Labor Law

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Historically the NLRB has espoused a complex and somewhat inconsistent formula when attempting to define and classify managerial employees.¹ No longer content with this approach, the Board is now seeking to promulgate a simplified standard which would effectively liberalize and apparently streamline the parameters within which persons who are closely allied with management will be categorized.² The Board’s latest attempt at reform, however, was clearly checked in NLRB v. Bell Aerospace Co., Division of Textron, Inc.,³ where the Supreme Court sustained not only what it viewed as the NLRB’s earlier approach to the classification of managerial employees, but also upheld the Board’s discretionary authority to apply either a rulemaking or adjudicatory procedure to the case before it.⁴

¹. Initially the Board classified a managerial employee on the basis of whether or not “the interests of these employees are more closely identified with those of management.” Denver Dry Goods, 74 N.L.R.B. 1167, 1175 (1947). It later added an alternative criterion when it defined managerial employees as “executives who formulate and effectuate management policies by expressing and making operative the decisions of their employer . . . .” Palace Laundry Dry Cleaning Corp., 75 N.L.R.B. 320, 323 n.4 (1947).
². See Bell Aerospace Co., Div. of Textron, Inc., 196 N.L.R.B. 827, 828 (1972). The Board held that only those managerial employees associated with the “formulation and implementation” of labor relations policies were to be excluded from the National Labor Relations Act, 29 U.S.C. §§ 141-68 (1970).
⁴. Id. at 1770-72. In so doing, the Court upheld the appellate court’s ruling that all “true managerial employees” were excluded from the NLRA, Bell Aerospace Co., Div. of Textron, Inc. v. NLRB, 475 F.2d 485 (2d Cir. 1973), but rejected the conclusion that the Board erred when it applied its adjudicatory rather than its rulemaking authority. Id. at 495.
On July 30, 1970, the United Auto Workers filed a representation petition with the Board. The petition sought certification as the bargaining representative of the twenty-five buyers in the purchasing and procurement department of the Bell Aerospace Co. plant located in Wheatfield, New York. The company opposed the petition on the ground that the buyers were managerial employees and were thus excluded from coverage under the National Labor Relations Act.

On May 20, 1971, the NLRB held that the buyers constituted an appropriate unit for purposes of collective bargaining and directing elections. In so doing the Board stated that the buyers were covered by the Act even though they might be classified as managerial. On that same day, however, the Eighth Circuit denied enforcement of a similar Board order in NLRB v. North Arkansas Electric Cooperative, Inc. Encouraged by this development the Company moved the Board for reconsideration. In denying the motion the NLRB stated that only those managerial employees associated with the "formulation or implementation" of labor relations policies were to be excluded from the Act. In review of each case the "fundamental touchstone" was to be whether the activities of the managerial employees did or did not include determinations which would involve any conflict of interest if such persons maintained membership in a union. Dissatisfied with the NLRB's ruling, the company appealed to the Second Circuit for review. The Board, in turn, cross-petitioned for enforcement.

The court of appeals denied enforcement, concluding that Congress intended to exempt all true managerial employees from the Act's protection. Moreover, the court ruled that although the Board was not prohibited from determining that "buyers or some types of buyers" are not true managerial employees, it could do so only in a rulemaking, and not in an adjudicatory proceeding. On certiorari the Supreme Court upheld the Second Circuit's

6. Id. at 432.
7. 446 F.2d 602 (8th Cir. 1971). The court ruled that managerial employees were not covered nor protected by the Act.
8. 196 N.L.R.B. at 827.
9. See note 2 supra.
10. 196 N.L.R.B. at 828.
11. 475 F.2d at 494.
12. Id. at 495. Section 6 of the NLRA empowers the Board to make rules and regulations to effectuate the policies of the Act. 29 U.S.C. § 156 (1970). The procedural requirements for rulemaking require the Board to publish a general notice of the proposed rules in the Federal Register, setting out the time and place of the proceedings, and specifying the portion of the Act under which the rule was proposed and the terms or substance of the contemplated rule. Administrative Procedure Act of 1946, 5 U.S.C. § 553 (1970).
ruling on the managerial employee question, but decided that the NLRB is not precluded from promulgating new policies in an adjudicatory proceeding. Justice White dissented in part, arguing in support of the Board's decision and declaring that Congress never intended to exclude managerial employees from the Act.

In reaching its conclusion the Court focused on two issues: first, whether all "managerial employees," rather than just those in positions susceptible to conflicts of interest in labor relations, are exempt from the protections of the Act; and secondly, whether the Board must invoke its rulemaking procedures if it determines that buyers are not managerial employees under the Act. This Note will discuss the question of whether or not managerial personnel are protected by the provisions of the National Labor Relations Act.

I. THE EVOLUTION OF THE TAFT-HARTLEY ACT

Prior to 1947, the Board had never excluded managerial employees from the protection of the NLRA, but only from bargaining units of rank and file personnel. However, the Board's position with respect to supervisors, however, vacillated during this time. In Maryland Drydock Co. the NLRB found

The Board's adjudicative function is derived from section 10 of the NLRA which empowers the Board to "prevent any persons from engaging in unfair labor practice affecting commerce," and outlines the procedures by which the Board may issue an appropriate order based upon its independent opinion. The Board's adjudicative function is derived from section 10 of the NLRA which empowers the Board to "prevent any persons from engaging in unfair labor practice affecting commerce," and outlines the procedures by which the Board may issue an appropriate order based upon its independent opinion. 29 U.S.C. § 160 (1970).

13. 94 S. Ct. at 1769.
14. Id. at 1771.
17. In one decision where it excluded buyers and expediters from a unit of office and clerical employees the Board stated: "This is not to say, however, that buyers and expediters are to be denied the right to self-organization and to collective bargaining under the Act." Dravo Corp., 54 N.L.R.B. 1174, 1177 (1944). See also Vulcan Corp., 58 N.L.R.B. 733 (1944); Hudson Motor Car Co., 55 N.L.R.B. 509 (1944).
18. Supervisory employees are expressly excluded from protection of the NLRA. The term is defined in section 2(11) as those persons who have the authority to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees," when such authority is "not of a merely routine or clerical nature but requires the use of independent judgment." 29 U.S.C. § 152(11) (1970).
19. 49 N.L.R.B. 733 (1943).
that a separate unit of supervisory personnel would not constitute an appropriate bargaining unit. *Maryland Drydock* was subsequently overruled in *Packard Motor Car Co.*,\(^\text{20}\) where the Board's decision that foremen were "employees" having the right to form their own unit was upheld by the Supreme Court.\(^\text{21}\) Fearful that the *Packard* decision would only add to the already burgeoning growth of union membership,\(^\text{22}\) and freshly aware of the crippling effects of industry-wide strikes,\(^\text{23}\) Congress amended the NLRA in 1946 by enacting the Taft-Hartley Act.\(^\text{24}\)

The amendments attempted to limit the growth of union membership by narrowing the definitional scope of the term employee as defined in the Act.\(^\text{25}\) To achieve this objective both the House and Senate expressly agreed to exempt all supervisors from the protection of the NLRA. The House Conference Committee Report\(^\text{26}\) specified that in addition to those persons working in labor relations, personnel and employment departments, confidential employees\(^\text{27}\) were also to be excluded from the protection of the Act. Explicit in the report was the view that since exemption of these persons was the prevailing Board practice, it was not the intention of the conferees to alter this practice in any respect.

Following enactment of the Taft-Hartley amendments, the Board continued to hold that managerial personnel were to be excluded from bargaining units of other employees.\(^\text{28}\) Not until *Swift & Co.*\(^\text{29}\) did the Board rule that it was the clear intent of Congress to exclude from the NLRA "all individuals allied with management."\(^\text{30}\) From the time of the decision in *Swift*, until the

\(^{20}\) 61 N.L.R.B. 4 (1945).
\(^{22}\) See 26 Vand. L. Rev. 850, 851-52 (1973). The author noted that union membership during the years 1935 to 1947 grew from 3 million to 15 million workers.
\(^{25}\) Section 2(3) of the NLRA defines employee as "any employee" with the express exceptions of "any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or . . . an independent contractor, or . . . supervisors . . . ." 29 U.S.C. § 152 (3) (1970).
\(^{27}\) Confidential employees have been classified as those who "assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." Westinghouse Elec. Corp. v. NLRB, 398 F.2d 669, 670 (6th Cir. 1968).
\(^{29}\) 115 N.L.R.B. 752 (1956).
\(^{30}\) Id. at 753-54.
NLRB's unsuccessful attempt at reversing the Swift doctrine in *North Arkansas Electric Cooperative*, the cases dealing with managerial employees had failed to clarify the Board's position. Thus, *Bell Aerospace* and *North Arkansas* appear to represent an effort by the Board to clear up the confusion created by the NLRB's decision in *Swift* and to establish criteria by which the Board may classify managerial personnel.

II. THE COURT INTERPRETS THE TAFT-HARTLEY ACT

In reaching its decision in *Bell Aerospace*, the Court examined the Board's rulings prior to enactment of the Taft-Hartley amendments, the legislative history of the amendments themselves and the NLRB's subsequent pronouncements. At the outset, Justice Powell reasoned that since the Board had explicitly excluded managerial personnel only from rank and file units, uncertainty prevailed as to whether the NLRB regarded all "managerial employees" as entirely outside of the protection of the Act. Justice White in his dissent, however, focused on the decision in *Dravo Corporation*, which categorically denied that managerial employees were to be excluded from the Act's protection. Unimpressed by the *Dravo* rule, the majority sought clarification in the legislative history of the Labor-Management Relations Act. The Court stressed the dissent of Justice Douglas in *Packard Motor Car Co. v. NLRB*, which chastised the Board for "obliterating" the line between management and labor and for paving the way for unionization of vice-presidents, managers and superintendents. In *Bell Aerospace*, the Court perceived congressional reversal of *Packard* as an attempt to enact the spirit of

31. 185 N.L.R.B. at 827. The Board ruled that managerial employees were entitled to be represented under the Act unless there is some "cogent reason" for denying such representation.

32. None of the cases following *Swift* have asserted a clear and definitive exclusion of managerial employees from the Act. *See*, e.g., *Eastern Camera & Photo Corp.*, 140 N.L.R.B. 569, 572 (1963); *Kearney & Trecker Corp.*, 121 N.L.R.B. 817, 822 (1958); *Diana Shop*, 118 N.L.R.B. 743, 745 (1957).

There have been instances, however, where the Board has cited *Swift* as authority for exclusion of managerial personnel from bargaining units of other employees. *See* AFL-CIO, 120 N.L.R.B. 969, 971 n.6 (1958); *Capeland Refrigeration Corp.*, 118 N.L.R.B. 1364, 1365 n.2 (1957).

33. 94 S. Ct. at 1763.

34. 54 N.L.R.B. 1174 (1944). Interestingly enough, Justice Powell employed the same case, but for the proposition that at this time the Board remained uncertain as to whether all buyers and expediters were to be considered managerial employees. *See* 94 S. Ct. at 1763.

35. 94 S. Ct. at 1774 (White, J., dissenting).


37. *Id.* at 494-95 (Douglas, J., dissenting).
Justice Douglas’ words into law. It should be noted, however, that the Packard dissent never advocated the exemption of all managerial personnel from the protection of the NLRB but only those persons who acted for management not only in formulating but also in executing its labor policies.

Specifically, the majority emphasized that although the statutory language adopted in the 1947 amendments did not expressly exclude confidential employees or persons working in labor relations, personnel or employment departments, they were implicitly exempted from the Act’s protection. Proceeding upon this supposition, the Court then assumed that managerial personnel were “paramount among this impliedly excluded group.” While the majority is accurate in its assertion that labor relations and confidential employees are exempted from the protection of the Act, the contention that managerial personnel are also excluded is difficult to reconcile with legislative history for two reasons. First, any explicit legislative directive to exempt persons closely allied with management is conspicuously lacking; and secondly, if “the absence of any express treatment” of managerial employees was intended to codify prior Board practice then managerial employees would be protected by the Act.

III. THE COURT’S RELIANCE ON Swift & Co.

Equally problematic is the majority’s declaration that immediately following passage of the Taft-Hartley Act, the NLRB adhered to the view that managerial personnel were excluded from the protection of NLRA. In truth, the Board continued to hold that persons with managerial interests were precluded from joining bargaining units of other employees. However, not until American Locomotive Co. did the Board reject the inclusion of managerial employees in a unit of rank and file personnel or their placement in a separate unit. Although the majority’s reference to American Locomotive exposed what appeared to be the Board’s difficulty in classifying managerial employees, it was not nearly as damaging as the Court’s reliance on the Swift doctrine. The Court utilized the precedential force of Swift to

38. 94 S. Ct. at 1763-64.
40. 94 S. Ct. at 1766.
41. Id. at 1767.
42. Id. at 1777 (White, J., dissenting).
43. Id. at 1767.
44. See, e.g., Westinghouse Elec. Corp., 89 N.L.R.B. 8 (1950) (buyers excluded from maintenance and production units); Denton’s, Inc., 83 N.L.R.B. 35 (1949) (excluded buyers and assistant buyers from a unit of clerical employees).
45. 92 N.L.R.B. 115 (1950).
46. 94 S. Ct. at 1768.
sustain what it perceived to be congressional intent. While the majority unconvincingly suggested\(^47\) that Congress intended to incorporate \textit{Swift} into the 1959 amendments to the NLRA,\(^48\) the dissenting justices were emphatic in their assertion that the same amendments dealt not with the managerial employee dilemma but rather with the problems arising out of secondary boycotts and picketing.\(^49\)

Nor did the dissent accept the Court's assumption that Congress' silent reaction to \textit{Swift} necessarily implied legislative approval of all Board rulings previously made.\(^50\) If the majority must resort to congressional silence in order to substantiate its position, it betrays a significant weakness in its argument.\(^51\) In its most favorable light, legislative silence has been viewed as congressional approval of the Board's statutorily prescribed use of discretion.\(^52\) Accordingly, the Board should be allowed to utilize this discretion in establishing the correct limits of a bargaining unit, and should not be subject to reversal unless it is "arbitrary and capricious in the exercise of its discretion."\(^53\)

It is fundamental to the exercise of agency discretion that decisions be based upon the experience of appointed officials who have an adequate understanding of the "complexities of the subject which is entrusted to their administration."\(^54\) Everyday experience in the administration of the NLRA gives the Board familiarity with the circumstances and background of employment relationships, and this experience "must be brought frequently to bear" on the question of who is an employer under the NLRA.\(^55\) In \textit{Bell Aerospace}, however, the Court has failed to defer to the competence and ex-

\begin{itemize}
\item \textit{Id.} \(^47\)
\item 94 S. Ct. at 1779 (White, J., dissenting). \(^49\)
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\item On two occasions the Supreme Court has declared that "it is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law." \textit{See} Boys Markets, Inc v. Retail Clerks Local 770, 398 U.S. 235, 241 (1970); Girouard v. United States, 328 U.S. 61, 69 (1946). \(^51\)
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\item In NLRB v. Seven-Up Co., 344 U.S. 344 (1953), the Supreme Court held that although the language of the NLRA pertaining to back-pay awards was reenacted while the Board adhered to a particular formula, the legislation did not compel the conclusion that Congress intended to freeze administrative decisions. Reenactment was merely an indication that the Board's prior practice was authorized and not a withdrawal of discretionary power to fashion remedies. \(^52\)
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\item Illinois State Journal-Register, Inc. v. NLRB, 412 F.2d 37, 40 (7th Cir. 1969). \(^53\)
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\item NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130 (1944). \(^55\)
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\end{itemize}
pertise of the Board\textsuperscript{56} and, as a consequence, has denied the NLRB the opportunity of reassessing its own prior decisions.

