Appeals for the  
 Ninth Circuit.

[December —, 1978]

MR. JUSTICE STEVENS, with whom MR. JUSTICE STEWART  
 and MR. JUSTICE REHNQUIST join, dissenting.

Section 1202 of the Internal Revenue Code describes the "normal" method of computing the tax on a long-term capital gain.<sup>1</sup> Section 1201 describes the "alternative" method which must be used if it produces a lesser tax than the § 1202 computation.<sup>2</sup> Under the "normal" method, one-half of the

<sup>1</sup> "SECTION 1202. Deduction for capital gains.

"In the case of a taxpayer other than a corporation, if for any taxable year the net long-term capital gain exceeds the net short-term capital loss, 50 percent of the amount of such excess shall be a deduction from gross income. In the case of an estate or trust, the deduction shall be computed by excluding the portion (if any), of the gains for the taxable year from sales or exchanges of capital assets, which, under sections 652 and 662 (relating to inclusions of amounts in gross income of beneficiaries of trusts), is includable by the income beneficiaries as gain derived from the sale or exchange of capital assets." 26 U. S. C. § 1202 (1964 ed.).

<sup>2</sup> Section 1201 (b) provides:

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"If for any taxable year the net long-term capital gain of any taxpayer (other than a corporation) exceeds the net short-term capital loss, then, in lieu of the tax imposed by sections 1 and 511, there is hereby imposed a tax (if such tax is less than the tax imposed by such sections) which shall consist of the sum of—

"(1) a partial tax computed on the taxable income reduced by an