

# The Burger Court Opinion Writing Database

## *Block v. Community Nutrition Institute*

467 U.S. 340 (1984)

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

RECEIVED  
SUPREME COURT, U.S.  
JUSTICE MARSHALL

CHAMBERS OF  
THE CHIEF JUSTICE

May 22, 1984

74 MAY 23 1984

Re: 83-458 - Block v. Community Nutrition Institute

Dear Sandra:

I join.

Regards,



Justice O'Connor

Copies to the Conference

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

May 16, 1984

No. 83-458

Block v. Community Nutrition Institute

Dear Sandra,

To the extent your opinion in this case addresses Congress' intent to preclude suits by milk-consumers, I am with you entirely. I am concerned, however, that, in addition to deciding this case, some statements strike me as unnecessarily watering down our approach to statutory preclusion. You are, of course, correct to point out that we have not "applied the 'clear and convincing evidence' standard in a strict evidentiary sense," p. 10, and that "[t]he presumption favoring judicial review of administrative action is just that--a presumption." P. 8. But other passages of the opinion are troubling. Although there are probably a variety of ways to meet my concerns, I will try to sketch out a few possibilities below.

Page 6, line 27: perhaps replace "strong reason to believe" with "could be an indication."

Page 6, lines 34 and 36: before the word "turn" on line 34, perhaps insert "only." And on line 36, perhaps replace "exclusively" with "ultimately." The ultimate question under §701(a)(1) is whether Congress intended to rely on a class of people to challenge agency unlawfulness, as you state. But whether Congress meant to protect that class certainly bears on that question. See Barlow v. Collins, 397 U.S. 159, 167 (1970).

Page 8-9: Is the sentence that begins on p. 8 and ends on p. 9 an accurate statement of what the Court said in Ludecke v. Watkins? I'm inclined to doubt that it is. That case, like the others in this area, states that preclusion turns entirely on congressional intent at the time an act is passed. We have never suggested that preclusion can be inferred from congressional silence in the face of a judicial construction barring review.

Page 9-10: delete the paragraph that begins on page 9 and the first sentence of the first full paragraph on p. 10. Regardless of whether one views Morris v. Gressette as right or wrong, I question whether it is accurate to characterize the case as "most representative of the Court's general preclusion analysis."

Page 10, 31-32: delete the phrase "where substantial doubt about the congressional intent exists." The presumption favoring judicial review is applicable in all cases, not just those in which substantial doubt exists. It is simply rebutted when Congress has indicated an intent to preclude review.

I hope that you can accommodate these suggestions to enable me to join fully.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill".

Justice O'Connor

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

May 17, 1984

No. 83-458

Block v. CNI

Dear Sandra,

Thank you very much for responding so promptly to my concerns in this case. With the modifications you have suggested, I am very happy with your opinion. Perhaps because I dissented so vehemently in Morris v. Gressette, however, I am still somewhat troubled by your characterization of that case as "most representative of the Court's general preclusion analysis." I wonder if you would be willing to begin the paragraph on page 9 with the following: "A case that illustrates the relevance of a statute's structure to the Court's preclusion analysis is..."

Sincerely,



Justice O'Connor

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

May 18, 1984

No. 83-458

Block v. Community  
Nutrition Institute

---

Dear Sandra,

We have a deal. "Best illustrates"  
is fine.

Sincerely,



Justice O'Connor

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

May 18, 1984

No. 83-458

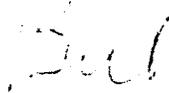
Block v. Community  
Nutrition Institute

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Dear Sandra,

I agree.

Sincerely,



Justice O'Connor

Copies to the Conference

84 MAY 18 10 53 A



12

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 15, 1984

Re: 83-458 -

Block v. Community Nutrition Institute

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Dear Sandra,

Join me, please.

Sincerely yours,



Justice O'Connor

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cpm

01:49 24 12 84:10

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 23, 1984

Re: No. 83-458-Block v. Community Nutrition Inst.

Dear Sandra:

Please join me.

Sincerely,



T.M.

Justice O'Connor

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 31, 1984

Re: No. 83-458 - Block v. Community Nutrition Institute

Dear Sandra:

Please join me in your recirculation of May 21.

Sincerely,



2028A 12 11 88

Justice O'Connor

cc: The Conference

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

RECEIVED  
SUPREME COURT, U.S.  
JUSTICE MARSHALL

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

84 MAY 21 19 25

May 18, 1984

83-458 Block v. Community Nutrition Institute

Dear Sandra:

Please join me.

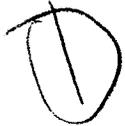
Sincerely,

*Lewis*

Justice O'Connor

lfp/ss

cc: The Conference



CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

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

RECEIVED  
SUPREME COURT, U.S.  
JUSTICE MARSHALL

84 MAY 14 12:30

May 14, 1984

Re: No. 83-458 Block v. Community Nutrition Institute

Dear Sandra:

Please join me.

Sincerely,

Justice O'Connor

cc: The Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

April 24, 1984

Re: 83-458 - Block v. Community Nutrition  
Institute 1

Dear Chief:

Shortly before I went on the bench in 1970 I represented Associated Milk Dealers, Inc. in some litigation challenging certain milk marketing restrictions in which the Oberweiss Dairy was the plaintiff. While I was on the bench this morning, I became aware of the fact that Associated Milk Dealers, Inc. is an intervening defendant in this litigation and since Joe Oberweiss is one of the complaining parties, I think the situation calls for my recusal.

Respectfully,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 16, 1984

Re: 83-458 - Block v. Community Nutrition  
Institute

Dear Sandra:

Please show me as not participating in this  
case.