\textbf{IV. Conclusion}

Whether or not the standard adopted in \textit{Bell Aerospace} adequately complies with the spirit of Taft-Hartley is an issue which the Court has left unresolved. Instead, the Court has chosen to create what appears to be an insurmountable barrier to managerial employees who seek protection under the NLRA. Although the majority has formulated an intricate rationalization in order to justify its conclusion, neither the legislative history of Taft-Hartley nor the NLRB's decisions preceding enactment of the LMRA\textsuperscript{57} support the Court's decision. Moreover, despite the Court's support of the \textit{Swift} doctrine, it is arguable that the leading role given to the Board, in what Congress intended to be the orderly formulation of sound national labor policy, makes the Board an appropriate forum in which to resolve the redefinition of managerial employees.

It is incumbent upon the Board that it reappraise old standards and definitions as they relate to labor policy formulation. The Board may perceive a change in attitudes between employers and lower level management\textsuperscript{58} and a concomitant deterioration of the community of interest which has long been thought to exist between an employer and a managerial employee.\textsuperscript{59} In addition, with accelerated corporate growth and technological advancement, there has been an intensified convergence of economic power in the hands of high level management\textsuperscript{60} and a growing difficulty in determining whether or not all managerial employees take an affirmative and substantial part in the implementation of executive policies. Thus, in light of the Board's continuing involvement in these matters and the expertise it has developed since its inception, it would appear that the NLRB is sufficiently competent to determine whether or not managerial employees have become so threatened by corporate growth that statutory protection is necessary.

\textit{Nicholas A. Appugliese, Jr.}


\textsuperscript{57} See note 24 supra.

\textsuperscript{58} See Ordman, \textit{The National Labor Relations Act: A Current and Prospective View}, N.Y.U. 23D ANN. CONF. ON LABOR 3, 13 (1971). The author noted, "Inflation, rising unemployment, growth of corporate enterprises, and mergers are the source of . . . new and different issues—both in the representational area and in the unfair labor practice area. Prominent among these are unit issues, where hitherto settled lines of authority are being re-examined . . . "


\textsuperscript{60} See Ordman, \textit{supra} note 58, at 4.

Paralleling the dramatic increase in the number and variety of local, state and federal statutory procedures designed to provide redress for discriminatory treatment which emerged during the 1960's was an equally dramatic increase in the proportion of collective bargaining agreements which included broad non-discrimination clauses. These agreements provide for redress of on-the-job discrimination through binding grievance and arbitration procedures. The creation of these multiple avenues for redress of grievance brought new problems. Since the newly available procedures varied widely as to their speed, complexity, cost and extent of possible remedial action available, the question of which procedure the aggrieved should choose has proven difficult. In addition to selecting the appropriate redress procedure, an employee had to face the problem that the election of one procedure might preclude the simultaneous or subsequent submission of the complaint to another forum. On the other hand, if submission of work-related grievances to arbitration did not preclude their being raised in other administrative or judicial forums, employers were faced with the question of how many times, in how many different proceedings, they would be required to defend themselves against charges arising from a single set of facts. In the case of Alex-

1. The term "discrimination" is used throughout this Note as it is defined in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1970), as discrimination based on race, color, religion, sex or national origin rather than in the more traditional labor law sense of referring to preferential treatment based on the presence or absence of union membership.


3. 94% of all collective bargaining agreements contain provisions for binding arbitration. *Collyer Insulated Wire*, 192 N.L.R.B. 837, 844 n.21 (1971); *BNA, 1970 LABOR RELATIONS YEARBOOK* 38.

ander v. Gardner-Denver Co. the Supreme Court squarely faced these questions and clarified the relative positions of employee and employer within the context of the dual national policy of ending discrimination on the one hand and encouraging arbitration of labor disputes on the other.

Harrell Alexander, Sr., a black drill press trainee, was discharged by his employer, the Gardner-Denver Company, for defective workmanship. Pursuant to the plant collective bargaining agreement, a grievance was filed alleging termination without just cause. Prior to the completion of the grievance-arbitration procedure, he also filed a complaint alleging discrimination with the Colorado Civil Rights Commission, which referred it to the Equal Employment Opportunity Commission (EEOC). The arbitrator found "just cause" for the termination and the EEOC found "no basis" for the discrimination charge. When Alexander attempted to exercise the Title VII remedy of filing suit in federal district court, the suit was dismissed and summary judgment granted on the employer's motion. The trial court, having found that the collective bargaining agreement included a clause providing arbitration for alleged discrimination and that the issue had been raised in the arbitration procedure, grounded its dismissal on election of remedies, waiver and the federal policy favoring arbitration of labor disputes. The Court of Appeals for the Tenth Circuit affirmed.

The Supreme Court, in an opinion by Justice Powell, reversed. A unanimous Court held that prior submission to arbitration of a claim under a non-discrimination clause of a collective bargaining agreement does not foreclose an employee's statutory right to a trial de novo under Title VII of the Civil Rights Act of 1964, since Congress intended that Title VII supplement, rather than supplant, alternative means of redress. The Court stated further that Congress intended the final responsibility for the enforcement of the Act to remain with the federal courts. The opinion pointed out that an arbitral award must be based on contractual rights, whereas Title VII confers statutory rights which cannot be prospectively waived in the collective bargaining process. Thus, a Title VII trial is not a review of an arbitral award, but rather a separate judicial determination of statutory rights, although the arbitral award can be admitted as evidence and accorded such weight as may

6. An evenly divided Court had wrestled less successfully with the same issues three years earlier. Dewey v. Reynolds Metals Co., 402 U.S. 689 (1971) (per curiam).
be appropriate under the facts and circumstances of the individual case.

This decision set aside a series of inconsistent lower court opinions and delineated the relative roles of employee, employer, the arbitral process and the federal judiciary in cases of alleged discrimination in employment. Whether it makes equally clear the role of the union as a third party in such situations, is less certain. The same doubts may also be entertained with regard to the relationship of this decision to the broader national policy of arbitration as the preferred means of resolving employment disputes.\(^{10}\)

I. PRIOR CONFLICTING LOWER COURT DECISIONS

Prior to the decision in Alexander, the lower court decisions mandated a variety of inconsistent solutions to the issue of whether prior submission of a discrimination complaint to arbitration under a collective bargaining agreement precluded redress under Title VII. At least four basic directions emerged from the district and circuit court opinions: 1) total preclusion; 2) no preclusion, if arbitration and Title VII remedies were pursued simultaneously; 3) deferral to arbitral awards under certain circumstances; and 4) no preclusion.

The leading case for total preclusion was Dewey v. Reynolds Metals Co.\(^{11}\) which seemed to dominate this issue after its affirmance by an equally divided Supreme Court. Nevertheless, this case was not free from ambiguity. As the Alexander Court pointed out, the reasoning in Dewey was initially believed to be based in part upon the doctrine of election of remedies.\(^ {12}\) Subsequently, however, the Sixth Circuit described its decision in Dewey as resting on equitable estoppel and “themes of res judicata and collateral estoppel.”\(^ {13}\)

It is at least arguable that the Sixth Circuit subsequently qualified its decision in Dewey. Dicta in Spann v. Kaywood Div., Joanna Western Mills Co.\(^ {14}\) indicates that “pursuit of arbitration, [with] some simultaneous use of court or agency process” means “judicial jurisdiction to later review the arbitrator’s decision” is not per se precluded.\(^ {15}\) Thus, completion of arbitral proceedings in the absence of parallel judicial proceedings (as in Dewey) pre-

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10. See note 34 infra.
11. 429 F.2d 324 (6th Cir. 1970).
14. 446 F.2d 120 (6th Cir. 1971). In Thomas v. Philip Carey Mfg. Co., 455 F.2d 911 (6th Cir. 1971), the Sixth Circuit returned to its position in Dewey and held again that a completed arbitral process barred assertion of a Title VII claim.
15. 446 F.2d at 122.
cludes access to judicial remedies available under Title VII, while a simultaneous undertaking along both avenues of redress does not necessarily have that effect.

Prior to Dewey, both the Seventh and Fifth Circuits had rejected a preclusion rule. Last year, the Ninth Circuit adopted the same position in Oubichon v. North American Rockwell Corp.

The Fifth Circuit chose an alternative approach to the problem by defining the circumstances under which a federal court could properly defer to an arbitral award in Rios v. Reynolds Metals Co. Devising a five-point standard designed to insure that the employees' rights would receive substantially the same protections in the arbitral forum as would be available in the federal court, the court stated that these requirements must be complied with before judicial deferral to an arbitral award would be appropriate.

These inconsistent lower court rulings were reviewed in the briefs before the Supreme Court. The briefs urging affirmance requested adoption of a clear preclusion rule or, alternatively, a liberalized standard for judicial deferral to arbitral awards. The briefs urging reversal argued for a no-preclusion rule.

16. Hutchings v. United States Industries, Inc., 428 F.2d 303 (5th Cir. 1970) (unfavorable arbitration award does not bar later Title VII charge and suit); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 715 (8th Cir. 1969) (parallel judicial and arbitral proceedings are permissible as long as duplicate relief or unjust enrichment does not result). The Third Circuit has also held that an arbitral award does not render moot a continuing violation of Title VII. Fekete v. U.S. Steel Corp., 424 F.2d 331 (3d Cir. 1970).

17. 482 F.2d 569 (9th Cir. 1973).
18. 467 F.2d 54 (5th Cir. 1972).
19. First, there may be no deference to the decision of the arbitrator unless the contractual right coincides with rights under Title VII. Second, it must be plain that the arbitrator's decision is in no way violative of the private rights guaranteed by Title VII, nor of the public policy which inheres in Title VII. In addition, before deferring, the district court must be satisfied that (1) the factual issues before it are identical to those decided by the arbitrator; (2) the arbitrator had power under the collective agreement to decide the ultimate issue of discrimination; (3) the evidence presented at the arbitral hearing dealt adequately with all factual issues; (4) the arbitrator actually decided the factual issues presented to the court; (5) the arbitration proceeding was fair and regular and free of procedural infirmities. The burden of proof in establishing these conditions of limitation will be upon the respondent as distinguished from the claimant.

Id. at 58.

20. The Brief for Petitioner, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), and the Brief of the United States as amicus curiae urging reversal reviewed the prior decisions in detail as did the Respondent's Brief. The briefs urging affirmation, those of the U.S. Chamber of Commerce and the American Retail Federation, focused primarily upon policy questions.
sion rule, at least in those situations where Title VII procedures had been initiated prior to the completion of the arbitral process.

II. THE REASONING OF THE SUPREME COURT

The Supreme Court's rejection of the lower courts' decisions on preclusion and deferral was based on an analysis of congressional intent, the distinction between statutory and contractual rights, the distinction between the federal judicial and the arbitral process, and the Court's view of the relationship the national policy against discrimination should have to the national policy favoring resolution of employment disputes through arbitration.

In its analysis of legislative intent, the Court noted that Congress indicated that the policy against discrimination was to be of the "highest priority." The Civil Rights Act of 1964 contains "no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction." Moreover, under the Act, "in general, submission of a claim to one forum does not preclude a later submission to another." Further, "the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." Thus, Justice Powell found that the purposes and procedures embodied in Title VII strongly suggest no preclusion.

By stressing the contractual nature of the rights to be vindicated through arbitration under a collective bargaining agreement as opposed to the statutory nature of rights conferred by Title VII, the Court found that "no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums." Thus, the doctrine of election of remedies, "which refers to situations where an individual pursues remedies that are legally or factually inconsistent, has no application in the present context."

Likewise, the Court asserted that arguments based on waiver are inapplicable. Whereas unions may waive certain rights related to collective activity, the rights conferred upon the individual by Title VII are absolute, and any waiver, other than a voluntary and knowing waiver made by the in-

23. Id. at 47-48.
24. Id. at 48.
25. Id. at 50.
26. Id. at 49. The same reasoning leads to the rejection of arguments based on res judicata and collateral estoppel. Id. at 49 n.10.
dividual to the employer as a part of a voluntary settlement, would defeat
the paramount Congressional purpose underlying Title VII.27

The dichotomy between statutory and contractual rights was also basic to
the Court's analysis of the arbitral process, since the arbitrator's duty is to
interpret only contractual rights, "regardless whether certain contractual
rights are similar to, or duplicative of, the substantive rights secured by Title
VII."28 After an extensive comparison of the arbitral and judicial processes,
the Court concluded that the same factors which make arbitration an "ef-
ficient, inexpensive, and expeditious means for dispute resolution" render it
"a less appropriate forum for final resolution of Title VII issues than the
federal courts."29 Scattered throughout the opinion are references to the
"final responsibility" and "plenary powers" of the federal courts for the en-
forcement of Title VII rights.30

These same conclusions also led to the rejection of rigid deferral standards.
The Court was of the opinion that standards for deferral as rigorous as those
applied in Rios would excessively burden the arbitral process;31 whereas
less stringent standards for deferral, such as those proposed by Alexander's
employer,32 would provide insufficient protection to the Title VII rights of
the employee.33

27. "In no event can the submission to arbitration of a claim under the nondiscrimi-
nation clause of a collective-bargaining agreement constitute a binding waiver with re-
spect to the employee's rights under Title VII." Id. at 52 n.15.
28. Id. at 54.
29. Id. at 58. The comparison stressed procedures for fact-finding, as well as
completeness of the record produced, rules of evidence employed, discovery procedures
available, obligation to state the reason for an award and the number of arbitrators
without legal training.
30. Id. at 44-57.
31. Id. at 58-59.
32. Deferral would be granted under those standards where 1) the claim was before
the arbitrator; 2) the collective bargaining agreement prohibited the form of discrimi-
nation charged in the suit under Title VII; and 3) the arbitrator has authority to rule
on the claim and to fashion a remedy. Id. at 55-56. The proposal was derived from
the NLRB's policy of deferring to arbitral decisions on statutory issues in selected cases.
33. 415 U.S. at 56-58. However, the Court did list a group of factors to be
considered by the trial court in determining what weight could be appropriately given
to arbitral awards:

Relevant factors include the existence of provisions in the collective-bargaining
agreement that conform substantially with Title VII, the degree of procedural
fairness in the arbitral forum, adequacy of the record with respect to the issue
of discrimination, and the special competence of particular arbitrators. Where
an arbitral determination gives full consideration to an employee's Title VII
rights, a court may properly accord it great weight. This is especially true
where the issue is solely one of fact, specifically addressed by the parties and
decided by the arbitrator on the basis of an adequate record. But courts should
Finally, the Court found unpersuasive arguments that a decision other than preclusion or deferral would be in conflict with the national labor policy's emphasis upon arbitration as the preferred means for the resolution of conflicts in employment.\textsuperscript{34} It also rejected the notion that such a decision would reduce employers' willingness to include nondiscrimination clauses in collective bargaining agreements. Proceeding from the well established concept that arbitration is the quid pro quo for the union's undertaking a no-strike obligation, the Court found that both employers and employees will continue to find the "therapeutic" process of "fair and regular" arbitration which "may well produce a settlement satisfactory to both employer and employee" desirable for the resolution of discrimination complaints, thus sparing both the "expense and aggravation associated with a lawsuit" or a strike.\textsuperscript{35}

III. IMPLICATIONS FOR THE FUTURE

Under the \textit{Alexander} decision, the employee need no longer make an initial choice between submission of his or her complaint to grievance-arbitration procedures provided by a collective bargaining agreement, or pursuing the Title VII routes of redress.\textsuperscript{36} Nor need there be concern for initiating the Title VII procedures prior to the receipt of an arbitral award, except for the usual statute of limitations considerations. Furthermore, a partial redress of the grievance in one forum cannot foreclose pursuit of full vindication of those rights in another.\textsuperscript{37} As a consequence of the expansion of the employee's means of redress, the employer is confronted with the possibility of ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum. \textit{Id.} at 60 n.21.


\textsuperscript{35} 415 U.S. at 55.

\textsuperscript{36} Under collective bargaining agreements such grievances must be filed promptly or they are regarded as waived. Under art. 23, § 5 of the agreement involved here, the time limit was five working days from the occurrence giving rise to it. \textit{Id.} at 40 n.3.

\textsuperscript{37} However, subsequent awards are to be so structured as to avoid the possibility of unjust enrichment through multiple recoveries. \textit{Id.} at 51 n.14.
being forced to defend against charges arising from the same set of facts under multiple sets of procedural rules and in different forums.

Far less clear is the position of the union in cases of on-the-job discrimination. Although the union clearly has a statutory duty not to discriminate against those whom it represents in the collective bargaining process,\(^{38}\) it seems far less clear how far its affirmative duty to assist in the redress of employer discrimination extends. At a minimum, the union clearly has the duty of "fair representation" of its members in the context of grievance-arbitration procedures.\(^{39}\) However, as the court noted, "a breach of the union's duty may prove difficult to establish."\(^{40}\)

Now that the finality of arbitration procedures in discrimination cases has been qualified, employers may well become more reluctant to include antidiscrimination clauses in collective bargaining agreements.\(^{41}\) If so, the unions will be faced with a difficult problem. How far should they go in the collective bargaining process in making concessions on economic issues designed to benefit all their members in order to secure the contractual right to arbitrate discrimination grievances on behalf of their female and minority members?\(^{42}\) Consideration of past experience does not yield optimistic answers. It would be indeed ironic if the Alexander decision, which was designed to secure the availability of multiple procedures for redress of grievances, should have the net effect of reducing or eliminating the availability of the arbitral forum by making it less likely that such clauses will be included in future collective bargaining agreements. One may also wonder whether, in any case, the Court's stressing the relative strengths of the judicial proc-

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39. This raises an important, but submerged, aspect of this case, because it was the petitioner's dissatisfaction with the assistance provided by his union which caused him first to involve his clergyman in the process and then to file his complaint with the Colorado Human Rights Commission. Appendix Brief at 12-14, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). See also note 44 infra.

40. 415 U.S. at 58 n.19 (1974). Certain pragmatic factors also work to make members' charges of union discrimination or breach of the duty of fair representation unlikely. The worker is unlikely to charge the union while the grievance-arbitration procedure is in progress, since the union serves as his or her representative during that process; but if the union is not included in the original EEOC charge, that charge cannot be amended to include it at the trial stage. Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).


42. Women, who make up the largest group receiving Title VII protection, constitute only 20.7% of all union membership and comprise 50% or more of the membership in only 26 of the 185 largest unions. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 1750, DIRECTORY OF NAT'L UNIONS AND EMPLOYEE ASS'NS 1971, at 75-76 (1972).
ess when contrasted with the limitations of arbitral procedure will not tend to cause many grievants to by-pass the arbitral for the judicial forum.

Although the Court rejected the contention that its decision would be in conflict with the national labor policy's treatment of arbitration as the preferred means of resolving employment disputes, it failed to delineate clearly how far its emphasis on the distinction between contractual and statutory rights is to be carried in this context. Is it a specific exemption for the "highest priority" national policy against discrimination or is it capable of further expansion into other areas involving statutory rights? 43

At least one aspect of the role of arbitration under the national labor policy seems to have suffered a rebuff from the Court. Many arbitrators had responded to the increased importance given to arbitration and the declining judicial predisposition to review arbitral awards in employment dispute cases by arguing that arbitration itself should become more judicial in character through the incorporation or expanded use of such devices as discovery and due process. 44 Both the Court's rejection of the Rios standards

43. Already a district court has found no valid reason to distinguish between discrimination in employment actions brought under Title VII and those brought under the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1970), and has extended the Alexander holding to include this additional class of actions. McMiller v. Bird & Son, Inc., 376 F. Supp. 1086 (W.D. La. 1974). At least one attempt to extend the statutory-contractual dichotomy developed in Alexander to other areas of labor law has already appeared in the scholarly journals. See Getman, Can Collyer and Gardner-Denver Co-Exist? A Postscript, 49 Ind. L.J. 285 (1974). But see Gateway Coal Co. v. UMW, 414 U.S. 368 (1974), handed down the preceding month, where the Court voted 8 to 1 to preserve the presumption of arbitrability in a situation where the subject was arguably exempted by statute. It is ironic that Mr. Justice Douglas who did so much to shape the judicial attitude toward arbitration through his opinions for the Court in Lincoln Mills and the Steelworkers Trilogy should now find himself the lone dissenter opposing the further extension of that attitude.

44. See, e.g., Gross, The Labor Arbitrator's Role: Tradition and Change, 25 Arb. J. (n.s.) 221 (1970). For the contrary view, that although increased emphasis upon due process might tend toward a fuller protection of the rights of individuals, it would also complicate the relationship between union and employer and thus might "diminish the union's ability to subsequently act in the most advantageous fashion for the majority of the workers," see Edwards, Due Process Considerations in Labor Arbitration, 25 Arb. J. (n.s.) 141, 169 (1970). The distinctions here are especially relevant to Alexander's case in that although his complaint was filed under article 4 (the "just cause" section) of the collective bargaining agreement, his subsequent conduct made clear that he intended it to be treated under the discrimination clause (art. 5, § 2). 415 U.S. at 39 nn.1 & 2. The union, however, seems to have treated the matter in a manner more consistent with the former than the latter category. Whether this was due to the union's greater familiarity with "just cause" procedures, misunderstanding, or the emphasis characteristic of the arbitration procedures, in focusing upon the facts of a single case rather than the marshalling of the comparative data required for the showing of discriminatory treatment, is not clear from the available facts. In any event, neither Alexander's argument that others with equally unsatisfactory work records had not been discharged nor his
of deferral and its accentuation of the "efficient, inexpensive and expeditious" nature of the arbitral process can hardly be viewed as offering encouragement to such proposals.45

James L. DeMarce


The question of whether the courts should give preference to minority groups in order to remedy the effects of past racial discrimination has arisen recently in a number of different contexts.1 In TV 9, Inc. v. FCC,2 the issue arose in a case which involved hearings before the Federal Communications Commission on a permit to construct and operate a television station. The question presented was whether black ownership and participation in the management of an applicant corporation should be considered as a compara-


2. 495 F.2d 929 (D.C. Cir. 1973), cert. denied, 95 S. Ct. 245 (1974). This case is a consolidation of the appeals of TV 9, Inc. [TV 9], Comint Corporation [Comint], Central Nine Corporation [Central Nine] and Florida Heartland Television, Inc. [Florida Heartland], all of whose applications had been denied by the Commission. Mid-Florida Television Corporation [Mid-Florida], the successful applicant, intervened in each of these appeals. TV 9 intervened in the appeals of Comint, Central Nine, and Florida Heartland.
tive factor and accorded a comparative merit by the Commission. The United States Court of Appeals for the District of Columbia Circuit has answered in the affirmative. In so doing, the court reversed the FCC's decision on the matter and addressed the problem of affirmative racial preferences within a new context. The decision suggests a substantial broadening of the factors that the FCC may consider in comparative licensing hearings. It also suggests that the racial preference issue may be determined in administrative proceedings by statutory interpretation alone—to the exclusion of constitutional analysis.

The history of this litigation is long and complex. The case was not new to the court of appeals. The question of who was to have the right to operate a TV station on Channel 9 in Orlando, Florida had been before the Commission and the court for more than two decades. However, marked the first time in the controversy that the court had considered the issue of black ownership. While several issues were raised on appeal, this Note will be limited to a discussion of the racial preference question.

Comint Corporation, the only applicant to raise the issue of racial preferences, entered the litigation in 1965 when the court of appeals vacated the Commission's grant of interim operating authority to applicant Mid-Florida Television Corporation and ordered the proceedings opened to additional applicants. After the FCC on remand had awarded interim authority to a joint venture composed of all the applicants, the controversy proceeded to comparative hearings to determine who would be awarded a construction permit for the new station.


5. Three other issues were raised on appeal. The first was whether the Commission's commingling of admissible and inadmissible evidence with respect to Mid-Florida's prior operation on Channel 9 was prejudicial error. The second was whether certain ex parte contacts with a former Commissioner on behalf of Mid-Florida should result in a comparative demerit to Mid-Florida. The third issue was whether the federal indictment of a former officer of Mid-Florida should be considered in assessing Mid-Florida's character qualifications.


8. The award of a construction permit by the Commission is tantamount to the award of an operating license. According to the Communications Act, an operator's li-
At the comparative hearings, Comint contended that it should have been awarded a preference over the other applicants because two members of its board of directors were black, owned stock interest in Comint, and would participate in the management of the station. Dr. James R. Smith, a medical doctor and one of the black directors, was to serve on one committee of the station. He did not propose to devote any specific amount of time to its operation. The other black director was Paul C. Perkins, an Orlando attorney, who was to assume the office of station vice-president and devote two days a week to the operation of the station. Together they owned slightly more than a fourteen per cent voting stock interest in Comint. Neither had had prior experience in broadcasting, although both had been active in the civil rights movement in Orlando.9

It was Comint’s position that this black ownership would be in the public interest since roughly one-quarter of the population of Orlando was black and the interests of blacks had been neglected in the past by local broadcast stations.10 It pointed out that of the twenty-six commercial television stations in Florida, including two others in Orlando besides Channel 9, none was owned by blacks.11 Comint argued that black ownership and management of Channel 9 would make the station “truly responsive” to the needs of the Orlando black community.

I. BLACK OWNERSHIP: THE FCC POSITION

The FCC decided the issue on the basis of licensing standards contained in the Communications Act of 193412 and the Commission’s Policy Statement cense will be issued to the holder of a construction permit as soon as construction is completed pursuant to the terms of the permit. 47 U.S.C. § 319(c) (1970).

9. Dr. Smith and Mr. Perkins testified as to their reasons for joining in Comint’s application during the course of the comparative hearings. Dr. Smith testified: “I think it is important that black people—when you say so and so owns something, there is a black person that owns it. They should be part owners as a part of the community. This is the only answer to our black problem.” Mid-Florida Television Corp., 33 F.C.C. 2d 34, 170 (1970). Mr. Perkins testified that he joined in the application because he “knew that this would be a chance for a Negro, because to my knowledge no Negro in the State of Florida was in any policy making or had any part or participated in ownership of any television station and I knew this was a chance and it was a needed thing.” Id. at 169-70.

10. Id. at 175 n.71.

11. Brief for Appellant Comint at 35, TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973). This statistic was indicative of the nationwide situation as well. At the time of the litigation, only ten of the roughly 7,500 radio stations in the country were owned by blacks. Of the more than 1,000 TV stations, none were black-owned. See FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT, A REPORT OF THE UNITED STATES COMM’N ON CIVIL RIGHTS 280 (1971), cited in 33 F.C.C.2d at 18 n.43.

on Comparative Broadcast Hearings (1965 Policy Statement).\textsuperscript{13} The Act itself gave the Commission little definitive guidance as to licensing standards. It merely provided that license applications would be granted if the "public interest, convenience, and necessity" would thereby be served.\textsuperscript{14} In 1965, therefore, the Commission gave added definition to this public interest standard in its 1965 Policy Statement.\textsuperscript{15} According to the 1965 Policy Statement, the primary objectives of comparative broadcast hearings were to insure the "best practicable service to the public" and "a maximum diffusion of control of the media of mass communications."\textsuperscript{16} In achieving these objectives, the Commission would consider several criteria. Diversification of control of the media, full time participation by owners in station management, and prior broadcast record were factors of particular relevance to the question of black ownership.\textsuperscript{17}

The initial decision\textsuperscript{18} was released by the FCC hearing examiner\textsuperscript{19} in June 1970, awarding the construction permit to Mid-Florida. Although he noted

\textsuperscript{13} 1 F.C.C.2d 393 (1965).
\textsuperscript{14} 47 U.S.C. § 309(a) (1970). This broad mandate has been termed "the high water mark of congressional abdication of power to the regulatory agency." 4 D. Schwartz, The Economic Regulation of Business and Industry: A Legislative History of U.S. Regulatory Agencies 2374 (1973). The Commission's broad delegation of authority has been validated by the U.S. Supreme Court in National Broadcasting Co. v. United States, 319 U.S. 190 (1943). The Court stated that the Communications Act gives the Commission "not niggardly but expansive powers." \textit{Id.} at 219.
\textsuperscript{15} The Policy Statement was issued "to serve the purpose of clarity and consistency of decision" and to be a "general review of the criteria governing the disposition of comparative broadcast hearings." \textit{1 F.C.C.2d} at 393-94. Prior to the Policy Statement, a great deal of criticism had been directed at the Commission for its vagueness and unpredictability in decisionmaking. See, e.g., H. Friendly, The Federal Administrative Agencies 73 (1962); G. Warren, The Federal Administrative Procedure Act and the Administrative Agencies 72-113 (1947).
\textsuperscript{16} \textit{1 F.C.C.2d} at 394.
\textsuperscript{17} \textit{Id.} at 394-98. The other criteria were (1) proposed program service, (2) efficient use of frequency, (3) character, and (4) other factors that might contribute evidence of an applicant's qualifications. The Policy Statement did not assign a numerical weight or value to any of the criteria. Neither does the Commission simply "add up points" to determine which applicant is to be chosen to receive a license in a particular case. Rather, the process involves the application of these criteria to the facts at issue. What factors will predominate in a given situation is left to the informed judgement of the administrative law judges and review board members. For a discussion of this process, see Irion, FCC Criteria For Evaluating Competing Applicants, 43 Minn. L. Rev. 479 (1959).
\textsuperscript{18} Mid-Florida Television Corp., 33 F.C.C.2d 34 (1970).
\textsuperscript{19} The general authority for the Commission's delegation of power to hearing examiners (now referred to as administrative law judges) and review boards is contained in 47 U.S.C. § 155(d)(1) (1970). The specific authority of administrative law judges in presiding over comparative hearings is outlined in 47 C.F.R. § 0.341 (1973).
that media ownership by blacks in the Orlando area was a "closed door," the examiner nevertheless concluded that Comint could not be awarded a preference for its black ownership. He stated that the "Communications Act, like the Constitution, is color blind. What the Communications Act demands is service to the public . . . and that factor alone must control the licensing process, not the race, color, or creed of an applicant." Additionally, the examiner noted what he perceived as the long involvement of Mid-Florida's white owners in working with Orlando's black community, and concluded from this that Comint's black ownership did not imply an ability or predisposition to render a service to the black community that other applicants could not provide.