Respectfully,



Justice O'Connor

Copies to the Conference

RECEIVED  
SUPREME COURT, U.S.  
JUSTICE MARSHALL

'84 MAY 14 AIO :05

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: Justice O'Connor

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

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1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-458

JOHN R. BLOCK, SECRETARY OF AGRICULTURE,  
ET AL., PETITIONERS *v.* COMMUNITY  
NUTRITION INSTITUTE ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[May —, 1984]

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the question whether ultimate consumers of dairy products may obtain judicial review of milk market orders issued by the Secretary of Agriculture (Secretary) under the authority of the Agricultural Marketing Agreement Act of 1937 (Act), 7 U. S. C. §§ 601 *et seq.* We conclude that consumers may not obtain judicial review of such orders.

I

A

In the early 1900s, dairy farmers engaged in near ruinous competition in the production of fluid milk products. See *Zuber v. Allen*, 396 U. S. 168, 172-176 (1969). To bring this harmful competition under control, the 1937 Act authorizes the Secretary to issue milk market orders setting the minimum prices that handlers (those who process dairy products) must pay to producers (dairy farmers) for their milk products. 7 U. S. C. § 608c. The "essential purpose [of this milk market order scheme is] to raise producer prices," S. Rep. No. 1011, 74th Cong., 1st Sess. 3 (1935), and thereby to ensure that the benefits and burdens of the milk market are fairly and proportionately shared by all dairy farmers. See *Nebbia v. New York*, 291 U. S. 502, 517-518 (1934).

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

May 16, 1984

No. 83-458 Block v. CNI

Dear Bill,

Thank you for your letter regarding this case. I appreciate your concerns and would like, where possible, to accommodate them.

On page 6, line 27: I would be willing to replace the adjective "strong" with the adjective "sufficient." Given the structure of the argument I have made, the sentence must indicate that the omission, when added to the structure of the statute, enables us definitively to determine in this case that Congress intended to preclude consumer suits.

On page 6, lines 34 and 36: I would be happy to make the requested changes.

On pages 8-9: Your point with regard to Ludecke v. Watkins is well-taken. I would propose to change the sentence to read: "The congressional intent necessary to overcome the presumption may also be inferred from contemporaneous judicial construction barring review and the congressional acquiescence in it, see, e. g., Ludecke v. Watkins, 335 U.S. 160 (1948), or from the collective import of legislative and judicial history behind a particular statute, see, e. g., Heikkila v. Barber, 345 U.S. 229 (1953)."

On page 9-10: Morris v. Gressette is, I believe, the case "most representative of the Court's general preclusion analysis." In his Administrative Law Treatise, Professor Kenneth Culp Davis reviews the Court's decisions in Abbott Laboratories and Morris and concludes that the language in Abbott Laboratories and cases citing it is "contrary to Supreme Court holdings." (emphasis in original). He then goes on to state that: "What is important to the law of

reviewability is that the Court in the Morris case did not repeat the requirement of "clear and convincing evidence" and that that requirement probably was not satisfied. The Morris case is in that respect probably more soundly based than the Abbott Laboratories language that the Supreme Court has quoted in half a dozen later opinions. Good law of the future is more likely to be built on the Morris opinion than on the half dozen previous opinions." 1982 Supplement to Ad. Law Treatise, 495, 496. I concur in Professor Davis' reading of our cases on this point and would hope you would agree to leaving the paragraph as it is.

On Page 10, lines 31-32: Your point is again well-taken. I would propose changing the relevant passage to read: "In the context of preclusion analysis, the "clear and convincing evidence" standard is not a rigid evidentiary test but a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling. That presumption does not control in cases such as this one, however, since the congressional intent to preclude judicial review is "fairly discernable" in the detail of the legislative scheme."

I hope these changes would enable you to join.

Sincerely,



Justice Brennan

P.P. 1, 2, 4, 12

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: Justice O'Connor

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

Recirculated: MAY 16 \_\_\_\_\_

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-458

**JOHN R. BLOCK, SECRETARY OF AGRICULTURE,  
ET AL., PETITIONERS v. COMMUNITY  
NUTRITION INSTITUTE ET AL.**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[May —, 1984]

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In the early 1900s, dairy farmers engaged in intense competition in the production of fluid milk products. See *Zuber v. Allen*, 396 U. S. 168, 172-176 (1969). To bring this destabilizing competition under control, the 1937 Act authorizes the Secretary to issue milk market orders setting the minimum prices that handlers (those who process dairy products) must pay to producers (dairy farmers) for their milk products. 7 U. S. C. § 608c. The "essential purpose [of this milk market order scheme is] to raise producer prices," S. Rep. No. 1011, 74th Cong., 1st Sess. 3 (1935), and thereby to ensure that the benefits and burdens of the milk market are fairly and proportionately shared by all dairy farmers. See *Nebbia v. New York*, 291 U. S. 502, 517-518 (1934).

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✓

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

May 17, 1984

No. 83-458 Block v. CNI

Dear Bill,

I think we can accommodate your request. I would be content with a change on page 9 such as you suggest if we can use the phrase "best illustrates."

Sincerely,



Justice Brennan

✓  
3, 6, 8, 9, 10, 11, 13

RECEIVED  
SUPREME COURT, U.S.  
JUSTICE MARSHALL

'84 MAY 21 A9:25

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: Justice O'Conno

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-458

JOHN R. BLOCK, SECRETARY OF AGRICULTURE,  
ET AL., PETITIONERS *v.* COMMUNITY  
NUTRITION INSTITUTE ET AL.

*John*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[May —, 1984]

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pp. 9

SDO  
FB  
7/1

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: Justice O'Connor

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

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

4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-458

**JOHN R. BLOCK, SECRETARY OF AGRICULTURE,  
ET AL., PETITIONERS v. COMMUNITY  
NUTRITION INSTITUTE ET AL.**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
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[May —, 1984]

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