The FCC Review Board affirmed the initial decision in January 1972. It found that black ownership per se did not fit within the objectives or criteria outlined in the 1965 Policy Statement. Indeed, such ownership could only be analogized to local residency—a factor no longer recognized by the Commission as an independent criterion of comparison. Mid-Florida was awarded the license on the basis of its "substantially superior showing" in the integration of ownership and management and the "unusually good" broadcast record of its owner.

The Commissioners unanimously denied petitions for review of the Board's decision. Commissioner Benjamin L. Hooks, however, filed a separate statement in which he vigorously disagreed with the view that black ownership per se could not be considered to be in the public interest. He also

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20. 33 F.C.C.2d at 169.
21. Id. at 268.
22. Id. at 59-65.
23. The administrative law judge stated:
   Unless Comint showed that the participation of Mr. Perkins and Dr. Smith in the operation of the station would use their experience, background and knowledge of the community in a way likely to result in a superior service it cannot prevail on this point. There is nothing in the degree or type of participation proposed by Mr. Perkins and Dr. Smith which gives assurance that the benefits of their racial background would inure in any material degree to the operation of the station.
   Id. at 268.
24. The scope of authority of the Review Board is described in 47 C.F.R. § 0.365(a) (1973).
26. Id. at 18.
27. Id. at 21.
29. Commissioner Hooks stated:
   The proposition—simply spelled BLACK MEDIA OWNERSHIP IS IN THE
disagreed with the Review Board that the objectives and criteria of the 1965 *Policy Statement* precluded consideration of black ownership as a comparative factor. Commissioner Hooks nonetheless joined in the Commission's decision since he believed the black ownership issue was not of "decisional significance" in the case.

**II. BLACK OWNERSHIP: THE COURT'S POSITION**

On appeal, the District of Columbia Circuit set aside the award to Mid-Florida and remanded the case to the Commission for rehearing. The opinion of Senior Circuit Judge Fahy took "a stand against heavy reliance upon the maintenance of the status quo" in the communications industry and held that Comint should have been accorded merit by the Commission. The court broadly interpreted the "public interest" standard of the Communications Act:

> To say that the Communications Act, like the Constitution, is color blind, does not fully describe the breadth of the public interest criterion embodied in the Act. . . . The thrust of the public interest opens to the Commission a wise discretion to consider factors which do not find expression in constitutional law.

The court also held that the Commission had misapplied the 1965 *Policy Statement*. The objectives of the *Policy Statement* did not rule out consideration of the racial issue; for it was not intended "to preclude the full examination of any relevant and substantial factor."

The court reaffirmed the requirement laid down by the Supreme Court in *Ashbacker Radio Corp. v. FCC*, that competing applicants for a construction permit be accorded a full comparative hearing before Commission action on their applications. The court of appeals also pointed to its own de-

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PUBLIC INTEREST—is so self-evident in this day and age that I cannot endure agonizing a patient recrudescence of what the black struggle is all about, nor will I list the decisions demonstrating the breadth with which the Commission has perceived the 'public interest' when it has so desired.

37 F.C.C.2d at 562-63.
30. *Id.* at 562.
31. *Id.* at 560.
32. The Communications Act provides that an applicant whose application for construction permit or station license has been denied by the Commission may appeal to the United States Court of Appeals for the District of Columbia Circuit. 47 U.S.C. § 402(b)(1) (1970).
33. 495 F.2d at 937. Along with Senior Circuit Judge Fahy, Chief Judge Bazelon and Circuit Judge Robinson heard the case on appeal.
34. *Id.* at 936.
35. *Id.* at 936-37.
36. 326 U.S. 327 (1945). *Ashbacker* was important in that it defined the Commission's responsibilities under section 309(a) of the Act with respect to comparative hear-
cision in *Citizens Communications Center v. FCC*, which held that applicants in comparative hearings must be judged on all relevant criteria, including plans for the integration of minority groups into station operation. The court emphasized its view that “[a]s new interest groups and hitherto silent minorities emerge in our society, they should be given some stake in and the chance to broadcast on our radio and television frequencies.” Consideration of black ownership as a comparative factor was thus seen by the TV court as being consistent with the 1965 Policy Statement’s “primary objective” of diversification of media ownership. “We hold only that when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded.”

The court seemed well aware of some of the practical objections its decision would elicit. It specifically disavowed any attempt to impose a quota system upon applicants or the Commission. Moreover, black ownership was not to be offered as a “mere token,” but “in good faith as broadening community representation,” if merit was to be afforded the applicant. The court also took cognizance of minority inexperience in the operation of TV stations and the difficulty such groups might have in giving advance assurance of superior community service in comparative hearings. Thus, “reasonable expectation” of community service, not advance assurance, was to be the basis for which merit would be accorded where minorities were concerned. Finally, the court emphasized that because minority ownership was in accord with the goals of public policy, the fact that non-minority applicants proposed to present the views of the Orlando black community could not offset the merit to be accorded Comint.

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37. 463 F.2d 822 (D.C. Cir. 1972).
38. *Id.* at 823.
39. 495 F.2d at 937 (citation omitted).
40. *Id.* at 938.
41. *Id.* at 937-38.
42. *Id.* at 937. The court did not indicate what degree of ownership would be more than a “mere token.” Commissioner Hooks had earlier indicated that he would consider any equity in excess of five per cent to be "substantial" ownership. 37 F.C.C.2d at 564 n.19.
43. 495 F.2d at 938. This position is of course in direct conflict with that taken by the administrative law judge in the initial decision. *See* note 23 *supra*.
44. 495 F.2d at 938. This was so, the court noted, because minority ownership had historically proven to be influential in achieving diversity in editorial content and pres-
Both Mid-Florida and the Commission unsuccessfully petitioned for a rehearing en banc. In denying Mid-Florida's petition, the court filed a supplemental opinion which sought to clarify the earlier ruling. Judge Fahy's majority opinion explained that the "merit" to be accorded Comint was not the same as a "preference." A preference was defined as a decision by the Commission that one applicant's qualifications on a certain issue were superior to those of another. A merit, on the other hand, was merely a recognition by the Commission that an applicant had demonstrated certain positive qualities which could, but would not necessarily, result in an outcome-determinative preference.45 Thus the fact that Comint was to be accorded a merit did not mean that the other applicants would be unable to prove on remand that they could better serve the Orlando community.46

The supplemental opinion also applied the court's "reasonable expectation" standard to the participation of Dr. Smith and Mr. Perkins. Although their positions were technically not managerial in the sense of the day-to-day operation of the station, it was nevertheless probable that their stock ownership and "substantial identification" with minority rights in Orlando would translate into a meaningful effect upon station programming and hence into service to the black community.47

Four judges dissented and would have granted the petitions for rehearing en banc. Judges MacKinnon, Robb and Tamm could find no substantial difference between "merit" and a "preference." Each, if based on race, was discriminatory and impermissible.48 Judge Wilkey likewise characterized the distinction as "semantics," and stated that the majority's decision was "constitutionally wrong, morally wrong, and dangerous."49

III. CONCLUSION

In ruling in favor of Comint on the black ownership question, the Court of Appeals for the District of Columbia Circuit acted in accord with prior decisions in which it had sought to afford minority groups access to media ownership. In Greater Boston Television Corp. v. FCC,50 for example, the court stated that the role of the Commission in license renewal hearings was not merely to insure that applicants had technically met prescribed minimum

entation. The Supreme Court has indicated that such diversity is required by the first amendment. Associated Press v. United States, 326 U.S. 1, 20 (1945).
45. 495 F.2d at 941 n.2.
46. Id. at 941 n.3.
47. Id. at 942.
48. Id.
49. Id.
standards, but that the Commission could "seek in the public interest to cer-
tify as licensees those who would speak out with fresh voice, would most nat-
urally initiate, encourage and expand diversity of approach and viewpoint."51
In Citizens Communications Center v. FCC,52 the court struck down an FCC policy53 that permitted incumbent licensees to have their licenses renewed without a comparative hearing. The court found that this policy impeded diversification of media ownership.64

But if TV 9 is consistent with the court's prior position on access to media
ownership, the decision is an abrupt change in the court's attitude toward the 1965 Policy Statement on Comparative Broadcast Hearings. Prior to TV 9, the court had apparently looked with favor upon the Commission's application of the Policy Statement's definitive objectives and criteria.65 The decision in TV 9 seems both to signal a change in judicial attitude and to dilute the Policy Statement's attempt to lend more definition and standard-
ization to comparative broadcast hearings.

The decision also seems to demonstrate that the court will not hesitate to take an active role in reviewing and overturning Commission decisions where its perception of the needs of public policy so dictates. This stance, too, seems an abrupt change from the court's prior philosophy as to its role in reviewing the decisions of administrative agencies.66

51. 444 F.2d at 860.
52. 447 F.2d 1201 (D.C. Cir. 1971).
53. Policy Statement on Comparative Hearings Involving Regular Renewal Applica-
allowed incumbent licensees to be granted license renewals without a comparative hearing, upon a showing by the incumbent that it had been "substantially attuned" to the needs of the community and had demonstrated no "serious deficiencies." 22 F.C.C.2d at 424-25.
The 1970 Policy Statement was challenged by several organizations which argued that it unfairly favored the maintenance of the status quo in the communications media and seriously impaired minority access to media ownership. See 447 F.2d at 1202 n.2.
54. 447 F.2d at 1213 n.36.
56. In Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), the
court indicated that it would intervene in an agency's decision if it became aware that the agency had not taken a "hard look" at the relevant problems and had not engaged in reasoned decisionmaking. However, if the agency had examined the salient issues, the court would exercise restraint and affirm the agency's decision "even though the
A final question with regard to TV 9 is whether the issue presented should have been limited to the context in which it arose. Although the court noted that the Supreme Court had recognized a connection between first amendment requirements and diversity in media ownership, the majority was apparently satisfied that the black ownership issue in TV 9 could be fully and appropriately resolved within the administrative context—without a constitutional analysis. The majority's unwillingness to consider the constitutional implications of the issue is underscored by its refusal to consider the constitutional arguments put forth by Comint and Mid-Florida in their briefs.

A minority of the court of appeals apparently would have considered the constitutional dimensions of the issue on a rehearing en banc. One important dimension would presumably have been whether the absence of black ownership in the Orlando area had in fact been the product of prior racial discrimination. Another could have been whether the classification of applicants according to race for the purposes of awarding merit constituted a "suspect" classification. Resolution of these constitutional dimensions of the black ownership issue in TV 9 could perhaps have shed some light on the important question of whether the equal protection guarantee of the

court would on its own account have made different findings or adopted different standards." Id. at 851. In WEBR, Inc. v. FCC, 420 F.2d 158 (D.C. Cir. 1969), the court indicated that where an agency's decision finds substantial support in the record of proceedings, the court may not interpose its power to overturn that decision. Id. at 160. These views are in accord with FCC v. WOKO, Inc., 329 U.S. 223 (1946), where the Court stated that the fact that a court might not make the same determination on the same set of facts does not warrant "a substitution of judicial for administrative discretion since Congress has confided the problem to the latter." It was also stated that "it is the Commission, not the courts, which must be satisfied that the public interest will be served." Id. at 229.


58. Comint argued that the Constitution required the award of a preference for minority ownership where a valid need existed. It relied in part on Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968). There the court had indicated that classification by race was not "inevitably" impermissible. Where done for the purposes of achieving equality, such a classification could be constitutionally required. Id. at 931-32. See Brief for Appellant Comint at 41, TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973). Mid-Florida argued that any reliance on Norwalk CORE was inapposite since Comint had made no showing that the absence of blacks in media ownership was the result of racial discrimination. It concluded that the Commission's refusal to award a preference for minority ownership was "well within the mainstream of current American Constitutional and social policy which prohibits the invidious classification of race to be utilized as a factor for determining how public franchises, designed to serve the public, will be issued." Brief for Intervenor at 26, TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973).

59. The issue has been of primary importance in the recent cases dealing with affirmative racial preferences. See cases cited note 1 supra.
fifth amendment encompasses affirmative racial preferences.

The court has taken a strong step in facilitating the diversification of ownership in the mass media. Perhaps this goal indeed justifies the court's intervention into an area of responsibility assigned by Congress to the Federal Communications Commission. Nevertheless, one would have hoped that the court would first have developed a firm constitutional foundation for taking that step.

Richard L. Guido


A primary concern in constitutional litigation is the accessibility of federal courts. Deferring to considerations of "comity and federalism," the Supreme Court has severely restricted the opportunities for federal courts to grant prospective relief to persons involved in pending state prosecution. The Court recently curtailed its restrictive trend, however, in Steffel v. Thompson. In doing so, it fashioned a new threshold requirement for plaintiffs seeking declaratory relief against threatened state prosecution.

The case involved a pair of anti-Viet Nam War leafleteers who challenged a Georgia criminal trespass statute. Richard Steffel and Sandra Becker, while actively distributing anti-war handbills in a large suburban shopping center, were requested to leave by center employees and later by local po-


4. For discussion of the substantive law on the right to distribute handbills on private property (company-owned town), see Marsh v. Alabama, 326 U.S. 501 (1946). For discussion of the right to leaflet in a privately owned shopping center, see Lloyd
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lice. Petitioners quit their activity but reappeared two days later. After further warning, Steffel again ceased his distributions but Becker refused to quit and was arrested. Both persons commenced action in federal district court, seeking an injunction against enforcement of the trespass statute and a judgment declaring the Georgia law to be a deprivation of first and fourteenth amendment rights. The district judge dismissed the suits of both Steffel and Becker. Plaintiff Steffel appealed to the Fifth Circuit, which affirmed the lower court decision. The Supreme Court granted certiorari on Steffel's prayer for declaratory relief and subsequently reversed the lower court.

Steffel is important in that it helps define the previously disputed parameters of the February Sextet doctrine, formerly the primary hurdle to federal intervention in state criminal matters. This Note will explore the limiting effect Steffel has upon the doctrine. The principal task will be to define the circumstances wherein an individual may seek prospective protection of his civil rights through federal disruption of state criminal processes.

I. PENDING PROSECUTION—DEVELOPING STANDARDS OF JUDICIAL SELF-RESTRAINT

The power of federal courts to enjoin state proceedings can be traced to Chisholm v. Georgia, an opinion rendered by Chief Justice John Marshall, which, though preceding the enactment of the eleventh amendment, was in essence affirmed in 1908. After defining this power, however, the courts felt compelled to exercise it in a manner consistent with basic tenets of federalism and judicial economy. Two tests emerged under which federal court injunct-

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7. A rehearing en banc was subsequently denied per curiam. Becker v. Thompson, 463 F.2d 1338 (5th Cir. 1972).
9. In Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), Marshall held that federal courts could entertain a citizen's suit against a state without the state's prior consent. The decision was bitterly criticized and was constitutionally reversed with the ratification of the eleventh amendment. In Ex parte Young, 209 U.S. 123 (1908), the Supreme Court circumvented the prohibition of the eleventh amendment, holding that citizens have a right to enjoin a state official when that official is engaged in illegal or unconstitutional conduct.
tions against state criminal proceedings would be measured: the doctrine of federal abstention and the concept of irreparable injury.

The doctrine of abstention presupposes that state courts will conscientiously exercise their responsibility to vindicate basic constitutional freedoms. The doctrine is grounded upon considerations of judicial economy and federalism. Judicial economy demands that federal courts avoid the duplication inherent when two courts simultaneously adjudicate the same set of facts; federalism requires federal judges to minimize intervention into traditional state functions by allowing state courts to rectify constitutional infirmities prior to federal review.

The second test, irreparable injury, involves the traditional equitable consideration of "alternate remedies." The basic issue is whether the plaintiff would be able through "prompt trial and appeal" to forestall irreparable harm. Since good faith prosecution inherently allows the defendant to vindicate his rights at trial, most federal courts were reluctant to intervene in ongoing state criminal proceedings. It was felt that under these circumstances federal courts could offer no protection not already offered by the state.

These twin tests of abstention and irreparable injury merged to form a strong federal policy against interference in contemporaneous state criminal proceedings. Illustrative of the strength of this doctrine is Douglas v. City of Jeannette, where the Supreme Court refused to enjoin a criminal prosecution under a city ordinance even though the statute was patently unconstitutional.

In 1965, the Supreme Court reexamined this policy in Dombrowski v. Pfister. Dombrowski differed from earlier cases in that it offered a blatant example of "bad faith." Although petitioners were arrested, repeatedly threatened with prosecution, and otherwise harassed, no formal prosecu-

13. In Murdock v. Pennsylvania, 319 U.S. 105 (1943), rendered the same day as Douglas, the Court struck down the city ordinance in question.
15. Petitioners were the Southern Conference Educational Fund and James L. Dombrowski, the fund's executive director.
17. Petitioners' homes and offices were raided at gun point. Voluminous material, including membership lists and subscription lists, was seized. The loss of subscription lists paralyzed petitioners' publications distributions. A state court subsequently quashed
tion ever resulted. Petitioners finally sought injunctive relief against further enforcement of the statute in question, alleging that it was unconstitutional on its face and could not be invoked with any realistic hope of obtaining a valid conviction. The Court deemed federal restraint inappropriate under these conditions. First, it noted that first amendment rights by their very nature cannot be assured of ample vindication by a criminal defense since even a good faith prosecution can irreparably discourage free expression and association. On the basis of the rights involved, therefore, a federal injunction was the only viable relief.

Second, the Court argued that a narrow interpretation of the Act by the state court could in no way meet the claim that the statute was applied solely to discourage the exercise of first amendment rights. Moreover, the state's overt failure to prosecute denied plaintiffs the chance to challenge the statute with a criminal defense based on constitutional grounds. This presence of bad faith, coupled with the fragile nature of the rights involved, thus rendered the theories of comity and abstention inapplicable. A new threshold standard emerged: federal courts could enjoin state prosecution if a statute was attacked "on [its] face as abridging free expression" and the statute was invoked "in bad faith to impose continuing harassment."

Two years later, the Supreme Court defined federal jurisdictional standards for declaratory relief in the absence of actual state prosecution in *Zwickler v. Koota.* Appellant alleged that a state statutory prohibition against the distribution of anonymous handbills was overbroad on its face. The Court first observed that defects in precisely drafted overbroad statutes cannot be cured by subsequent state court construction. Hence, the concept of abstention was not applicable. Second, the Court noted that the Judiciary Act of the arrest warrants and suppressed all confiscated evidence. State officials nevertheless continued their harassment by threatening further prosecution, and the police publicly displayed xerox copies of petitioners' illegally seized membership lists and leaked information from petitioner's subscription files.

18. 380 U.S. at 485-86.
19. Justice Brennan relied in part upon *NAACP v. Alabama,* 357 U.S. 449 (1958). This case recognized that anonymity sometimes is a prerequisite for unfettered exercise of the right of association. Thus, the publicity inherent in any litigation may render even good faith prosecution harmful to certain rights. *Dombrowski v. Pfister,* 380 U.S. 479, 488-89 (1965). Consequently, the Court created an exception to the rule of standing. The equitable relief authorized in *Dombrowski* is an alternate remedy to this problem.
20. 380 U.S. at 490.
21. 389 U.S. 241 (1967). Appellant's initial conviction was overturned on state law grounds because the state failed to prove a necessary element of the offense. Appellant, alleging a chilling effect, subsequently sought federal relief in the form of an injunction against further enforcement of the statute and a judgment declaring the statute unconstitutional.
1875 made the federal courts the primary forum for protection of constitutional rights. Inherent in this status is the "duty" to "give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims." Therefore, absent "narrowly limited 'special circumstances,'" federal courts should exercise their powers even though an alternate state forum may exist.

Finally, the Court noted that Congress intended declaratory judgments to be a more easily obtainable and less obtrusive alternative to injunctions. Requiring the standard of irreparable equitable harm as a requisite for both forms of relief would dilute this difference. Hence requests for declaratory relief must be considered independently of the standard for equity. The lower court was therefore held in error for dismissing the prayer for declaratory relief for want of irreparable harm.

Dombrowski and Zwickler, when read together, significantly increased the availability of federal courts for prospective relief from state criminal enforcement. Their scope, however, was severely restricted in the February Sextet. In the lead case of Younger v. Harris, Justice Black argued that principles of "comity and federalism" require minimal federal intervention into traditional state affairs. In cases involving pending state prosecution, the requisite for federal injunctive relief is a showing of truly severe and immediate irreparable harm.

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23. 389 U.S. at 248.
24. Id. The Court did not fully explain the nature or scope of this caveat. A state court's avoidance or modification of a constitutional question, done in the course of construing a state statute, was cited as one example of the "narrowly limited" circumstances which justified intervention. See Harrison v. NAACP, 360 U.S. 167 (1959). The Zwickler Court also found "special circumstances" in cases involving diversity of citizenship and in cases involving disruption of complex state administrative processes. 389 U.S. at 249 n.11. In the latter instances, however, the presence of unsettled questions of controlling state law were prominent and appeared to be the decisive common element.

The Fifth Circuit has construed this caveat of "special circumstances" to specifically include certain subjects. See Barrett v. Atlantic Richfield Co., 444 F.2d 38, 43-44 (5th Cir. 1971). Judge Wisdom asserted for a unanimous panel that certain subjects vital to a state's political or economic interests should per se preclude federal intervention. Examples given were state water management, state fishery administration, state mineral policy, and the law of eminent domain. Wisdom cited Justice Brennan's concurrence, joined by Justices Marshall and Douglas, in Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593 (1968), as authority. However, although Justice Brennan's language is supportive of the Fifth Circuit's position, the facts of Kaiser involved a "truly novel" issue of state law. Id. at 594. Thus, Kaiser cannot be viewed as expanding the definition of "special circumstances." Indeed, as an alternative reason for abstaining in Barrett, Judge Wisdom noted the presence of conflicting state statutes. No other court has favorably cited the Fifth Circuit position.

arable harm. The alleged injury cannot be of a type that could be remedied by a one-time criminal defense. The anxiety inherent in preparing a criminal defense does not meet the test. The harassment found in Dombrowski, however, was held to be sufficient. Younger thus isolated the element of bad faith and declared it to be the sole justification for federal intervention into pending litigation. Federal injunctive relief was precluded in all but the most exigent circumstances.

Younger's companion, Samuels v. Mackell, extended this restrictive test to cases involving declaratory judgments. The Court found, where prosecution is pending, that the effect of a declaration was equal to that of an injunction: massive disruption of state proceedings. The considerations of comity and federalism announced in Younger, requiring minimal federal intervention into state affairs, made such a result clearly improper. Samuels represented a two-fold departure from earlier precedent: the existence of formal charges was held to preclude declaratory judgments in the absence of bad faith and the presence of prosecution was held to allow singular treatment of prayers for equitable and declaratory relief. Both departures veered from greater federal court accessibility.

In view of Younger and Samuels, the earlier expansive rules appeared to be an aberration. The February Sextet gave the states a strong presumption of legitimacy and a relatively free hand in the prosecution of their criminal laws. The mere presence of pending state action thus severely reduced the avenues of access to federal courts for prospective relief.

II. OPENING THE DOORS

Steffel faced an issue absent in Zwickler and expressly reserved in both Younger and Samuels: whether federal courts can issue declaratory judgments in instances where criminal litigation is threatened but not pending.

26. Justice Black relied heavily on Douglas v. City of Jeannette, 319 U.S. 157 (1943). In Douglas, Chief Justice Stone made a comparison with Hague v. CIO, 307 U.S. 496 (1939). Stone noted that the respondent in Hague was subjected to forcible dispersal of union meetings and deportation without trial. In Douglas, however, plaintiff only alleged harm engendered by a standard criminal prosecution and equity was withheld, while in Hague an injunction was issued.

27. Justice Brennan conceded other tests were employed in Dombrowski, but asserted, that "such statements were unnecessary to the decision . . . ." 401 U.S. at 50.


29. The Younger standard was applied to the area of juvenile law in Conover v. Montemuro, 477 F.2d 1073, 1078-79 (3d Cir. 1973).

30. The Supreme Court did not break judicial ground in granting certiorari in this case. The applicability of the bad faith harassment test had earlier been considered in Wulp v. Corcoran, 454 F.2d 826 (1st Cir. 1972); Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971); and Crossen v. Breckenridge, 446 F.2d 833 (6th Cir. 1971).
In addressing that question, the Court limited the force of *Younger* and *Samuels* to circumstances where prosecution had actually commenced. Justice Brennan, writing for the majority, first noted that a federal suit in the absence of a bona fide state court action “does not result in duplicative legal proceedings or disruption of the state criminal justice system.” He pointed out that the failure of the state to prosecute gives the individual a genuine Hobson's choice: either flout the law and risk prosecution, or forego basic civil rights. The majority concluded, therefore, that the “principles of equity, comity, and federalism have little force in the absence of a pending state proceeding.” With its underpinnings eroded, *Younger-Samuels* was held not controlling.

The majority opinion then analyzed the standards of traditional equity relief as they apply to declaratory judgment. With the limiting force of *Younger* and *Samuels* removed, the Court found that *Zwickler* compelled independent tests for equitable and declaratory relief.

The effect of *Steffel* on the February Sextet doctrine is clearly restrictive. First, *Steffel* reduces *Younger-Samuels* from a per se test to a rule of degree. The distinction between pending and threatened prosecution indicates that state action per se is not determinative of federal powers. Instead, *Steffel* holds the degree of state involvement to be the critical test. Where action is only threatened, the degree of state involvement is simply not enough to invoke the restrictive principles of comity and federalism. Second, *Steffel* dispels the notion that *Younger* and *Samuels* created “new law” of general applicability. Instead, the Sextet doctrine is limited to a well-defined class

ally, two three-judge district panels had reviewed the issue in Thoms v. Smith, 334 F. Supp. 1203 (D. Conn. 1971), and in Anderson v. Vaughn, 327 F. Supp. 101 (D. Conn. 1971). In both cases, the courts ruled that the *Younger* doctrine was inapplicable in the absence of actual prosecution. Thus, the Fifth Circuit's rule in Becker v. Thompson, 459 F.2d 919 (5th Cir. 1972), was clearly the minority rule among the circuits. For another example of the view of the Fifth Circuit, see Cooley v. Endictor, 340 F. Supp. 15 (N.D. Ga. 1971), aff'd, 458 F.2d 513 (5th Cir. 1972), cert. denied, 409 U.S. 1115 (1973).

31. 415 U.S. at 462.
32. [W]hile a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.

*Id.* (citation omitted).
34. *See* Petitioner's Brief for Certiorari at 11-17, Steffel v. Thompson, 415 U.S. 452 (1974).
of cases involving pending prosecution. In all other instances, more liberal standards control.\textsuperscript{35}

To fill the void created by the rejection of \textit{Younger-Samuels}, \textit{Steffel} fashions a new rule for declaratory jurisdiction that in some respects is less rigorous than the standard enunciated by the pre-Sextet precedents. Under \textit{Steffel}, a plaintiff can fulfill the article III requirement of an actual controversy merely by demonstrating "a genuine threat of enforcement of a disputed state statute."\textsuperscript{36} This test relaxes the standard in \textit{Dombrowski} since demonstration of "genuine threat of enforcement" does not require a showing of bad faith enforcement. Second, \textit{Steffel} rejects any notion that declaratory jurisdiction is limited to the facts of \textit{Dombrowski} and \textit{Zwickler}, both of which involved allegations that the statute in question was overbroad.\textsuperscript{37} The unqualified language employed by Justice Brennan does not preclude complaints based on alternative constitutional theories. Finally, \textit{Steffel} rejects the test of "facial infirmity" used in both \textit{Dombrowski} and \textit{Zwickler}. Indeed, the majority specifically rejected the contention that declarations can be sought only where a statute is facially challenged and held declaratory relief to be proper where a statute is attacked as construed.\textsuperscript{38} Thus, in three critical areas \textit{Steffel} reduces the hurdles to federal court intervention established in \textit{Dombrowski} and \textit{Zwickler}.

\textsuperscript{35} State taxation may be an exception to this statement. In both Matthews v. Rodgers, 284 U.S. 521 (1932), and Great Lakes Dredge and Dock Co. v. Huffman, 319 U.S. 293 (1943), the Supreme Court emphatically directed federal courts not to interfere with a state program of taxation where the state offered adequate remedial procedures. \textit{Matthews} dealt with injunction and \textit{Great Lakes} extended the rule to declaratory relief. The decisions were based on a combination of theories: the existence of adequate remedy at law, a desire not to interfere in this sensitive area of state concern, and statutory mandate. In \textit{Great Lakes}, the Court analyzed the policy considerations underpinning the statutory prohibition of federal injunctions against state tax collection (now 28 U.S.C. § 1341 (1970)) and found them sufficient to prohibit declaratory relief as well. No mention of this line of cases was made in \textit{Steffel}. Since \textit{Great Lakes} rests on statutory policy as well as the equitable underpinnings found in \textit{Younger}, it is doubtful that \textit{Steffel}'s limitation on \textit{Younger} would authorize federal declaratory intervention into state tax collection activities. \textit{Cf.} note 24 supra.

\textsuperscript{36} 415 U.S. at 475. Four Justices filed three separate concurrences. All were in substantial agreement with this test.

\textsuperscript{37} This rejection of the jurisdictional requirement that the overbreadth of the statute be alleged supports a recent trend in lower federal courts. Originally the facts of \textit{Zwickler} were incorporated into a "rule," so that allegations of facial overbreadth were regarded as a requisite for federal declaratory jurisdiction. More recently, however, allegations of facial overbreadth have been viewed as only an example of circumstances under which subsequent state court construction could not affect the constitutional issue. \textit{See, e.g.}, King-Smith v. Aaron, 455 F.2d 378 (3d Cir. 1972) (statute held not overbroad but violative of fourteenth amendment guarantees of equal protection and declaratory jurisdiction taken).

\textsuperscript{38} 415 U.S. at 473. \textit{Contra}, Jones v. Wade, 479 F.2d 1176 (5th Cir. 1973).
Although Steffel generally allows easier access to the federal courts, it does not go as far as Dombrowski in providing special protection to first amendment freedoms. The liberal interpretation of Dombrowski, namely, that federal intervention can be obtained whenever an infringement of first amendment freedoms is alleged, had been rejected in Younger. With the restrictive force of Younger eased, Dombrowski could be read as mandating federal intervention whenever first amendment rights are at issue. This analysis is precluded, however, by the test of "genuine threat of enforcement;" Steffel emphasizes that an apprehension of criminal proceedings, not a fear of damaged rights, is the key threshold requirement. Indeed, Justice Stewart took pains to emphasize that Steffel

must not be understood as authorizing the invocation of federal declaratory judgment jurisdiction by a person who thinks a state criminal law is unconstitutional, even if he genuinely feels "chilled" in his freedom of action . . . and even if he honestly entertains the subjective belief that he may now or in the future be prosecuted under it. 89

Thus, in one respect, Steffel narrows the channels of access to the federal courts.

The limitation of the applicability of the February Sextet to instances of pending prosecution resolves an important issue for constitutional litigators. Some questions nevertheless remain. First, the practical impact of Steffel upon future state prosecutions is unclear. Justice White alone asserted that declarations should "be accorded res judicata effect in any later prosecution of that very conduct." 40 Justice Rehnquist, joined by the Chief Justice, flatly disagreed. 41

Second, the increased volume of cases that will fall within the new parameters is speculative and remains to be seen. Justice Stewart remarked that "[c]ases where such a 'genuine threat' can be demonstrated will, I think, be exceedingly rare." 42 Whether the new standard will actually result in more litigation remains unknown. Third, Steffel reserved the issue of whether federal equity relief is available in instances where prosecution is threatened but not pending. Finally, the Court abstained from defining the all important term of "pending prosecution," either in terms of the parties involved, 43 in

40. 415 U.S. at 477 (White, J., concurring).
41. 415 U.S. at 479 (Rehnquist, J. & Burger, C.J., concurring).
42. 415 U.S. at 476 (Stewart, J. & Burger, C.J., concurring).
43. The Supreme Court did not address this issue in Steffel. However, the fact that prosecution had already commenced against Becker obviously did not preempt Steffel's assertion that he was subject only to threatened action. This question has been ad-
terms of the technical rules of procedure, or in terms of prosecution initiated after the petition for declaratory relief.

III. THE JURISDICTIONAL MATRIX

The Steffel decision definitively resolved an unsettled jurisdictional issue. Much of the guesswork previously inherent in seeking federal relief was eliminated. It is clear that when state prosecution is underway, the minimum requirement for federal intervention is a showing of severe, irreparable injury resulting from bad faith enforcement. In the absence of actual litigation, declaratory intervention may be obtained upon a demonstration of genuine

dressed in the lower federal courts. For example, in Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971), twenty-seven of the original plaintiffs were granted jurisdiction to seek declaratory relief against police harassment after the claims of the remaining ten plaintiffs, who had previously been arrested, had been severed and dismissed. Apparently the jurisdictional barrier of "pending prosecution" applies only to individual plaintiffs. Thus, the official charging of one party has no bearing on the status of any other so long as the actions are separate. Accord, Conover v. Montemuro, 477 F.2d 1073 (3d Cir. 1973). But cf. Roe v. Wade, 410 U.S. 113, 127 n.7 (1973) and Hamar Theatres, Inc. v. Cryan, 365 F. Supp. 1312 (D.N.J. 1973), where a caveat is included regarding class action suits. In Roe, a case involving prosecution for abortion, one Dr. Hallford sought to "distinguish his status as a present state defendant from his status as a potential future defendant." 410 U.S. at 126. The Supreme Court refused to recognize the distinction. However, the Court reserved the issue of whether "intervention on behalf of a class would change the outcome." Id. at 127 n.7. In Hamar Theatres, a class action suit where three of the class members were subject to pending prosecution, the district court noted the Roe reservation and held that "where such class relief is sought, it furthers the purposes of class adjudication to distinguish between . . . status as a present criminal state defendant and . . . status as a potential future defendant." 365 F. Supp. at 1320.

44. The Supreme Court, in the companion case to Younger, Byrne v. Karalexis, 401 U.S. 216 (1971), appeared to favor a flexible approach when using technical rules of procedure to define "pending prosecution." In Byrne, respondent filed suit in federal court after being indicted. Soon afterwards the original indictments were dismissed but new ones were later issued. In a footnote to its per curiam opinion, the Court stated, "[U]nder these circumstances we treat the state prosecution as pending at the time the federal suit was initiated." 401 U.S. at 218 n.2. Lower federal courts have explicitly construed this language as creating a flexible standard. Independent Tape Merchants Ass'n v. Creamer, 346 F. Supp. 456, 460-61 (M.D. Pa. 1972); Burak v. Pennsylvania, 339 F. Supp. 534, 537 (E.D. Pa. 1972). Thus, the courts have tended to view each situation realistically and with little regard for the technical rules of criminal procedure. The existence of pending prosecution has been determined on the basis of the total circumstances in each case.

45. To date, only one court has addressed this issue. In Modern Social Educ., Inc. v. Peller, 353 F. Supp. 173, 180 (D. Md. 1973), Younger was held to bar the granting of federal injunctive relief in a case such as the present one in which criminal prosecution of the plaintiffs not only was expected and imminent at the time the federal action was filed but also was commenced within a short time thereafter.
threats of enforcement of a disputed criminal statute. Only the question of issuing injunctions against threatened criminal proceedings remains unresolved. Assuming that the traditional hurdle of irreparable harm has been removed, the jurisdictional question can be approached from the Younger requirement of bad faith, from the Steffel precedent of ignoring comity and federalism in the absence of prosecution, or simply from the doctrine of federal abstention.46

Access to the courts is a critical first step for any constitutional litigant. By refusing to extend the highly exclusive February Sextet doctrine, the Supreme Court decided a previously unresolved jurisdictional issue in favor of greater judicial accessibility. The decision will be welcomed by those persons who desire their day in court.

Ronald A. Johnston


A pioneer in landlord-tenant litigation,3 the District of Columbia recently provided the setting for yet another landmark decision in this area. In Per-
nell v. Southall Realty, the District's long history of court reorganization and congressionally-mandated statutory revision served as an impetus for deciding the delicate seventh amendment question of a tenant's right to jury trial in a landlord's suit for repossession of real property for alleged non-payment of rent.

In May 1971, petitioner David Pernell entered into a lease agreement with Southall Realty for rental of a house in the District of Columbia. Three months later, Southall filed a complaint in the Landlord and Tenant Branch of the Superior Court of the District of Columbia, pursuant to D.C. Code § 16-1501, seeking to evict Pernell for alleged default on rent payment. Pernell filed an answer proposing a setoff for repairs he made during his tenancy and a counterclaim for Southall's alleged failure to maintain the property in compliance with the District's housing regulations. Pernell also filed a timely request for jury trial.

The trial judge sua sponte struck the jury demand, tried the case himself after a one week continuance, and entered judgment for Southall. On appeal, the District of Columbia Court of Appeals affirmed, asserting that under the seventh amendment Pernell was not entitled to a jury trial either in defending his right to possession in the eviction action, or on the money damage claims he was seeking in the same proceedings.

The Supreme Court granted certiorari because of the unique nature of the seventh amendment question and subsequently reversed the lower court's holding. It noted that actions to recover land are generally actions at law triable by a jury, and that this presumption is not dependent on the presence

   When a person detains possession of real property without right, or after his right to possession has ceased, the Superior Court of the District of Columbia, on complaint under oath verified by the person aggrieved by the detention, or by his agent or attorney having knowledge of the facts, may issue a summons to the party complained of to appear and show cause why judgment should not be given against him for the restitution of possession.
4. D.C. case law allows several innovative defenses in landlord-tenant cases. See cases cited note 1 supra. See also Robinson v. Diamond Housing Corp., 463 F.2d 853 (D.C. Cir. 1972), which involved a tenant who successfully asserted a retaliatory eviction defense in an eviction proceeding, but was subsequently served a thirty day notice to quit by the landlord.
5. The only witness at trial was a representative of Southall, who testified that back rent was owing. Pernell was not at the hearing, and the written evidence his counsel sought to enter on the record was not accepted by the court because the papers were allegedly not authenticated or presented by a witness who could be cross-examined. See Pernell v. Southall Realty, 294 A.2d 490, 491 (D.C. Ct. App. 1972).
6. 294 A.2d at 490.
7. In Whitehead v. Shattuck, 138 U.S. 146 (1891), the Court stated that, for seventh amendment purposes, "where an action is simply for the recovery and possession of spe-
or absence of title, as the appeals court contended. Although the distinction between possession of, and title to, real property was one recognized at common law, the Court concluded that this did not affect a litigant's right to jury trial.8

In examining the historical development of common law possessory actions, Justice Marshall, writing for the majority, found the lower court's analysis "fundamentally at odds with the test [the Supreme Court has] formulated for resolving Seventh Amendment questions."9 The appeals court, in trying to find an exact common law analogue to D.C. Code § 16-1501, had placed unjustified reliance on the form of similar actions, rather than on their substance. The valid seventh amendment test of whether a litigant has a right to jury trial is not predicated on the existence of a common law procedure which rigidly corresponds to a present-day form, but rather the existence of similar rights and remedies.

I. LEGISLATIVE HISTORY: AN ANALYSIS OF COMMON LAW UNDERPINNINGS10

Traditional seventh amendment analysis of the need for jury trial in an action focuses on whether the claim sought to be litigated existed as a "legal" claim triable by jury at common law.11 Southall's claim for repossession was statutory in nature, and therefore the right to jury trial depended in great part on the availability of a jury trial under the closest historical ana-

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9. 94 S. Ct. at 1729. There were no dissenters from the majority opinion, though Chief Justice Burger and Justice Douglas concurred only in the result.
11. The best indication of what is meant by "legal" is provided by Ross v. Bernhard, 396 U.S. 531 (1970). The Court indicated that analysis of its cases shows the "legal" nature of an issue to be determined by considering three factors: the analogous pre-merger custom, the remedy sought, and the abilities and limitations of juries. "Of these factors," the Court noted, "the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply." Id. at 538 n.10.
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logue to D.C. Code § 16-1501. Both the District of Columbia Court of Appeals and the Supreme Court framed the issue in this manner.\(^\text{13}\)

D.C. Code § 16-1501 provides, in brief, that one who retains possession of another's real property without right may be summoned, on occasion of the owner's complaint, by the Superior Court of the District of Columbia to show cause why judgment should not be made against him.\(^\text{14}\) Certainly some analogous forms of action existed prior to 1791, when the seventh amendment was adopted. Summary eviction procedures for repossession of real property were well-known in England, having been enacted to obviate landlords' frequent resort to self-help and to prevent breaches of the peace.\(^\text{15}\)

An examination of relevant District of Columbia laws reveals that there has always been some sort of statutory eviction proceeding since the Capital's founding in 1800. Through the Organic Act of 1801, for example, Congress adopted for the newly created District the common laws and statutes then in force in Maryland.\(^\text{16}\) Among those statutes was one providing for "a summary mode of recovering the possession of lands and tenements," commenced by complaint of a landlord and subject to trial by "twelve good and lawful men" who were to decide if the landlord was entitled to possession.\(^\text{17}\)

Proceedings under this Act continued until 1864,\(^\text{18}\) when Congress enacted a general revision of landlord-tenant law.\(^\text{19}\) The revision provided for a de novo appeal with the right to jury trial before the Supreme Court of the District of Columbia for those tenants who did not wish to be tried before a justice of the peace alone.\(^\text{20}\)

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\(^\text{13}\). "... whether this action or its equivalent existed at common law in England in 1791." 294 A.2d at 492. The term "common law" is used generally to mean that body of law prevailing when the seventh amendment was adopted. See Baltimore and Carolina Line, Inc. v. Redman, 295 U.S. 654 (1935); Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913).

\(^\text{14}\). See note 3 supra.

\(^\text{15}\). See 4 W. Blackstone, Commentaries *179.

\(^\text{16}\). Ch. 15, § 1, 2 Stat. 103. Of course, the unique aspect of congressional governance of the District of Columbia was continued. Congress maintained entire control over the District for every purpose of government. See, e.g., Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838) (no division of power exists in the District between general and state governments); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (Congressional acts in reference to the District are laws of the United States); Loughborough v. Blake, 18 U.S. (5 Wheat.) 317 (1820) (Congress has authority to impose a direct tax on the District).

\(^\text{17}\). Act of Maryland of 1793, ch. XLIII, reprinted in 2 W. Kilty, Laws of Maryland (1800). The Act was entitled "An Act to provide a summary mode of recovering the possession of lands and tenements holden by tenants for years, or at will, after the expiration of their terms."

\(^\text{18}\). See, e.g., Lenox v. Arguelles, 15 F. Cas. 313 (No. 8244) (C.C.D.C. 1834).


\(^\text{20}\). Id. at 384. The Act provided, however, that if a defendant were to appeal, in addition to other bail he must pay "all intervening damages to the leased property re-
In 1899, the United States Supreme Court examined those trials which involved a justice of the peace rather than a judge in the case of *Capitol Traction v. Hof.* It concluded that such tribunals were not sufficient to satisfy the meaning of a jury trial as contemplated under the seventh amendment.

*Capitol Traction* impelled further court restructuring intended to make the seventh amendment's provisions fully applicable to the District of Columbia. For example, the Justice of the Peace Court was made a full Court of Record in the sense required by *Capitol Traction,* and a system of jury trials was thus formally instituted. Further, section 3 of the new Act provided "that hereafter when the value in controversy in any action pending in said Municipal Court shall exceed $20., and in all actions for the recovery of possession of real property, either party may demand a trial by jury . . . ."23

In 1970, Congress again substantially reorganized the District's court system with the District of Columbia Court Reform and Criminal Procedure Act. General original jurisdiction in eviction proceedings was transferred from the old Court of General Sessions to the Superior Court of the District of Columbia.

The most important aspect of this reorganization, in retrospect, is that the right to jury trial in summary possessory actions, which formerly had been assured by D.C. Code § 13-702, was eliminated. As both the court of appeals and the Supreme Court pointed out in *Pernell,* there exist different interpretations as to why Congress omitted this statutory provision. Some legislative history suggests that Congress considered the section "superfluous in the light of constitutional jury trial requirements . . . ."27 On the other hand, the original Senate version apparently considered it sufficiently important to retain the statutory guarantee "so as to assure the constitutionality of the provisions regarding small claims."28

22. *Id.* at 18, 38. Such persons were determined to be in the nature of special commissioners or referees.
27. H.R. Rep. No. 907, 91st Cong., 2d Sess. 164 (1970). The Committee invoked constitutional requirements and cited P.L. 90-274 in further support of its view. The law involves the policy of the United States that all litigants in federal courts who are entitled to trial by jury shall have the right to grand and petit juries.
28. S. Rep. No. 405, 91st Cong., 1st Sess. 35 (1969). Some procedural provisions regarding jury trial were repealed as inconsistent with the Uniform Interstate and Inter-
II. THE COURT OF APPEALS APPROACH

Because Congress did not clearly state why it dropped the statutory provision for jury trial, the historical basis of section 16-1501 became the focus for both the District of Columbia Court of Appeals and the Supreme Court. The statute's mixed heritage, however, did not provide forceful guidance in the debate regarding its progenitors. If Southall's claim were to be traced, as Southall argued, to common law forcible entry and detainer statutes of Henry VI's time, then section 16-1501's common law analogue was an action tried not by jury, but before special commissioners or referees, which under Capitol Traction is not to be regarded as tantamount to the traditional jury trial. If, on the other hand, the claim were to be traced to the classic common law possessory actions of ejectment, novel disseisin, or writs of entry, an historical analysis would prove such claim to be triable by jury, since these were actions for which there was a right to jury trial.

By basing its analysis on the former approach, the court of appeals felt justified in denying Pernell's request. Rejecting the assertion that the closest historical analogue was an action of ejectment, the court reasoned that the District of Columbia Code currently contains another, separate section regarding ejectment and that the question of title is normally present in an ejectment action.

Moreover, the court emphasized that the type of trial used in the District's summary possession proceedings in the 1800's involved a justice of the peace rather than a judge. Since Capitol Traction seemingly held that such a tribunal was not sufficient to satisfy the meaning of a jury trial within the sense of the seventh amendment, the court concluded that the action provided for in section 16-1501 was not one triable by jury at common law and thus did not require the provision for a right to jury trial in cases where the amount in controversy exceeds $20 and in real property actions was retained.

29. Nor do the rules of the District of Columbia courts offer guidance for someone in Pernell's situation. For example, Landlord and Tenant Rule 6 provides that "any party entitled to a jury trial may demand a trial by jury of any action brought in this branch." And Superior Court Civil Rule 38(a) provides that "[t]he right of trial by jury as declared by the seventh amendment to the Constitution or as given by an applicable statute shall be preserved to the parties inviolate."

30. See 8 Hen. 6, c. 9 (1429), a forcible entry and detainer statute under which actions were tried before a justice of the peace with no right of appeal.


32. D.C. Code Ann. § 16-1124 (1973) provides that, in a situation where a tenant's rent is more than one-half year in arrears, a landlord has the right by law to reenter and may, without any formal demand or reentry, commence a civil action in ejectment.

not require a jury unless mandated by statute. The court read Block v. Hirsh,\(^4\) which upheld the constitutionality of a statute that transferred a landlord's action to recover possession from a trial court to a rent control commission, to bolster this conclusion.

Additional support for the court's denial of jury trial was derived from its reading of Lindsey v. Normet.\(^5\) A recent Supreme Court case which checked slightly the rapid evolution of modern landlord-tenant law,\(^6\) Lindsey upheld the constitutionality of an Oregon forcible entry and detainer statute which provides that after service of summons a tenant has no more than six days to take a contested claim to court unless he provides security for accruing rent.

Lindsey's holding was narrow, but it had significant impact on other jurisdictions, as witnessed by the court of appeals' contention that the decision proved that a jurisdiction may validly "single out possessory disputes between landlord and tenant for especially prompt judicial settlement without violating equal protection."\(^7\) Under this reading, the expedited character of such proceedings could, presumably, obviate a requirement for jury trial where it was not constitutionally mandated. The court's analysis thus came full circle to the major focus, an historical analysis of D.C. Code § 16-1501 in view of the seventh amendment.

III. A MEANINGLESS BATTLE OF FORMS YIELDS TO CONSTITUTIONAL ANALYSIS

It can be contended that searching for an exact common law analogue to section 16-1501 is a process both misleading and anathema to a forward-looking judiciary. The seventh amendment was not intended to bind the country's judicial system to the forms of action belonging to another era. As the Supreme Court recently stated in Ross v. Bernhard,\(^8\) the seventh amendment question turns on the nature of the issue to be tried rather than the character of the overall action.\(^9\)

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\(^4\) 256 U.S. 135 (1921). The date of this suit is noteworthy. A sudden influx of people to the District of Columbia caused by the war and increased governmental needs played a large part in the Court's decision that the suspension of ordinary remedies was a reasonable provision of a statute in view of its aim and intent.

\(^5\) 405 U.S. 56 (1972).

\(^6\) It particularly slowed the trend toward recognition of an implied warranty of habitability in leases. \textit{See} note 1 \textit{supra}.

\(^7\) 294 A.2d at 493.

\(^8\) 396 U.S. 531 (1970).

\(^9\) This view finds support in a much earlier case, Parsons v. Bedford, 28 U.S. (3 Pet.) 433 (1830): "By common law [the framers] meant . . . not merely suits, which the common law recognized among its old and settled proceedings, but suits in which
Certainly, some guidance can be gleaned from an analysis of a claim's closest historical statutory analogue, but it is the correlative right or remedy at common law that is truly determinative of whether the seventh amendment requires a jury to hear that claim. Guided by this principle, the Supreme Court in *Pernell* pointedly commented that the seventh amendment requires jury trial in actions which may have been unheard of at common law, as long as the action involves rights and remedies of the sort traditionally enforced in an action at law.\(^{40}\) Actions to recover land, it continued, have long been regarded as actions at law triable by jury.\(^{41}\)

The Court went on to admit that the broad language of *Capitol Traction v. Hof* might be interpreted as proposing that a trial before a justice of the peace was totally unknown at common law.\(^{42}\) It asserted, nonetheless, that such a reading, as applied to Pernell's case, is mistaken. Rather, the Court emphasized that in England a common law trial before a justice of the peace represented a jury trial in the full constitutional sense,\(^{43}\) and was thus distinguishable from the trial before a justice of the peace in *Capitol Traction*.

Similarly, the Court rejected the District of Columbia Court of Appeals' contention that, in an action for the recovery of real property, the distinction between title to and possession of the property is sufficient to deny or award jury trial. Though it may have been a distinction recognized at common law, the Court was of the opinion that it has no bearing currently on the right to jury trial.

Finally, following a deeply embedded judicial principle that the Constitution recognizes higher values than procedural expediency, the Court totally rejected the lower court's reliance on the possibility that affording tenants the right to jury trial would place an unmanageable burden on the expeditious handling of landlord-tenant cases.

The lower court's reading of *Block v. Hirsh* to support such a contention was clearly incorrect for, according to the Supreme Court, *Block* merely stands for the principle that the seventh amendment is generally inapplicable

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\(^{40}\) 94 S. Ct. at 1729.


\(^{42}\) 94 S. Ct. at 1732.

\(^{43}\) English justices of the peace were required to be learned in the law. They were judges of record and their courts, courts of record. The procedures they followed differed in no essential manner from that of the high court of assize held by the King's judges. Trial by jury before the justices of the peace proceeded in the usual manner of a criminal trial by jury in the King's court.

94 S. Ct. at 1732.
in administrative proceedings where jury trials would be incompatible with the whole concept of administrative adjudication. Nor does Lindsey v. Normet support the notion that there is some inherent inconsistency between the need for summary possession actions and the right to jury trial. The Court noted that the forcible entry and detainer statute involved in Lindsey itself guaranteed a right to jury trial.

IV. Conclusion

Placing a statute in its historic framework can be a useful analytical tool when, as in the Supreme Court’s decision in Pernell, the analysis goes to the substance rather than the form of the statutory claim. Courts must be wary, however, of attempts to rigidly define a correlation between modern statutes which have evolved to meet the needs of justice in a modern judicial system, with earlier forms of action that were responsive to different values and circumstances. The District of Columbia Court of Appeals in Pernell erred in this respect.

By extracting absolute, and occasionally obscure, facets of D.C. Code §16-1501 (such as its provision for expeditious proceeding and the fact that its nineteenth-century counterpart utilized justices of the peace rather than judges), the court of appeals constructed a series of false analogies. It reasoned, for example, that providing for jury trial in the disposition of summary possessory actions might place an unmanageable burden on the court system. Yet, prior to 1970, jury trial in such proceedings had been recognized by statute for nearly a century, and no such burden had developed.

The criticism that affording the right to jury trial in summary repossession proceedings will create a backlog in the courts is nevertheless likely to remain a point of major contention among critics of Pernell. But, logically extended, this argument goes too far by implying that the very existence of the seventh amendment right to jury trial is somehow inversely proportional to the volume of landlord-tenant litigation in the District of Columbia at any given time. Certainly, seventh amendment rights cannot be weighed in such a fashion.

So fundamental a right that it “should be jealously guarded by the courts,” the right to jury trial should neither fall victim to subjective logic nor be qualified in the name of expediency. The Supreme Court’s treatment of Pernell demonstrated that it is substantive common law rights, not the transient forms relative to a claim, that emerge as the valid touchstones in a con-

44. Id. at 1733.
institutional analysis of the right to jury trial. The Court's approach goes a long way toward guaranteeing that reasoned judicial analysis will continue to complement the evolution of landlord-tenant law.

Carole Mattessich


The fourteenth amendment provides that no state can deprive a person of his rights to due process and equal protection. The eleventh amendment says that no state can be sued in a federal court. An aggrieved plaintiff can attempt to circumvent the eleventh amendment bar by bringing a federal cause of action against a state officer rather than the state itself. But even if he is able to invoke the jurisdiction of a federal court, he may then be faced with overcoming the obstacle of a state official's assertion of immunity from suit.

Recently, in Scheuer v. Rhodes, the Supreme Court reviewed the effects of the eleventh amendment and common law immunities in an action brought against Ohio officials under section 1983 of the Civil Rights Act of 1871.

1. The amendment reads in part: "... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

2. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. By its own terms the amendment bars suit against one state by citizens of another state, and it has been construed to bar suits against a state by its own citizens. Hans v. Louisiana, 134 U.S. 1 (1890); In re Ayers, 123 U.S. 443 (1887).


   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
In a unanimous opinion the Court found that neither the eleventh amendment nor the common law doctrines of executive immunity bar a suit for damages.

Personal representatives of three students killed in the May 1970 civil disorders on the campus of Kent State University in Ohio brought their action initially under both section 1983 and the wrongful death statutes of Ohio. Petitioners asserted that state officials of the executive branch did intentionally, recklessly, willfully and wantonly bring about the deaths of the three students. Petitioners sought $11,000,000 in compensatory and punitive damages. The district court dismissed the complaints on the pleadings, without receiving any evidence, on the grounds that in substance and effect the claims were being made against the State of Ohio, and thus were barred by the eleventh amendment. The court dismissed on the alternative ground that the common law doctrine of executive immunity was absolute, also barring the actions.

The Court of Appeals for the Sixth Circuit affirmed, one judge dissenting, stating that the district court properly dismissed the complaints on the pleadings since “[t]he Civil Rights Act, § 1983, cannot be engrafted on the Eleventh Amendment by judicial construction.” The circuit court applied

5. Mr. Justice Douglas took no part in the decision.
6. The pertinent provision of the Ohio statutes relating to the state militia reads:
   When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct.
   OHIO REV. CODE ANN. § 5923.37 (Supp. 1973). The federal district court will, on remand, take jurisdiction of the wrongful death claims under diversity rules in two complaints and under pendent jurisdiction in one.

7. Defendants included the former Governor of Ohio (Rhodes), the adjutant general and his assistant, named and unnamed officers of the Ohio National Guard, and the president of Kent State University.

8. The complaints alleged that Governor Rhodes unnecessarily ordered troops to Kent State; authorized the troops to carry loaded weapons, but failed to give definitive orders regarding the circumstances under which the firing of the weapons would be authorized; and authorized indiscriminate action against persons assembled on the campus, regardless of whether or not such assembly was lawful. The complaints alleged further that the inadequate training of the officers and troops of the Guard increased the risk of harm to the university students, and that university president White took no action to alleviate this situation. Krause v. Rhodes, 471 F.2d 430, 449-50 (6th Cir. 1972), rev'd sub nom. Scheuer v. Rhodes, 94 S. Ct. 1683 (1974).

9. Dismissal was for lack of subject matter jurisdiction under Fed. R. Ctv. P. 12(b) (1).
11. Id. at 443.
the doctrine of sovereign immunity under Ohio law to the state's "agencies and instrumentalities,"12 and emphasized that where sovereign immunity exists "it cannot be defeated by allegations that the defendant acted maliciously."13 The circuit court further held that executive immunity was also a bar to relief, since it "would not be conducive to good government to require the Chief Executive of either the nation or the state to defend himself in court . . . because he called out troops to suppress riots or disorders which resulted in injury."14

The Supreme Court held that the district court improperly dismissed the complaints and thereby precluded any opportunity for the representatives of the decedents to prove their claims.15 The Court focused on both the eleventh amendment and the executive immunity issues as framed by the circuit court, and reversed and remanded the case for review on the merits. This Note will explore the issues posed by eleventh amendment sovereign immunity and common law executive immunity, as presented in Scheuer, and as applied to prior suits brought under section 1983.16

I. THE ELEVENTH AMENDMENT

The Supreme Court has never squarely resolved the apparent conflict be-

12. Id. at 439.
13. Id. at 442.
14. Id. at 437. No additional authority was cited for extending absolute immunity to the Governor.

Under Ohio law the Governor can use the state militia to "suppress or prevent riot or insurrection," Ohio Rev. Code Ann. § 5923.21 (1954) and can call on the Guard in instances of "tumult, riot, mob, or body of men acting together to commit a felony, or to do or offer violence to person or property, or by force and violence break or resist the laws of the state . . . ." Ohio Rev. Code Ann. § 5923.22 (Supp. 1973). Members of the state militia are immune from civil suit for any act performed within the scope of their military duties unless the conduct was willful or wanton. See note 6 supra.

15. Scheuer v. Rhodes, 94 S. Ct. 1683 (1974). It seems clear that the district court's refusal to accept as true the allegations of the complaints is contrary to a large body of law. See, e.g., Collins v. Hardyman, 341 U.S. 651 (1951); Ickes v. Fox, 300 U.S. 82 (1937); Ickes v. Virginia Colorado Dev. Corp., 295 U.S. 639 (1935). The defendants did not answer but merely attached to the motions to dismiss two proclamations of Governor Rhodes, each calling on the militia, as proof of insurrection and violence. From these proclamations, and by taking judicial notice of the events surrounding the Kent State tragedy, the district court found no cause of action under section 1983 or the wrongful death statutes of Ohio. 471 F.2d at 432-33, construed in 94 S. Ct. at 1693.

16. Other noteworthy civil suits arising from the Kent State disorders include Gilligan v. Morgan, 413 U.S. 1 (1973) (United States Supreme Court held that the political question doctrine precluded a judicial remedy to control the manner in which troops were trained, armed and ordered in emergencies); Krause v. State, 31 Ohio St. 2d 132,
between the jurisdictional bar of the eleventh amendment and the right to a private action against a state under the fourteenth. However, the Court has recognized since Ex parte Young that a state officer sued in an equity proceeding cannot invoke what is considered only the state's right to eleventh amendment immunity. The eleventh amendment reflects the common law doctrine of sovereign immunity and operates in that context as a purely jurisdictional matter. When a state official is the defendant, however, the amendment operates not as an automatic procedural bar but in a substantive context, requiring an analysis of the relief being sought and a focus on whether, and how, the nature of that relief legally affects the official's assertion of personal immunity.

What is clear from past decisions is that the eleventh amendment will operate as a bar when the state is a named party of record, or when it is an "indispensable party" or holds a "real party interest" in the outcome of a suit. Chief Justice Marshall stated for the Court in Osborn v. Bank of the United States that the state was not an indispensable party to a suit in equity which sought to compel the state auditor to return illegally seized federal funds. The auditor could be sued individually, notwithstanding the eleventh amendment. The "indispensable party" test evolved somewhat into a "real party in interest" test in the half century after Osborn, and today both tests are applied differently depending on the circumstances.

209 U.S. 123 (1908). Stockholders of a railroad sought to enjoin the attorney general of Minnesota from enforcing state legislation involving rate schemes and penalties which the stockholders claimed were violative of both due process and equal protection. The attorney general claimed that the suit was "in truth and effect ... against the State of Minnesota." Id. at 132.

Action by state officers, whether within their scope of authority or not, is considered as sufficient "state action" to invoke the due process and equal protection clauses of the fourteenth amendment. See, e.g., Ex parte Young, supra; Dombrowski v. Pfister, 380 U.S. 479 (1965).

The concept of sovereign immunity stems from English law under which the King had absolute personal immunity from suit in his courts. See McCormack, Intergovernmental Immunity and the Eleventh Amendment, 51 N.C.L. REV. 485, 502-03 (1973).

22 U.S. (9 Wheat.) 738 (1824).

21. Ohio had levied a tax on a local branch of the federally operated bank, similar to the situation reviewed in the landmark case McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Osborn, the state auditor, seized bank funds in satisfaction of the taxes allegedly owed the state. The bank sued Osborn for immediate return of the tax and to enjoin Osborn from future attempts at seizure.


functionally combined under federal procedural rules. A state is considered indispensable or as having a real party interest when the suit is brought against state officials who hold no personal interest in the subject matter of the suit. Essentially, when satisfaction for the judgment would come from the state treasury, or when the suit is seeking to compel the state to act or refrain from acting, such as an action for specific performance of a contract, the eleventh amendment will operate as a bar.

There was no such state interest operating in Scheuer. The Ohio executive officials were being sued as individuals for tortious conduct, and the relief sought would have had no effect on the state's finances or activities. Chief Justice Burger, writing for the Court in Scheuer, relied on the doctrine of Ex parte Young in saying that “the Eleventh Amendment provides no shield for a state official confronted by a claim that he deprived another of a federal right under the color of state law.” An action for monetary damages rather than for injunctive relief as was sought in Ex parte Young is, in some circumstances, a permissible remedy and “can be as effective a redress for the infringement of a constitutional right [in one instance] as injunctive relief might be in another.”

The Scheuer Court thus made it clear that the eleventh amendment has no direct impact on the availability of money damages from state officers or any bearing on suits where the state is neither named nor indispensably involved.

II. IMMUNITIES AND SECTION 1983

Once a private claimant clears the jurisdictional and “indispensable party” barriers embodied in the eleventh amendment, the doctrines of personal im-

25. See, e.g., Ford Motor Co. v. Indiana Dep't of Treasury, 323 U.S. 459 (1945); Ex parte New York, 256 U.S. 490 (1921).
28. 94 S. Ct. at 1687.
29. Id. The Court cites for this proposition Moor v. County of Alameda, 411 U.S. 693 (1973); Monroe v. Pape, 365 U.S. 167 (1961); Myers v. Anderson, 238 U.S. 368 (1915). In Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963), a private person sued highway patrolmen for using excessive force in an arrest. The court allowed compensatory damages on the common law counts and punitive damages on the civil rights count. See also Basista v. Weir, 340 F.2d 74 (3d Cir. 1965), wherein punitive damages were allowed under section 1983 without allowing any actual damages on common law counts.
30. Presumably, the same reasons dictate that Ohio wrongful death actions are also not suits against the state and thus are not barred by the eleventh amendment. That does not mean that Ohio's immunity laws will not operate, however. See note 43 infra.
munity introduce further obstacles to recovery. Members of Congress hold a constitutionally-based absolute immunity with respect to their activities while Congress is in session. For reasons parallel to those which underlie legislative immunity, the judiciary has historically enjoyed absolute immunity in damage actions as derived from the common law, but may be subject to equitable claims. Immunity for executive officials, however, has generally not been recognized to the same degree. Prosecutors, like judges, have been found subject to equitable claims, but nevertheless have enjoyed immunity from suits seeking damages. Policemen, on the other hand, hold a somewhat more qualified immunity, and can be subject to damage claims. The validity of extending executive immunity to state officers being sued for damages under section 1983 is less than clear, and thus requires a look at both the statute itself and the common law development of the executive immunity doctrine.

On its face, section 1983 appears inconsistent with the doctrine of executive immunity. Every person who acts under color of state law is subject to a suit brought for injunction or damages. Some courts have interpreted

34. See, e.g., Madison v. Gernstein, 440 F.2d 338 (5th Cir. 1971); Fanale v. Sheehy, 385 F.2d 866 (2d Cir. 1967).
35. Policemen have been granted an immunity under the common law to actions of false arrest and imprisonment. See Pierson v. Ray, 386 U.S. 547, 555-57 (1967); Restatement (Second) of Torts § 121 (1965); p. 170 infra. For a relatively brief, but good review of the various common law doctrines of personal immunity, see McCormack, Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I, 60 Va. L. Rev. 1, 10-17 (1974).
36. A different question, not posed in Scheuer, is whether these plaintiffs are entitled to a trial by jury. The statute does not specify the types of relief available, which under the seventh amendment is the primary determinant of whether or not the right to a jury trial arises. Actions for money damages are usually considered legal in nature and thus fall within the purview of the seventh amendment. See Ross v. Bernhard, 396 U.S. 531 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). But see Lawton v. Nightingale, 345 F. Supp. 683 (N.D. Ohio 1972), where the court held there was no right to a jury trial under section 1983 since the action could not have been brought at common law. See generally 8 Harv. Civ. Rights-Civ. Lib. L. Rev. 613 (1973).
37. See note 4 supra.
38. To bring a suit under section 1983, plaintiff must first establish that the official infringed upon a federal right and that the official's conduct was sufficiently under color of state law. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Hague v. CIO, 101 F.2d 774 (3d Cir. 1939). An officer who acts contrary to his duty as defined by state law may nevertheless be acting under color of that law. Monroe v. Pape, 365 U.S. 167, 172 (1961). Such an act, even if unlawful, is sufficient state action to invoke a remedy
the legislative history of the 1871 Act as eliminating the granting of any immunities, including those accorded by the common law to members of the judiciary and legislature. Nevertheless, the immunities have survived, and the Supreme Court has expressly recognized them as a bar to suits against judges and legislators brought under section 1983. The immunity accorded executive officials, however, has never been firmly established, although the circuit courts have for the most part rejected claims of absolute immunity by state executives sued on constitutional grounds.

Immunity for executive and administrative officials has been generally recognized as "qualified," something less than absolute and highly dependent on the facts from which the suit evolved. In Pierson v. Ray, a suit was

under the fourteenth amendment. See note 18 supra.


The dissenting judge in the lower court noted that the doctrine of executive immunity was not recognized here or in England until some twenty years after the enactment of section 1983, and therefore, it was very doubtful that Congress intended the doctrine to apply. Krause v. Rhodes, 471 F.2d 430, 454 (6th Cir. 1972), citing Barr v. Matteo, 360 U.S. 564, 581-82 (1959) (Warren, C.J., dissenting). See also Spalding v. Vilas, 161 U.S. 483 (1896); 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1632-33 (1956).


43. Absolute immunity has been extended to certain executives of high rank at least in one frequently cited defamation case, Barr v. Matteo, 360 U.S. 564 (1959). Defamation is a tort and does not in most circumstances reflect a constitutional deprivation. Although an absolute privilege may be permitted for tortious conduct alone, once a state officer violates civil rights he may no longer be entitled to the privilege. Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971).

It is clear that some courts will view certain common law torts as infringements upon constitutional rights. See, e.g., Whirl v. Kern, 407 F.2d 781 (5th Cir. 1969) (false imprisonment); Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965) (false arrest); Hardwick v. Hurley, 289 F.2d 529 (7th Cir. 1961) (assault and battery).

Justice Douglas, writing for the Court in Monroe v. Pape, 365 U.S. 167 (1961), ad-
brought against policemen under section 1983 and common law counts of false arrest and imprisonment. Plaintiffs had been arrested for entering a racially segregated room. After their convictions were reversed they sought damages from the arresting officers. The Court allowed the officers to assert common law defenses of good faith and probable cause to the section 1983 claim as well as to the tort causes of action. The rationale of the defense, often termed a "qualified immunity," was that policemen acting within the scope of their duties should not be held personally accountable in damage claims for a reasonable, honest mistake. In allowing the assertion of this defense, the *Pierson* Court required the defendants to undertake the burden of proving that they acted in good faith in order to sustain their claims of executive immunity.

In *Moyer v. Peabody*, however, the Court did not look to the defendants' evidence of good faith in upholding a district court's dismissal of a 1983 claim against the Governor of Colorado and the heads of the state militia. In *Moyer*, plaintiff was a leader of a union whose members were rioting. He was arrested by an officer of the National Guard and imprisoned for over two months without charges being filed. The dismissal was found appropriate because the alleged false arrest and imprisonment occurred during a time of "insurrection," when deterrence of the activity engaged in by Moyer's constituents seemed necessary. Although the Court did not grant the Governor absolute immunity, it did note that plaintiff had not alleged that the state executives had acted in bad faith. Consequently, there was no need


44. 386 U.S. 547 (1967).
45. *Id.* at 556-57.
46. It has been suggested, however, that policemen should be liable for the natural consequences of their acts. Monroe v. Pape, 365 U.S. 167, 187 (1961).
47. The "good faith" test appears to be an acceptable one to the circuit courts. *See*, e.g., Fluker v. Alabama Bd. of Educ., 441 F.2d 201 (5th Cir. 1971); McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968); Nelson v. Knox, 256 F.2d 312 (6th Cir. 1958).
49. *Id.* at 85.
50. *Id.* The dissenting judge in *Krause v. Rhodes* argues that the rule in *Moyer v. Peabody* should also be limited to times of "actual insurrection," which were not neces-
to receive evidence since the Governor's reason for calling on the Guard had not been put into issue.

The scope of the *Moyer* ruling became more clear in *Sterling v. Constantin*, where a suit was brought to enjoin the Governor of Texas and generals of the National Guard from restricting the production of oil from plaintiff's wells. The Supreme Court upheld the district court's decision to take evidence in order to determine the extent to which executive immunity could be invoked. The plaintiff had in his pleadings expressly placed in issue the propriety of the Governor's resort to force.

From *Moyer* and *Sterling* it was clear that plaintiffs had to allege an absence of good faith on the part of the defendant state officials if plaintiffs were to surmount assertions of immunity at the pleading stage. *Pierson* applied the common law defense of good faith to actions under section 1983. These cases, however, were viewed under the theory that the officers were acting within the scope of their authority, even if in derogation of it.

A wholly different issue arises when the state officer is clearly acting outside the scope of his authority. This issue was put squarely before the Court in *Monroe v. Pape*. In *Monroe*, police officers broke into a home, searched and arrested plaintiffs, physically beat them and put them under rigorous interrogation, all without warrant or probable cause. Plaintiffs brought an action under section 1983. The Court found the policemen's tortious conduct to be a total misuse of power, made possible because the "wrongdoer is clothed with the authority of state law." The standard to be derived from *Monroe* appears to be that a state official acting outside his authority can be held accountable if he could reasonably have foreseen the unconstitutionality of his actions. An action taken in good faith alone is not necessarily a constitutional one.

In *Scheuer*, the Court briefly explored areas of the *Moyer*, *Sterling* and *Monroe* decisions, along with other cases, and relied heavily on the rationale of *Pierson* in extending only a "qualified" immunity to the Ohio Governor.
The petitioners had in their pleadings expressly placed in issue whether the defendants had acted within the scope of their authority, and if so, whether they had acted in good faith. Consequently, petitioners were entitled to present evidence on these issues. The Court declined to explicitly define the scope of immunity to which Ohio executives might be entitled, and limited its consideration to the question of whether the immunity was absolute. The Scheuer Court clearly announced that absolute immunity may never exist at the outset of a case; a plaintiff must be given the opportunity to be heard on the merits. As Chief Justice Burger wrote in Scheuer, “There was no opportunity afforded petitioners to contest the facts assumed [by the district court] in [its] conclusion. There was no evidence before the Court from which such a finding of good faith could be properly made . . .” Thus, the scope of immunity which the defendant executives could invoke was necessarily related to facts not yet established. Those facts, when established, would yield further insight into the availability of the immunity protection. The state officer operating in a situation calling for discretion can assert a good faith defense, but a good faith defense cannot be asserted to justify clearly unconstitutional conduct.

III. CONCLUSION

The decision in Scheuer v. Rhodes is narrow but not insignificant. Scheuer has, in undeniable terms, upheld the basic doctrines of Ex parte Young and clearly recognized the existence of a private federal cause of action against state officials, notwithstanding the eleventh amendment. In establishing that a state executive’s immunity is not absolute, Scheuer promises that section 1983 will not be wholly circumscribed by common law privileges. As the

57. 94 S. Ct. at 1693 (1974).
58. Id. Under Ohio law there is a distinction between, and a different approach to, immunity under “discretionary” and “ministerial” tests. If the officer’s act was a ministerial one, he is subject to individual liability for negligence. If his act was a discretionary one within the scope of his authority, he is not liable absent bad faith or corrupt motive. Krause v. Rhodes, 471 F.2d 430, 465-66 (6th Cir. 1972). Negligence in a ministerial function would not protect an official from section 1983 liability. See Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), wherein Judge Bazelon stated that the substantive law of torts should be enough protection for officials who act reasonably under the circumstances, and that when the act is of a discretionary nature then the discretion required should be raised not as an immunity issue but as an issue relating to ultimate liability. Id. at 364 n.15.
59. It follows, too, that evidence has to be taken in the Ohio wrongful death actions, since the complaints allege “willful and wanton” misconduct, a condition precedent to standing to sue under Ohio law. See note 6 supra. The Court made it very clear, however, that summary judgment could be granted. 94 S. Ct. at 1693.
60. 94 S. Ct. at 1693.
dissenting judge in the Sixth Circuit stated: "The burden upon state officials to defend against these suits—the nonmeritorious as well as the meritorious—is but a small price to pay for the protection of constitutional rights." What remains to be resolved, however, is what standards the trial court should follow in determining the scope of an executive's immunity once the issue is properly placed before the court.

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